IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kinder Morgan, Petitioner	:	
v.	:	No. 885 C.D. 2011
	:	Submitted: September 30, 2011
Workers' Compensation Appeal Board (Flanagan), Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: December 9, 2011

Kinder Morgan (Employer) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) granting benefits to William Flanagan (Claimant). In doing so, the Board affirmed the decision of the Workers' Compensation Judge (WCJ) that Claimant's stroke was triggered by the physical exertion of cleaning up a chemical spill at work and, thus, work-related. Employer argues that the Board erred in awarding benefits because Claimant did not give it timely notice that the stroke was work-related.

Claimant filed a claim petition on October 4, 2008, alleging that he suffered a stroke caused by over-exertion while in the course of his job with Employer. Employer filed a timely answer denying the allegations and contending that Claimant did not advise Employer that his stroke was work-related within 120

days of the work injury, as required by Section 311 of the Workers' Compensation Act (Act), 77 P.S. §631.[1] The matter was assigned to a WCJ.

Claimant testified before the WCJ that he worked as an Assistant Terminal Manager at Employer's facility, which handles transfers of chemicals transported by ship. On October 4, 2008, Claimant inspected a disabled crane at the facility, getting down on his hands and knees to take pictures of a damaged hydraulic hose and fitting. Then, after walking up a 750 foot catwalk, he noticed a spill of the chemical known as urea. Claimant began cleaning up the spill by shoveling the urea onto two belts, a process Claimant described as akin to breaking ice on a driveway. As Claimant was pushing and shoveling the urea he felt a strange sensation in his face and became dizzy. By the time he returned to his office, approximately 30 minutes later, he was sweating and still dizzy. Claimant's secretary called 911, and he was taken to the hospital. There it was determined that he had suffered a stroke, and he was hospitalized for several weeks.

Because of his stroke, Claimant had difficulty communicating verbally with doctors and other staff. He communicated mainly by nodding or shaking his head. Claimant's direct supervisor, James Shine, visited him in the hospital. Claimant testified that when Shine asked Claimant what happened, he told Shine that he was shoveling urea when "something happened" and he suddenly had a "weird feeling." Reproduced Record at 16a (R.R. ___).

Claimant testified that he continues to suffer the effects of his stroke, including a dropped right foot, which renders him unable to perform his previous

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §631. The text of Section 311 is set forth in n.3, *infra.*

job. Claimant stated that he broke his right arm when he fell in his daughter's back yard after his right foot failed him.

Shine testified that he visited Claimant several times in the hospital. Shine did not recall Claimant mentioning any physical exertion on the day of his stroke. Shine acknowledged, however, that Claimant's job is "very much a feet on the ground, out on the workplace kind of a position." R.R. 96a. Shine testified that Claimant's job frequently involved "physical exertion," including the cleanup of chemical spills such as Claimant described in his testimony. R.R. 102a. Shine testified that he could not find any report of a chemical spill or cleanup, or of a crane breaking down on October 4, 2008. Shine added, however, that these events are not always reported.

Claimant offered the deposition testimony of Dr. Anthony Mannino, his primary care physician. Dr. Mannino opined that Claimant's physical exertion on the day of the work incident triggered his stroke, even though he exhibited other risk factors for stroke, including high cholesterol and high triglycerides, for which he had been taking medication. Dr. Mannino testified that Claimant cannot return to work and has not yet fully recovered from his stroke.

Dr. Richard Katz, a board-certified neurologist, testified for Employer. Dr. Katz noted that unusual physical exertion was not documented in Claimant's emergency medical records. He did not believe, therefore, that physical exertion played a role in his stroke. Nevertheless, Dr. Katz conceded that physical exertion can play a role in strokes, and he agreed that Claimant's right foot drop was associated with the stroke.

Employer entered into evidence records from Claimant's hospital stay. Absent from the records was any notation by Claimant's treating physicians about his physical activities on the day of the work incident.

The WCJ credited Claimant's testimony that physically demanding tasks, such as cleaning up the urea spill, were typical of his job. The WCJ resolved in Claimant's favor the apparent conflict between Claimant's account of his activities on the day of the work incident and the lack of such a report in the hospital records, relying on Claimant's testimony, as largely corroborated by Shine. The WCJ reasoned that because Claimant routinely cleaned up chemical spills, it was not unusual that he did not report performing that task on the day in question. The WCJ also found, based on the conversations between Shine and Claimant at the hospital, that Claimant provided timely and adequate notice of his work injury to Employer. Finally, the WCJ credited Dr. Mannino's testimony over that of Dr. Katz in concluding that Claimant's physical exertion at work "significantly contributed to the stroke by triggering his underlying risk factors." R.R. 157a. The WCJ granted the claim petition and awarded benefits. Employer appealed to the Board, and it affirmed the WCJ's decision. Employer now petitions for this Court's review.

On appeal,[2] Employer argues that the Board erred in holding that Claimant provided timely and adequate notice of a work-related injury. In particular, Employer argues that the conversations between Claimant and Shine at

[2] This Court's review of workers' compensation matters is limited to determining whether constitutional rights were violated, errors of law committed, violations of Board procedure occurred, and whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. §704, *Borough of Heidelberg v. Workers' Compensation Appeal Board (Selva)*, 593 Pa. 174, 178, 928 A.2d 1006, 1009 (2007).

the hospital did not specify that Claimant's physical exertion at work on October 4, 2008, caused the stroke he suffered.

Notice to an employer of a work-related injury is a prerequisite to compensation under the Act. *Pennsylvania Mines Corporation/Greenwich Collieries v. Workmen's Compensation Appeal Board (Mitchell)*, 646 A.2d 28, 30 (Pa. Cmwlth. 1994). The claimant bears the burden of establishing that the employer received proper and timely notice of the injury. *Id.* Whether notice was provided is a question of fact for the WCJ to decide. *Id.*

Sections 311 and 312 of the Act establish the requirements for notifying an employer of a work injury. Section 311 bars recovery of benefits if the employee fails to notify his employer of a work-related injury within 120 days of its occurrence.[3] 77 P.S. §631. However, the time does not begin to run until the employee knows of the "possible relationship of his employment" to his injury. *Id.* Then, Section 312 sets forth the content requirements of a notice. It "shall inform the employer that a certain employe received an injury, described in ordinary

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[3] Section 311 states:

> Unless the employer shall have knowledge of the occurrence of the injury, or unless the employe or someone in his behalf, or some of the dependents or someone in their behalf, shall give notice thereof to the employer within twenty-one days after the injury, *no compensation shall be due until such notice be given, and, unless such notice be given within one hundred and twenty days after the occurrence of the injury, no compensation shall be allowed*. However, in cases of injury resulting from ionizing radiation or any other cause in which the nature of the injury or its relationship to the employment is not known to the employe, *the time for giving notice shall not begin to run until the employe knows, or by the exercise of reasonable diligence should know, of the existence of the injury and its possible relationship to his employment*. The term "injury" in this section means, in cases of occupational disease, disability resulting from occupational disease.

77 P.S. §631 (emphasis added).

language, in the course of his employment on or about a specified time, at or near a place specified." 77 P.S. §632.

Whether an employee has given proper notice of a work-related injury is "heavily fact-intensive due to the particularities inherent in a given employee communicating the existence of an injury to his or her employer." *Gentex Corp. v. Workers' Compensation Appeal Board (Morack)*, __ Pa. __, __ n.10, 23 A.3d 528, 534 n.10 (2011). A reviewing court must focus on the totality of the circumstances surrounding the notice, including the context and setting of the injury, and give significant deference to the WCJ's determination regarding adequate notice. *Id*. at __, 23 A.2d at 537. Notice may be given over a period of time or in a series of communications, and need only be conveyed in ordinary language. *Id.* Because the Act was designed to benefit the injured employee, borderline interpretations will be interpreted liberally in favor of the claimant. *Id.* at __, 23 A.2d at 534 (citing 1 Pa.C.S. §1928(c)); *City of Philadelphia v. Workers' Compensation Appeal Board (Williams)*, 578 Pa. 207, 215-16, 851 A.2d 838, 843 (2004)).

In this case, the WCJ found that Claimant's conversations at the hospital with his supervisor, Shine, provided sufficient notice to Employer that Claimant's stroke was work-related. Although Shine could not recall the contents of these conversations, Claimant testified that he told Shine that he was shoveling and pushing urea when he began to "feel weird." R.R. 16a. The WCJ recognized that Claimant's testimony was not supported by any documentation in his hospital medical records that physical exertion preceded his stroke at work. The WCJ assigned little weight to this lack of documentation because Claimant's ability to communicate was impaired by the stroke and because cleaning up a chemical spill would not have been a noteworthy event in Claimant's typical work day. Thus, the

WCJ found notice to Employer both timely and sufficient in content. The facts, as found by the WCJ, support the WCJ's conclusion.[4]

For the foregoing reasons, the adjudication of the Board is affirmed.

MARY HANNAH LEAVITT, Judge

[4] A WCJ's determination of credibility and evidentiary weight will not be disturbed when supported by substantial, competent evidence. *Kocher's IGA v. Workers' Compensation Appeal Board (Dietrich)*, 729 A.2d 145, 147 (Pa. Cmwlth. 1999).

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O R D E R

AND NOW, this 9th day of December, 2011, the order of the Workers' Compensation Appeal Board dated April 20, 2011, in the above-captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge