IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Snap-Tite, Inc. and Old Republic Insurance Company, Petitioners	:	
v.	:	No. 1047 C.D. 2008 Submitted: October 10, 2008
Workers' Compensation Appeal Board (Ramey), Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKEY FILED: December 2, 2008

Snap-Tite, Inc. (Employer) and Old Republic Insurance Company (ORIC) petition for review of an order of the Workers' Compensation Appeal Board (Board), affirming the decision, (as modified), of the Workers' Compensation Judge (WCJ), which granted the claim petition filed by Helenka Ramey (Claimant). We now affirm.

Claimant was employed as an assembler of snap rings for Employer for approximately seven to eight years. In March, 2005, Claimant filed a claim petition against Employer and Pennsylvania Manufacturers Association Insurance Company (PMA) alleging an injury to her right elbow in the course and scope of her employment on April 12, 2004. A second claim petition was filed shortly thereafter naming ORIC as Employer's workers' compensation insurance carrier and further

alleging that Claimant suffered a repetitive, accumulative traumatic injury to her right elbow as of November 23, 2004.[1]

In response to the claim petition, on March 22, 2005, ORIC filed an answer and alleged that any current disability suffered by the Claimant was attributable to the work injury she sustained on April 12, 2004, when PMA was the Employer's workers' compensation insurance carrier. PMA also filed an answer to Claimant's original claim petition on March 22, 2005. The two claim petitions were consolidated for hearings before the WCJ.

On January 13, 2006, after hearing, the WCJ issued an interlocutory order pursuant to Section 410 of the Pennsylvania Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 751.[2] He ordered PMA and ORIC to each pay Claimant compensation benefits at the rate of $173.61 per week for total compensation of $347.22 based on Claimant's average weekly wage of $520.90 per week. The WCJ ordered such compensation for the period from January 25, 2005, through May 24, 2005.

The WCJ subsequently held additional hearings as to the merits of Claimant's claim petitions. At the hearings, Claimant testified on her own behalf. She also presented the report of David M. Babins, M.D., an orthopedic surgeon and her treating physician. Steven E. Kann, M.D. and Mark E. Baratz, M.D., Board

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[1] ORIC replaced PMA as Employer's workers' compensation insurance carrier between Claimant's alleged dates of injury.

[2] Section 410 provides that whenever any claim for compensation is presented and the only issue involved is the liability as between the defendant or the carrier or two or more defendants or carriers, the WCJ shall order payments to be immediately made by the defendants or the carriers. After a final decision is reached, the payments made by the defendant or carrier not liable in the case shall be awarded or assessed as costs against the defendant or carrier found to be liable in the case.

certified orthopedic surgeons, testified by deposition on behalf of ORIC and PMA, respectively.

Before the WCJ, Claimant testified that her job for Employer required the repetitive use of her hands. She reported that in April, 2004, she started developing a problem with her right elbow which continued to get worse. Claimant testified that she reported the problem to her supervisor and was sent to Dr. Babins. She was treated by Dr. Babins with cortisone injections and testified that by late summer, she no longer had the pain in her right elbow. However, Claimant testified that the pain returned in November, 2004, and continued until she underwent surgery on January 27, 2005. Claimant eventually returned to work on May 25, 2005. After working for several months, the pain returned and Claimant underwent another surgery on March 3, 2006. Claimant returned to work, without restriction, on May 11, 2006.

Dr. Babins' indicated that he began treating Claimant on May 3, 2004, when she complained about pain in her right elbow associated with her work-related activities. Dr. Babins indicated that after the cortisone injections were no longer effective, he recommended and Claimant agreed to surgery on her right elbow. The surgery was performed on January 27, 2005. Dr. Babins noted that he performed a second surgery on March 3, 2006. He indicated that he found it difficult to apportion the work injury to one of the dates of injury because the Claimant's initial discomfort improved but then reappeared. He opined that he would apportion the two injuries by attributing 60% to the first injury of April 12, 2004, and 40% to the second injury which he concluded occurred on November 23, 2004.

Dr. Kann's deposition testimony indicated that he performed an independent medical examination (IME) on Claimant on August 24, 2005, and

subsequently issued a report. He opined that Claimant had persistent right lateral epicondylitis despite having surgery and that she was a candidate for revision surgery. Dr. Kann asserted that the Claimant's pain began after the injury in April, 2004, and never receded. He testified that Claimant had not related information to him about any second injury that might have occurred in November, 2004. Dr. Kann concluded that he did not believe that Claimant's epicondylitis was the result of any repetitive, cumulative trauma.

With respect to Dr. Baratz's deposition testimony, he indicated that he performed an IME on Claimant on August 22, 2005, and subsequently issued his report. Dr. Baratz diagnosed Claimant's condition as recurrent right lateral epicondylitis, which he believed was an ongoing condition which had recurred following her surgery. Dr. Baratz noted that Claimant related to him that she had periods of time when her condition was improved and periods of time when her condition worsened. He opined that such a history was very typical for her injury. Dr. Baratz opined that Claimant's particular work activity was one that would lead her to develop the progressive symptoms even though she could not relate a specific traumatic event that caused her injury. Dr. Baratz concluded that although Claimant did not describe a "particular event that occurred" that caused her pain to begin in April, 2004, she had an "onset of symptoms at that time." (R.R. at 385a).

Following the hearings, the WCJ issued a decision and order granting Claimant's claim petition against ORIC and dismissing her claim petition against PMA. In rendering his opinion, the WCJ found Claimant's testimony to be credible. The WCJ also accepted the testimony of Dr. Baratz as credible and "as fact," concluding that his testimony was "logical, convincing, well reasoned and supported by the Claimant's testimony." (WCJ's Decision at 2). With respect to the

remaining medical experts, the WCJ rejected Dr. Babins' report as being indefinite and unconvincing with respect to causation. He also rejected the testimony of Dr. Kann as unconvincing, speculative, not well reasoned and unsupported by the record.

The WCJ concluded that Claimant suffered injuries in the course and scope of her employment as a result of repetitive trauma due to repeated activities at work. He further determined that the injury did not take place until the last exposure of the trauma occurred, which was her last day of work. Thus, the WCJ concluded that the responsible insurance carrier was ORIC, as ORIC was Employer's workers' compensation insurance carrier on that date. The WCJ found that Claimant was totally disabled from January 5, 2005, through May 24, 2005, and from April 28, 2006, through May 10, 2006. He suspended compensation effective May 11, 2006, based on Claimant's return to work without restrictions.[3]

ORIC then filed an appeal to the Board.

However, as ORIC's appeal was pending, Claimant filed a cross-appeal with the Board on August 4, 2007. Specifically, Claimant argued that the WCJ erred in finding a reasonable basis for contesting the claim and failing to order the assessment of attorney's fees for an unreasonable contest. On August 23, 2007, Employer and ORIC filed a motion to quash the Claimant's cross-appeal.

[3] Additionally, the WCJ awarded ORIC credit for the compensation it paid pursuant to the interlocutory order and directed ORIC to reimburse PMA for the compensation it paid to Claimant pursuant to the same order. ORIC was further ordered to pay costs, Claimant's unreimbursed medical expenses of $747.00 and Claimant's unreimbursed lost time from work of $49.72. The WCJ also recognized the subrogation right of Highmark Blue Shield for medical bills.

By decision and order issued May 7, 2008, the Board affirmed as modified the WCJ's order.[4] The Board noted that the WCJ found the testimony of Claimant and Dr. Baratz credible and that such a credibility determination was not subject to its review. It concluded that the WCJ's decision granting Claimant's claim petition was supported by substantial competent evidence. However, the Board recognized that although the WCJ ordered benefits to commence on January 5, 2005, the record indicated that Claimant was not disabled until January 27, 2005. Therefore, the Board modified the WCJ's order to reflect that Claimant's disability commenced as of January 27, 2005. ORIC subsequently filed an appeal with this Court.

On appeal,[5] ORIC argues that several of the WCJ's findings of fact are not supported by substantial, competent evidence of record and, thus, have resulted in errors as a matter of law. It also asserts that the WCJ erred in suspending Claimant's benefits as of May 11, 2006, when the evidence demonstrates that her benefits should have been terminated. Specifically, ORIC argues that the WCJ erred in the following findings of fact:

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[4] Finding that Claimant's cross-appeal was indeed untimely filed, the Board granted the motion to quash filed by Employer and ORIC.

[5] Our scope of review in a workers' compensation appeal is limited to determining whether an error of law was committed, constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of Administrative Agency Law, 2 Pa. C. S. § 704. Further, in Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002), our Supreme Court held that "review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in which such question is properly brought before the court." Wintermyer, 571 Pa. at 203, 812 A.2d at 487.

> 12. Taking into consideration all of the testimony in the record, and for the reasons set forth in my discussion above, which I incorporate herein by reference and make a part hereof, I find that the Claimant's epicondylitis, was the result of repetitive trauma due to repeated activities at work. I further find, that the injury therefore did not take place until the last exposure of the trauma occurred. I therefore, further find, that the Old Republic Insurance Company is the responsible insurance carrier.
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> 13. Taking into consideration all of the testimony in the record, and for the reasons set forth above, I further find that as a result of the said injury, the Claimant was totally disabled from performing the duties of her employment from January 5, 2005 through May 24, 2005 and from April 28, 2006 through May 10, 2006.[[6]]
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> 15. Highmark Blue Shield has a subrogation lien in the total amount of $4,866.98. Defendant has agreed to pay Claimant a counsel fee of twenty percent (20%) of the said amount.
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> 16. The Claimant incurred out of pocket expenses for her medical treatment in the amount of $747.00.

(WCJ's Decision at 9, 10).

First, with respect to the WCJ's Findings of Fact Nos. 12 and 13, ORIC argues that these findings are not supported by Claimant's testimony or the medical experts' testimony. ORIC argues that the Claimant testified that she suffered a "specific injury at work on April 12, 2004 when she was lifting an item" and she immediately reported the injury to a supervisor. (ORIC's Brief at 11). It argues that the testimony of Drs. Kann, Baratz and Babins indicates that the Claimant's date of

[6] The Board subsequently amended this finding to reflect that the correct date of Claimant's disability was January 27, 2005, rather than January 5, 2005.

injury was April 12, 2004. ORIC argues that Dr. Kann testified that the Claimant never reported to him that any injury occurred on November 23, 2004. It notes that Dr. Baratz confirmed the date of injury as April 12, 2004, in both his report and his deposition testimony. ORIC asserts that Dr. Babins reported that Claimant's surgery was directly related to her April, 2004, injury. ORIC argues that none of the physicians related that Claimant's date of injury was November 23, 2004, the date Claimant alleged in her claim petition against ORIC.

Additionally, ORIC asserts that the WCJ never made a specific finding as to the date when the actual injury occurred or when the last trauma occurred. ORIC argues that the only date of injury claimed against it was November 23, 2004, and there is no evidence of record to support that date as the date of Claimant's injury. As the evidence of record only references an April, 2004, injury date, when it was not Employer's workers' compensation insurance carrier, ORIC argues that the WCJ erred in ordering it to pay benefits. We disagree.

An injury that develops over a period of time and results from a number of work activities in which the employee is engaged is compensable from the date of injury. Curran v. Workmen's Compensation Appeal Board (Maxwell Industries) 664 A.2d 667 (Pa. Cmwlth. 1995), petition for allowance of appeal denied, 543 Pa. 732, 673 A.2d 337 (1996). Section 311 of the Workers' Compensation Act, however, does not define "date of injury". 77 P.S. § 631. Where an employee is exposed to continuing multiple traumas, the injury does not take place until the last exposure of the injury occurs, which is usually the last day of work. City of Philadelphia v. Workers' Compensation Appeal Board (Williams), 851 A.2d 838 (Pa. Cmwlth. 2004).

Although ORIC argues that Claimant and the medical experts testified that the date of Claimant's injury was April 12, 2004, we find that the record evidence indicates otherwise. Claimant testified that "[i]nitially [her elbow] hurt when [she] picked up things and the pain just got more aggressive." (R.R. at 118a). She did not testify that there was a specific isolated event which she thought caused the pain or injury to her right elbow in April, 2004. Also, Claimant explained why she reported a second injury date. She testified that she filled out a second claim petition because her condition worsened in October of 2004 and "because PMA wasn't - - it was Old Republican (sic)" who was the workers' compensation insurance carrier at that time. (R.R. at 101a).

In addition, Dr. Baratz's testimony, the only medical testimony found credible by the WCJ, indicated that he examined Claimant on August 24, 2005, and that she reported to him that "nothing in particular" occurred on April 12, 2004, but that she "just noticed her pain starting" around that date. (R.R. at 384a). Dr. Baratz indicated that "injury might not be the best word to use, but clearly she had an onset of symptoms at that time." (R.R. at 385a). He related that he specifically asked the Claimant if there had been a particular event that she could point to as to causing the onset of pain and she stated that she "could not relate [the onset of pain] to a specific traumatic incident." Id. Dr. Baratz testified that he believed that what necessitated Claimant's surgery was a "progressive injury that reached a crescendo in January of 2005." (R.R. at 386a).

Thus, considering the Claimant's testimony as well as the credible testimony of Dr. Baratz, we cannot say that the WCJ's Findings of Fact Nos. 12 and 13 were not supported by substantial evidence or that the WCJ erred in making these findings.

Next, with respect to the WCJ's Finding of Fact No. 15, ORIC argues that the WCJ erred in awarding a subrogation lien to Highmark Blue Shield as the record lacked evidence in support of this award. It argues that the evidence presented was a "lien letter of Highmark Blue Shield," to which it properly objected, and no further evidence was submitted in support of the lien. (ORIC's Brief at 16). ORIC also argues that there was no evidence presented that Claimant's surgery in 2006 was causally related to an injury on November 23, 2004.[7]

We begin with the issue of subrogation. Any request for subrogation must be presented to the WCJ during the initial proceeding or it will be waived. Independence Blue Cross v. Workers' Compensation Appeal Board (Frankford Hospital), 820 A.2d 868 (Pa. Cmwlth. 2003). Subrogation by an employer or insurance company is limited to amounts actually paid by the employer or insurance company. Miller v. Myers, 300 Pa. 192, 150 A. 588 (1930).

The record indicates that Claimant introduced "subrogation information from Ainsman and Levine regarding the subrogation lien being asserted by Highmark Blue Cross/Blue Shield" at the hearing before the WCJ. (R.R. at 142a). This exhibit submitted by Claimant included letters from counsel for Highmark Blue Shield and an itemized report of medical expenses paid on behalf of Claimant relative to her work-related injury. Counsel for ORIC did not object to the exhibit.[8]

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[7] As noted above, the proper date of injury was January 25, 2005, Claimant's last day of work, not November 23, 2004.

[8] Contrary to the indication in ORIC's brief, only Counsel for PMA commented on this exhibit, noting that while he did not object, he would like further clarification that the medical expenses did not include expenses for a non-work-related wrist injury Claimant suffered in November of 2004.

With regard to the 2006 surgery, Dr. Baratz opined that Claimant suffered from "lateral epicondylitis or tennis elbow." (R.R. at 382a). Dr. Baratz noted Claimant's surgery in the nature of a lateral release in January of 2005. However, as to his examination on Claimant in August of 2005, Dr. Baratz testified that Claimant's condition "recurred following her surgery." (R.R. at 384a). Dr. Baratz opined that Claimant would continue to have problems associated with this condition and that she would "ultimately . . . need [a second] operation." (R.R. at 385a).

Moreover, Claimant herself testified before the WCJ that she returned to work following the first surgery, but that she again experienced problems, including pain radiating up to her right elbow. In fact, Claimant testified that she was experiencing the same symptoms as she had prior to the surgery. Claimant later testified that she had a second surgery performed on her right elbow on March 3, 2006. Based upon the testimony of Claimant and Dr. Baratz, which the WCJ found to be credible, we cannot say that the record lacks evidence causally relating Claimant's 2006 surgery to her work-related injury.

Next, ORIC argues that the WCJ erred in awarding reimbursement of Claimant's out-of-pocket expenses, as the record does not contain any evidence of the same. Again, we disagree.

At the hearing before the WCJ, Claimant introduced into evidence, as an exhibit, a detailed listing of her unreimbursed medical expenses. These expenses included Claimant's payment totaling $747.00. (R.R. at 275a). Counsel for ORIC did not object to this exhibit.[9] Additionally, Claimant testified before the WCJ that

[9] Similar to the subrogation lien above, Counsel for PMA raised an objection to this exhibit citing the same need for clarification of Claimant's medical expenses.

she was paying a $20.00 co-payment for every one of her physical therapy visits and for each visit to Dr. Babins, as well as a co-payment for her drug prescriptions. (R.R. at 187a). Thus, we cannot say that the WCJ erred in awarding Claimant reimbursement of her out-of-pocket expenses.

Finally, ORIC argues that the WCJ erred when he suspended Claimant's benefits instead of terminating the same. ORIC argues that Claimant testified that she was "symptom free" and Dr. Babins opined that she had no residual disability in his letter dated November 15, 2006. ORIC argues that there is no need for the use of certain magic words such as "full recovery" and further asserts that the burden of showing that the Claimant's disability has ceased has been met in the present matter. (ORIC's Brief at 18).

The burden of proof for a termination of benefits is on the employer to establish that either the employee's disability has ceased or that the current disability arises from a cause unrelated to the employee's work injury. Campbell v. Workers' Compensation Appeal Board (Antietam Valley Animal Hospital), 705 A.2d 503 (Pa. Cmwlth. 1998). A finding that the employee was able to return to work, without more, does not comport with the requisites of the Act and will not support an order terminating benefits. Graham Architectural Products Corporation v. Workmen' Compensation Appeal Board (Rothrock), 619 A.2d 404 (Pa. Cmwlth. 1993).

Initially, we note that the testimony of Dr. Babins, upon which ORIC relies, was rejected as not credible. At most, the evidence of record reveals that Claimant returned to work, without restrictions, and apparently at her pre-injury wages. Thus, a suspension of her benefits was proper, and we see no error on the part of the WCJ in this regard.

Accordingly, the order of the Board is affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge

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O R D E R

AND NOW, this 2nd day of December, 2008, the order of the Workers' Compensation Appeal Board is hereby affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge