IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Young-Su Suh,	:	
Petitioner	:	
	:	
v.	:	No. 1214 C.D. 2007
	:	SUBMITTED: October 26, 2007
Workers' Compensation Appeal Board (Stroehmann Bakeries and Zurich America Insurance Company),	:	
Respondents	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** January 24, 2008

Claimant Young-Su Suh petitions for review from the May 29, 2007 order of the Workers' Compensation Appeal Board (Board) that affirmed the order of the Workers' Compensation Judge (WCJ) denying and dismissing his claim petition filed approximately three years after his last day with employer Stroehmann Bakeries. The sole issue before us is whether the Board erred in determining that claimant failed to comply with Section 311 of the Workers' Compensation Act,[1] which provides that a claimant must provide notice to an

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 631.

employer of the occurrence of an injury within 120 days of that injury or, under the discovery rule exception, when a claimant knows, or by the exercise of due diligence should know, of the existence of the injury and its possible relationship to his employment.[2] We affirm.

Employed by Stroehmann Bakeries from 1990 until March 30, 2000, claimant worked in the production, shipping and sanitation departments. Claimant maintained that "he left his job and did not return because of ongoing severe verbal and physical abuse at the hands of his co-workers and supervisors." Finding of Fact No. 6. Specifically, he averred that "his co-workers began to tease, abuse and intimidate him in 1991 just after he began working for the Employer in 1990." *Id.*

In April 2000, claimant filed a Pennsylvania Human Relations Commission (PHRC) complaint, therein alleging that employer "subjected [him] to a hostile work environment, forced [him] to resign, because of [his] National Origin, South Korean and/or disability, Cretinism and/or in retaliation for [his] opposing unlawful discrimination."[3] In May 2001, claimant filed a federal complaint "to redress arbitrary, improper, unlawful, willful, deliberate and intentional discrimination with respect to his compensation, terms, conditions and privileges of employment by [employer], based on his national origin (South

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[2] We conclude that claimant waived any issue relating to the discovery rule exception by failing to pursue it at all levels of litigation. Pa. R.A.P. 1551(a). As employer noted, claimant did not pursue that theory before the WCJ nor attempt to make a record to support any fact-findings in that regard. In any event, the board concluded that claimant did not come within that exception in that there was nothing in the record to show that he did not or could not have known about his injuries and their relationship to his employment within the requisite time period for notifying employer.

[3] PHRC Complaint, para. 3; R.R. 36.

Korean), gender (male) and disability/perceived disability (mild mental retardation, achondroplasia dwarfism, and congenital hypothyroidism [a/k/a Cretinism]).”[4]

Approximately three years after his last day with employer, claimant filed his March 24, 2003 claim petition for workers’ compensation benefits, alleging that he sustained psychological, psychiatric and physical injuries as a result of abnormal working conditions. He alleged that he served notice of these injuries on employer on July 15, 2000, when his brother verbally notified management. Claim petition, para. 6.

In support of his claim petition, claimant presented his own testimony and that of M. Allan Cooperstein, Ph.D., board-certified as a senior disability analyst and in forensic traumatology. Dr. Cooperstein testified that, after a 2000 examination, he diagnosed claimant as suffering from an adjustment disorder with mixed anxiety and depressed mood. He stated that between 80 to 90% of that condition was directly attributable to claimant’s employment at Stroehmann. As a result of that impairment, Dr. Cooperstein concluded that claimant was unable to perform his normal work-related activities and he could use vocational rehabilitation. Dr. Cooperstein re-examined claimant in 2005 and concluded that claimant’s adjustment disorder had progressed to post-traumatic stress disorder and that his previous depression had worsened to a level of major depression. Further, the doctor opined that claimant’s work-related psychological injuries rendered him incapable of returning to any gainful employment.

The WCJ found claimant’s testimony regarding the workplace incidents and his reaction to them to be credible and convincing. The WCJ also accepted the testimony of Dr. Cooperstein. The WCJ, however, rejected claimant’s

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[4] Federal Complaint, para. 2; R.R. 44.

testimony that he gave proper notice to employer in a timely manner.[5] The Board agreed with the WCJ and affirmed his decision and order.

In its decision, the Board noted that, although claimant advised employer of the abuse he had suffered over the years, he never told anyone there his reasons for leaving or the injuries he suffered. The Board pointed out that claimant's only explanation for this failure to notify was that he did not trust anyone. Accordingly, the Board concluded that claimant did not notify employer of his work injuries until he filed his claim petition, approximately three years after he left his job. Claimant's petition for review to this court followed.

"While the Act is to be liberally construed, Section 311 of the Act is mandatory and bars a claim where it is found that appropriate notice of the injury has not been given to the employer within 120 days of its occurrence." *Storer v. Workers' Comp. Appeal Bd. (ABB)*, 784 A.2d 829, 832 (Pa. Cmwlth. 2001). In addition, pursuant to that section,

> an employer must have knowledge of an injury or no compensation shall be payable. This knowledge can be ascertained two ways: (1) the employer has actual knowledge of the injury; or (2) the claimant provides notice to the employer within 120 days of the occurrence of the injury. It is well settled that the procedural notice sections of the Act are designed to make knowledge rather than formal notice the standard. Thus, notice to an

[5] In his fact-findings and conclusions of law, the WCJ erroneously cited 180 as the number of days in which an employee had to notify an employer of an injury. Because the sixty-day difference between 180 and 120 would not change the result in this case, we view this discrepancy as merely a clerical error. Whether a claimant has complied with the notice requirement is a question of fact for the WCJ. Upon consideration of the evidence as a whole, this court must determine whether the WCJ's findings have the requisite measure of support in the record. *C. Hannah & Sons Constr. v. Workers' Comp. Appeal Bd. (Days)*, 784 A.2d 860 (Pa. Cmwlth. 2001).

> employer must encompass proof of actual receipt thereof or the requirement of the Act that an employer shall have knowledge of an injury in order for compensation to be payable is negated. . . . [T]he claimant has the burden of establishing that the employer was given notice of the injury and receipt of such notice is a prerequisite to receiving compensation.

Id. at 833 (citations omitted).

To reiterate, claimant in his claim petition maintained that he served employer with notice of his March 30, 2000 injuries within 120 days when his brother verbally notified management on July 15, 2000. On appeal, however, claimant argues that the Board erred in determining that he failed to give actual notice to employer within 120 days, maintaining that 1) he advised his supervisor on March 30, 2000 that he could no longer tolerate the abuse and was leaving his position; 2) he filed a complaint with the PHRC in April 2000 and shared a report from Dr. Cooperstein with employer in connection therewith; and 3) he filed a civil action in federal court in May 2001 alleging a work-related injury and disability.

In response, employer points out that claimant unambiguously testified that he never advised employer as to why he left or that he suffered injuries on the job. Claimant also agreed that, when two co-workers subsequently contacted him and asked him why he left, he told them nothing. October 28, 2005 Deposition of Young-Su Suh, N.T. 37-38, 53-57; R.R. 25, 29-30. Finally, claimant agreed that he advised Mr. Bill Phillips, a union representative, that “it was just time to get out.” *Id*. at 56; R.R. 29.

As for the PHRC complaint, employer contends that it did not contain allegations which reasonably would have imparted notice to employer that someone was claiming an injury. In addition, employer notes that there is no evidence of record that Dr. Cooperstein’s initial report was transmitted to defense

counsel within 120 days of March 30, 2000, when he left his job. As for the federal complaint, employer points out that claimant filed it in May 2001, which would have exceeded the 120-day requirement. In any event, employer maintains that the federal complaint was primarily an action for damages due to discrimination and, like the PHRC complaint, would not have reasonably imparted knowledge of any injuries.

After carefully reviewing the decisions made below, the record and the parties' arguments, we conclude that the Board did not err in determining that claimant failed to satisfy the notice requirement, the purpose of which "is to protect the employer from stale claims for injuries, of which it would have no knowledge, made after the opportunity for a full and complete investigation had passed." *Storer*, 784 A.2d at 832. By his own testimony, claimant denied numerous times that he advised anyone at work as to why he left or that he suffered any injuries as a result of work-place abuse.

With respect to the PHRC complaint, we agree that the allegations therein were insufficient to notify employer of any injuries. Although claimant alleged therein that the harassment became "unbearable," he never averred that he suffered any injuries as a result of his mistreatment. It is well established that a claimant must inform an employer of an *injury* within 120 days, not merely notice of an *incident*. *Rawling v. Workmen's Comp. Appeal Bd.*, 414 A.2d 447 (Pa. Cmwlth. 1980). Therefore, even if employer was aware of incidents involving claimant, it does not necessarily follow that it was aware of claimant's injuries.

Moreover, claimant filed his May 2001 federal complaint over one year after his March 30, 2000 alleged date of injury, and we reiterate our

determination that claimant waived any arguments regarding the discovery rule exception by failing to pursue them at all levels.

Accordingly, for the above reasons, we affirm the order of the Board.

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BONNIE BRIGANCE LEADBETTER,
President Judge

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<u>O R D E R</u>

AND NOW, this 24th day of January, 2008, the order of the Workers' Compensation Appeal Board in the above captioned matter is hereby AFFIRMED.

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BONNIE BRIGANCE LEADBETTER,
President Judge