

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dennis A. Fredericks,	:	
Petitioner	:	
	:	
v.	:	
	:	
Workers' Compensation Appeal	:	
Board (Omnova Solutions),	:	No. 1160 C.D. 2011
Respondent	:	Submitted: September 30, 2011

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

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: November 1, 2011

Dennis A. Fredericks (Claimant) petitions this Court for review of the May 23, 2011 order of the Workers' Compensation Appeal Board (Board) affirming the decision of a Workers' Compensation Judge (WCJ) denying the claim and penalty petitions filed by Claimant. Claimant presents two issues for this Court's review: (1) whether the WCJ erroneously failed to award penalties, and (2) whether the WCJ erroneously failed to award litigation costs. For the reasons set forth below, we affirm the Board's order.

Claimant sustained a work-related injury on August 27, 2007. On September 19, 2007, Omnova Solutions (Employer) issued a medical only Notice of Temporary Compensation Payable (NTCP), accepting groin strain as the work injury. Claimant subsequently filed a Claim Petition alleging he sustained a work-related back injury, and a Penalty Petition alleging that Employer violated the Workers'

Compensation Act (Act)¹ by failing to timely file an acceptance or rejection of the injury. On June 3, 2010, the WCJ denied Claimant's petitions. Claimant appealed to the Board. On May 23, 2011, the Board affirmed the decision of the WCJ. Claimant appealed to this Court.²

Claimant argues that the WCJ erroneously failed to award penalties. Specifically, Claimant contends that penalties should have been awarded based on Employer's undisputed violation of Section 406.1(a) of the Act, 77 P.S. § 717.1.³ We disagree.

Section 406.1 (a) of the Act provides, in pertinent part:

The employer and insurer shall promptly investigate each injury reported or known to the employer and shall proceed promptly to commence the payment of compensation due either pursuant to an agreement upon the compensation payable or a notice of compensation payable as provided in section 407 or pursuant to a notice of temporary compensation payable as set forth in subsection (d), on forms prescribed by the department and furnished by the insurer. *The first installment of compensation shall be paid not later than the twenty-first day after the employer has notice or knowledge of the employe's disability.*

(Emphasis added). Section 435 of the Act⁴ provides in relevant part:

(d) The department, the board, or any court which may hear any proceedings brought under this act shall have the power to impose penalties as provided herein for violations of the provisions of this act or such rules and regulations or rules of procedure:

¹ Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§ 1-1041.4, 2501-2708.

² This Court's review is limited to determining whether an error of law was committed, whether the findings of fact are supported by substantial evidence and whether there was a violation of constitutional rights. *Sysco Food Servs. of Phila. v. Workers' Comp. Appeal Bd. (Sebastiano)*, 940 A.2d 1270 (Pa. Cmwlth. 2008).

³ Added by Section 3 of the Act of February 8, 1972, P.L. 25.

⁴ Also added by Section 3 of the Act of February 8, 1972, P.L. 25.

(i) Employers and insurers *may be penalized* a sum not exceeding ten per centum of the amount awarded and interest accrued and payable: Provided, however, That such penalty may be increased to fifty per centum in cases of unreasonable or excessive delays. Such penalty shall be payable to the same persons to whom the compensation is payable.

77 P.S. § 991 (emphasis added). Here, the NTCP was issued twenty-three days after the injury occurred. In addition, Claimant had returned to work within six days of the injury. Thus, Claimant sustained no earnings loss. While the WCJ had the power to penalize Employer under Section 406.1 of the Act, that power is discretionary per Section 435 of the Act. “An abuse of discretion occurs where the WCJ’s judgment is manifestly unreasonable, where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.” *Allegis Grp. and Broadspire v. Workers’ Comp. Appeal Bd. (Coughenaur)*, 7 A.3d 325, 327 n.3 (Pa. Cmwlth. 2010). Clearly, the WCJ’s judgment in this case was not manifestly unreasonable, the law was correctly applied, and there is no evidence of partiality, prejudice, bias, or ill will in the record. Accordingly, the WCJ did not abuse his discretion in not awarding penalties.

Claimant next argues that the WCJ erroneously failed to award litigation costs. Specifically, Claimant contends that he was entitled to litigation costs because he successfully established a work injury substantially different from the soft tissue injury accepted by Employer. We disagree.

Section 440(a) of the Act⁵ provides in pertinent part:

In any contested case *where the insurer has contested liability* in whole or in part, including contested cases involving petitions to terminate, reinstate, increase, reduce or otherwise modify compensation awards, agreements or other payment arrangements or to set aside final receipts,

⁵ Added by Section 3 of the Act of February 8, 1972, P.L. 25.

the employe or his dependent, as the case may be, *in whose favor the matter at issue has been finally determined in whole or in part* shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred for attorney's fee, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend the proceedings

77 P.S. § 996(a) (emphasis added). Here, Claimant filed two petitions both of which were litigated, denied, and dismissed. Clearly, he was not the prevailing party in whole or in part.

Moreover, the WCJ did not amend the injury to include a work injury substantially different from the soft tissue injury accepted by Employer. In referring to Claimant's injury as a sports hernia, as opposed to a groin sprain, in his findings of fact, the WCJ was merely using the terminology elicited from Employer's expert. It did not alter the insurer's liability. Accordingly, the WCJ properly denied litigation costs.

For all of the above reasons, the Board's order is affirmed.

JOHNNY J. BUTLER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dennis A. Fredericks,	:	
Petitioner	:	
	:	
v.	:	
	:	
Workers' Compensation Appeal	:	
Board (Omnova Solutions),	:	No. 1160 C.D. 2011
Respondent	:	

ORDER

AND NOW, this 1st day of November, 2011, the May 23, 2011 order of the Workers' Compensation Appeal Board is affirmed.

JOHNNY J. BUTLER, Judge