IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Myrtle Barnes,	:	
Petitioner	:	
	:	
v.	:	No. 1199 C.D. 2008
	:	SUBMITTED: October 10, 2008
Workers' Compensation Appeal	:	
Board (Hospital Ambulance, Inc. and	:	
State Workers' Insurance Fund),	:	
Respondents	:	

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

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** December 5, 2008

Claimant Myrtle Barnes petitions for review of the June 9, 2008 order of the Workers' Compensation Appeal Board (Board) denying her penalty petition. We affirm.

In December 1984, Claimant sustained injuries to her back and right leg in the course of her employment with Employer Hospital Ambulance, Inc. Pursuant to a February 1985 Notice of Compensation Payable (NCP), Claimant received weekly disability benefits in the amount of $139.57, based on an average weekly wage of $155.08. In March 1993, Employer filed a petition to suspend Claimant's benefits as of January 1, 1993, contending that work was available to

her as of that date without a loss of wages. Employer requested a supersedeas in connection with that petition, but the Workers' Compensation Judge (WCJ) denied its request.

In September 1997, the WCJ issued a decision granting Employer's petition to suspend benefits as of January 9, 1993, concluding that Claimant had failed to respond in good faith to referrals of jobs that were available and within her physical limitations. Claimant appealed from that decision and, in February 1999, the Board vacated it, remanding for a specific finding as to which of the job referrals Claimant failed to pursue in good faith.[1] On remand, the WCJ in a December 2003 decision found that Claimant had failed to pursue in good faith half of the job referrals. Accordingly, he once again suspended Claimant's benefits as of January 9, 1993. The WCJ in the present case concluded that the December 2003 decision was final.

In March 2006, Claimant filed a penalty petition seeking a penalty in the amount of fifty percent of benefits not paid from February 10, 1999, the date of the Board's remand order, to December 30, 2003, the date of the WCJ's decision on remand. Claimant later amended that petition to include the time period from October 9, 1997, the date of the last payment of indemnity benefits, to February 10, 1999.[2] In May 2007, the WCJ denied Claimant's penalty petition, concluding

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[1] The WCJ adopted the parties' stipulation that the December 2003 decision did not reflect whether a supersedeas was considered or granted in connection with the remand proceedings. There is a Bureau document in the record indicating that the State Workers' Insurance Fund (SWIF) filed a February 2004 application for supersedeas fund reimbursement. As per that document, the Bureau granted SWIF's request for the period from March 19, 1993 to October 9, 1997. Certified Record, Bureau's May 18, 2004 Letter, Exhibit D-1

[2] Before the WCJ, the parties stipulated that the last payment of indemnity benefits was October 9, 1997. Both parties asserted in their briefs to this Court, however, that Employer ultimately paid Claimant the indemnity compensation at issue, including statutory interest. **(Footnote continued on next page…)**

that she failed to establish a violation of the Workers' Compensation Act (Act),[3] believing that the Board in its February 1999 remand decision merely remanded the matter rather than vacating it, thereby negating any duty to resume payment of disability benefits during the pendency of the remand. In the alternative, the WCJ concluded that the doctrine of laches applied. The Board affirmed on the basis of laches, and thus did not reach the issue of whether Employer violated the Act by failing to resume indemnity payments after the remand order. Claimant's timely petition for review to this Court followed.

Claimant has preserved only one issue on appeal:[4] whether the WCJ erred in determining that her penalty petition was barred by the doctrine of laches.[5] We note that "the doctrine of laches is available in administrative proceedings where no time limitation is applicable, where the complaining party failed to exercise due diligence in instituting an action, and where there is prejudice to the other party." *Mitchell v. Workers' Comp. Appeal Bd. (Devereux Found.)*, 796

(continued…)

Employer apparently made the payment shortly before the WCJ's May 2007 decision denying the penalty petition and it appears to have occurred as a result of an action Claimant pursued before a common pleas court.

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

[4] In her brief to this Court, Claimant sought to raise two additional issues: 1) whether Employer improperly withheld indemnity payments to Claimant after the Board vacated and remanded the WCJ's grant of the suspension petition; and 2) whether Employer's unilateral withholding of indemnity payments was contrary to an existing NCP such that it violated the Act and became subject to potential penalties. Because Claimant in her appellate petition for review failed even to allude to these issues, however, we conclude that she waived any right to raise them on appeal. Pa. R.A.P. 1513.

[5] In light of the purely legal issue presented, our appellate review over the Board's order is limited to determining whether it committed an error of law. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704.

A.2d 1015, 1017-18 (Pa. Cmwlth. 2002) [citing *Roadway Express, Inc. v. Workmen's Comp. Appeal Bd. (Allen)*, 618 A.2d 1224 (Pa. Cmwlth. 1992)].

Claimant argues that the WCJ erred in determining that the doctrine of laches applied, maintaining that Employer was obligated to resume the payment of indemnity benefits in February 1999 when the Board vacated and remanded the WCJ's September 1997 decision to suspend her benefits. She asserts that Employer failed to seek any relief from its affirmative duty to comply with the Act and that it knowingly risked a penalty by not making the required indemnity payments. She contends that Employer should not benefit from its gamble.

Employer maintains that the WCJ correctly determined that it was entitled to a laches defense, emphasizing his determination that Claimant failed to exercise due diligence in instituting her action. Specifically, it notes the WCJ's observation that, even though the Board remanded the matter in February 1999, Claimant failed to advise anyone that she was not receiving indemnity benefits, let alone file a penalty petition or otherwise seek the resumption of payments, until nearly seven years later when she filed her March 2006 penalty petition. In addition, Employer points out that Claimant again failed to exercise due diligence in that she filed her March 2006 penalty petition more than two years after the WCJ's December 2003 final decision, which was not appealed.

Moreover, Employer maintains that it was prejudiced by Claimant's delay in filing her penalty petition in that she could have raised her issue during the course of the litigation, but failed to do so. Thus, it would have been prejudiced by the grant of the belated penalty petition because it would have been liable for a far greater amount of penalties and/or interest given the significant passage of time.

We agree with the Board that the WCJ did not err in concluding that Claimant's penalty petition was barred by the doctrine of laches. To reiterate, laches is available as a defense where no time limit is applicable, the complaining party fails to exercise due diligence and there is prejudice to the other party. *Mitchell*. Regarding the applicability of the first criterion to the present case, we note that in enacting the Act's penalty provision,[6] the legislature did not specify a time period in which a claimant must seek penalties. Therefore, no time limitation is applicable. In addition, ample evidence in the record indicates that Claimant failed to exercise due diligence in instituting her action. As the Board noted, Claimant offered no explanation for the seven-year delay in filing her penalty petition. Finally, we find such a lengthy delay to be virtually prejudicial as a matter of course in that, had the WCJ granted the penalty petition, Employer would have been subject to a significantly increased penalty and/or interest award.

Accordingly, we affirm the Board's order.

BONNIE BRIGANCE LEADBETTER,
President Judge

[6] Section 435 of the Act, added by Section 3 of the Act of February 8, 1972, 77 P.S. § 991.

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O R D E R

AND NOW, this 5th day of December, 2008, the order of the Workers' Compensation Appeal Board in the above captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge