[J-68-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, EAKIN, BAER, BALDWIN, JJ.

GLORIA ROMAINE,	:	No. 62 EAP 2004
	:	
Appellant	:	
	:	Appeal from the Order of the
	:	Commonwealth Court dated 8/19/04 at
v.	:	626 CD 2004 affirming the Order of the
	:	Workers' Compensation Appeal Board
	:	dated 3/12/04 at A03-2156
WORKERS' COMPENSATION APPEAL BOARD (BRYN MAWR CHATEAU NURSING HOME),	:	
	:	
Appellees	:	SUBMITTED: March 28, 2005

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: JUNE 22, 2006**

I join the majority's holding that, as a general rule that is applicable in this case, payment by check occurs upon receipt by the payee, where the check is tendered and can be honored in due course. I have two reservations concerning the majority opinion, however.

First, although I agree with the majority's decision to allocate to Claimant the burden of proof to establish her compliance with the statute of limitations specified in Section 413(a) of the Workers' Compensation Act, I believe that central aspects of its rationale conflict with precedent. Compare Majority Opinion, slip op. at 13-14 (opining that Section 413(a) operates to bar both rights and remedies, and thus, sets forth a non-waivable defense), with Smith v. WCAB (Concept Planners & Designers), 543 Pa. 295,

300-01, 670 A.2d 1146, 1147-48 (1996) (holding that Section 413(a) should be viewed as extinguishing a remedy rather than a right, and therefore, the defense is waivable). My own reasoning proceeds as follows.

As a general rule applicable in civil matters, a statute of limitations forms the basis for an affirmative defense, see Pa.R.Civ.P. No. 1030, as to which a defendant would bear the burden of going forward with the evidence to establish that the action was not commenced within the statutory period. Once this burden is satisfied, the plaintiff bears the burden of establishing an exception, sometimes couched as "tak[ing] the case out of the statute." Huffman's Estate, 349 Pa. at 62, 36 A.2d at 643.[1] Relying upon general civil precepts, but in an administrative context, however, the Commonwealth Court has indicated that a defendant need only plead the statute of limitations in order to shift the burden to the plaintiff to prove that her claim falls within the statutory period. See Westinghouse v. DEP, 705 A.2d 1349, 1354 (Pa. Cmwlth. 1998). Although I disagree with this approach as a general proposition,[2] I believe that,

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[1] The present matter entails a situation in which initial compliance is in question; therefore, ordinarily, I believe that the party asserting the statute of limitations as a defense, Employer in this instance, would bear the burden of going forward with the evidence.

[2] The Commonwealth Court predicated its position that mere pleading of a statute-of-limitations question is sufficient to shift the burden of proof on McPhilomy v. Lister, 341 Pa. 250, 19 A.2d 143 (1941). However, the statement from McPhilomy on which the Commonwealth Court relied expressly took into account both that the defendant had pled the statute of limitations as an affirmative defense and that the defendant had established that the action against her was not commenced within the facial statutory period. See id. at 252, 19 A.2d at 144 (concluding, based on the evidence in an assumpsit action that the last payment on a debt was made in 1932, that "[s]ince this action was commenced May 24, 1939, and the statute of limitations was pleaded, it was incumbent upon the plaintiff to prove facts sufficient to remove the bar of the statute" (emphasis added)).

where the statute of limitations in question is not merely one of general application spanning all similar actions, but rather, derives from a specific proviso within a statute giving rise to the right sought to be vindicated, the plaintiff or complainant should be required to affirmatively show that the suit was commenced within the period provided. See 51 AM. JUR. 2D LIMITATION OF ACTIONS §418 (2005) (reflecting the prevailing view of other jurisdictions in this regard). This position has particular force in the context of Section 413(a), which affirmatively prescribes that relief is available "provided" that the reinstatement petition is timely filed. See 77 Pa.C.S. §772.

For these reasons, I support the allocation of the burden of proof to Claimant in this case. Further, I note that the workers' compensation judge afforded both parties ample opportunity to present their evidence concerning the point.[3]

Additionally, I respectfully dissociate myself from the majority's indication that the phraseology "the date to which payments have been made" from Section 434 of the Workers' Compensation Act, 77 P.S. §1001, means the time period for which benefits were paid, see Majority Opinion, slip op. at 10, as opposed to the date of the last payment made by the insurer, as the Commonwealth Court has indicated, see, e.g., Urick Foundry Co. v. WCAB (Aarnio), 91 Pa. Cmwlth. 24, 26 n.2, 496 A.2d 883, 885 n.2 (1985); Aetna Electroplating Co. v. WCAB (Steen), 116 Pa. Cmwlth. 66, 71, 542 A.2d 189, 191-92 (1988) ("It seems too obvious for argument that under the provision in

[3] See, e.g., N.T., September 4, 1998, at 7-8 (reflecting the workers' compensation judge's directive that "I would like both parties, by the time of the next hearing, to be prepared to supply any of the information they have regarding the date of last payment of benefits[.]"); id. at 51 ("I'll expect any further evidence on the [statute of limitations] issue to be submitted at the next hearing."); N.T., January 8, 1999, at 4-6 (reflecting the observations of the workers' compensation judge that the expected evidence concerning the statute of limitations was not forthcoming, and that "there has been an extraordinary amount of delay on the Claimant's part in this case").

Section 434 . . . the three-year limitation does not begin to run until the last payment has been made[.]").[4] I believe that this issue should remain open to appropriate argument in this Court, since the statutory language seems to me to be ambiguous, and there is no issue concerning Section 434 that is presently before us.

[4] Again, my reservation in this regard is limited to the interpretation of the language of Section 434. Contrary to the majority's indication, see Majority Opinion, slip op. at 10 n.4, I am not suggesting that judgment should be reserved on the Section 413(a) issue. Indeed, while I have noted my differences with the majority's reasoning on the Section 413(a) question, I have also expressly indicated my agreement with its holding.