IN THE COMMONWEALTH COURT OF PENNSYLVANIA

George Weston LTD/Maier's Bakery, Petitioner	:	
v.	:	No. 1030 C.D. 2008
	:	Submitted: October 10, 2008
Workers' Compensation Appeal Board (Sandt), Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: November 25, 2008

George Weston LTD/Maier's Bakery (Employer) petitions for review from an order of the Worker's Compensation Appeal Board (Board) modifying a decision of a Workers' Compensation Judge (WCJ) to reflect Russell Sandt (Claimant) had an average weekly wage (AWW) of $1,087.91 as opposed to $660.56 for an injury occurring December 10, 2004. We affirm.

Claimant sustained an injury to his low back in the course and scope of his employment on February 22, 1995. Employer issued a Notice of Temporary Compensation Payable that converted to a Notice of Compensation Payable by operation of law acknowledging a "lumbar spine" injury. Claimant's AWW at that time was $1,087.91. Claimant returned to his employment with restrictions in 1996. Claimant was restricted to working forty hours per week. As a result, Claimant received partial disability benefits that were paid through December 10, 2004. The insurer on the risk for the 1995 injury was Liberty Mutual.

Claimant filed a Claim Petition alleging that on December 10, 2004, he sustained an injury to his back and shoulders while handling "beef pans." Employer's insurer at the time of this injury date was Ace USA Esis (Esis). By a decision circulated December 30, 2005, the WCJ found Claimant sustained a new injury and granted his Petition. The WCJ found Esis liable for Claimant's new injury and awarded total disability benefits based on Claimant's 1995 AWW.

Employer appealed arguing that the WCJ erred by utilizing Claimant's 1995 AWW to calculate Claimant's benefit rate for the 2004 injury. The Board, on April 26, 2007, vacated the WCJ's decision. It remanded for the WCJ to calculate Claimant's AWW as of December 10, 2004, the date a new injury was found to occur. The WCJ issued a new decision clarifying that Claimant's benefits should be based on an AWW of $660.56. Claimant appealed this decision to the Board arguing the WCJ's ruling was contrary to the Supreme Court's opinion in Colpetzer v. Workers' Compensation Appeal Board (Standard Steel), 582 Pa. 295, 870 A.2d 875 (2005). The Board, in an opinion dated May 9, 2008, agreed. It noted that while Claimant's AWW should be calculated as of the December 10, 2004 injury date, his wages were artificially depressed because of his prior injury. As such, it indicated Claimant's original AWW should be used when necessary in calculating Claimant's wages under the proper formula provided in Section 309 of the Pennsylvania Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §582. Consequently, it modified the WCJ's decision to reflect Claimant's AWW for his December 10, 2004 injury was $1,087.91. This appeal followed.[1]

[1] Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights

Employer argues that Claimant's AWW for Claimant's most recent work injury was incorrectly calculated. We disagree.

An AWW is computed as of the injury date. Connors v. Workmen's Compensation Appeal Board (B.P. Oil), 663 A.2d 887 (Pa. Cmwlth. 1995). Section 309 of the Act reads, in relevant part:

> …
>
> (d) If at the time of the injury the wages are fixed by any manner not enumerated in clause (a), (b) or (c), the average weekly wage shall be calculated by dividing by thirteen the total wages earned in the employ of the employer in each of the highest three of the last four consecutive periods of thirteen calendar weeks in the fifty-two weeks immediately preceding the injury and by averaging the total amounts earned during these three periods….

The goal of Section 309 of the Act is to calculate an AWW that reasonably reflects the reality of the claimant's pre-injury earning experience. Triangle Bldg. Ctr. v. Workers' Compensation Appeal Board (Linch), 560 Pa. 540, 746 A.2d 1108 (2000). Moreover, the Act is remedial in nature and is subject to liberal construction to benefit the injured worker. Gallie v. Workers' Compensation Appeal Board (Fichtel & Sachs Indus.), 580 Pa. 122, 859 A.2d 1286 (2004). When a claimant has missed time because of a prior work-related injury within the fifty-two weeks preceding a second work-related injury, his AWW for his first injury should be used in calculating his AWW for his most recent work

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were violated. Campbell v. Workers' Comp. Appeal Bd. (Pittsburgh Post Gazette), 954 A.2d 726 (Pa. Cmwlth. 2008).

injury for each period where his earnings were artificially depressed due to the prior work injury. Colpetzer, 582 Pa. at 313-4, 870 A.2d at 886. In so holding, the Court reasoned "[i]t is not an accurate measure of economic reality to treat periods where no wages were earned solely because the worker was unfortunate enough to have suffered a previous work injury, as if the worker had no earning capacity for those periods." Id., 582 Pa. at 313, 870 A.2d at 886. Further, it stated "the Act was not designed to punish the worker merely because a work calamity befell him." Id., 582 Pa. at 314, 870 A.2d at 887.

Claimant, at the time of his second injury, was working with restrictions from his original 1995 work injury. Consequently, he was limited to working forty hours per week and unable to earn overtime. Thus, his earnings were less than what he was capable of earning prior to his 1995 injury. Section 309(d) of the Act instructs that Claimant's AWW should be determined by taking the three highest quarters in the fifty-two weeks immediately preceding Claimant's 2004 injury, divide those by thirteen, and average the totals to calculate Claimant's new AWW. Colpetzer indicates, however, that when a claimant's wages are "artificially depressed" due to a prior work-related injury, his previous AWW should be used when computing his current AWW for quarters where his earnings are impacted by the original work injury. Claimant's wages were reduced during all four quarters immediately preceding his 2004 injury due to his prior injury. Thus, his 1995 AWW should be used for all three quarters in calculating his 2004 AWW. Colpetzer. Thus, Claimant's AWW for his 2004 injury is $1,087.91 as found by the Board.

We acknowledge that the claimant in Colpetzer actually missed work altogether during parts of the year immediately preceding his second work injury

while Claimant, in the instant matter, was able to work, albeit with restricted hours, during the relevant four quarters. Considering the instruction in Gallie, however, that the Act should be liberally construed to benefit the injured worker and that, per Linch, the goal of Section 309 of the Act is to capture the reality of Claimant's pre-injury earning capacity, we, like the Board, see no reason why the Supreme Court's holding in Colpetzer would not apply to the instant matter. We see no error in its determination and affirm the same.[2]

JIM FLAHERTY, Senior Judge

[2] Employer contends that the Board, in its 2007 Order vacated the WCJ's original decision that determined Claimant's benefits should be paid based upon the 1995 AWW and remanded the matter to the WCJ to calculate Claimant's AWW as of December 10, 2004. It argues that the Board inappropriately reversed itself in its May 9, 2008 Opinion when it modified the WCJ's determination that that Claimant's correct AWW was $660.56 to reflect the correct calculation of the 2004 AWW was $1,087.91. While it may have behooved the Board in the first instance, and in the interest of judicial economy, to affirm the WCJ's December 30, 2005 decision on alternative grounds as the correct grounds were clear from the record as it is authorized to do pursuant to Tynan v. Workmen's Compensation Appeal Board (Associated Cleaning Consultant & Serv., Inc.), 639 A.2d 856 (Pa. Cmwlth.), appeal denied, 539 Pa. 699, 653 A.2d 1236 (1994), the Board was indeed correct to hold that Claimant's AWW must be calculated for the December 10, 2004 injury date as a new injury was found to occur. Connors. We reiterate that the WCJ originally instructed Claimant's benefits should be paid based on Claimant's 1995 AWW. The WCJ, on remand, failed to utilize the directive in Colpetzer, to utilize the original AWW when calculating the new AWW for quarters where Claimant's wages were artificially depressed due to his prior work injury. Thus, the Board did not actually reverse itself when it used Claimant's 1995 AWW where appropriate to calculate Claimant's 2004 AWW when utilizing the formula provided in Section 309(d).

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O R D E R

AND NOW, this 25th day of November, 2008, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

JIM FLAHERTY, Senior Judge