IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Philadelphia, Petitioner	:	
v.	:	No. 1245 C.D. 2009
	:	Submitted: June 23, 2010
Workers' Compensation Appeal Board (Butler), Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION
BY JUDGE LEAVITT FILED: December 16, 2010

The City of Philadelphia (Employer) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) denying its petition to suspend the total disability benefits of Rita Butler (Claimant) in spite of the finding of the Workers' Compensation Judge (WCJ) that Claimant was fully recovered from her work injury and able to work. The Board held that benefits can never be terminated as of a date that predates the employer's issuance of a Notice of Compensation Payable (NCP). Here, by the time Employer issued its NCP, approximately one month after her injury, Claimant had already recovered. Concluding that the Board erred in holding that the date of an NCP, as opposed to its contents, is outcome determinative, we reverse.

Background.

The facts in this case are not in dispute. On September 28, 1995, Claimant was injured in a car accident in the course of her work for Employer as a probation officer. The next day, Employer sent Claimant to Lawrence H. Foster, D.O., who began treating Claimant for her injuries, which he described as a series of sprains and bruises. Dr. Foster last examined Claimant on October 19, 1995, at which time he found her to be fully recovered and capable of returning to her pre-injury job. However, because Claimant was still complaining of head and back pain, for which Dr. Foster could find no objective evidence, he referred her to Lorraine Gutowicz, M.D., for a second opinion. Dr. Gutowicz examined Claimant and concurred in Dr. Foster's opinion that she had fully recovered. While Claimant was off work, Employer paid Claimant "Injured on Duty" benefits, *i.e.*, her full salary, in accordance with Philadelphia Civil Service Regulation 32.[1]

On November 7, 1995, Employer issued an NCP, describing Claimant's work injury as bruises to the head, back and neck and listing a weekly compensation rate of $447.82. Reproduced Record at 1a (R.R. ___). In that portion of the NCP providing for the inception date of disability compensation, Employer placed an asterisk, directing the reader to the "Remarks" section of the NCP. There, Employer explained Claimant received "salary in lieu of workers' compensation benefits under Regulation 32." *Id.*

[1] Regulation 32 is the mechanism by which the City fulfills its obligations under the act commonly known as the Heart and Lung Act, Act of June 28, 1935, P.L. 477, *as amended*, 53 P.S. §§637-638. *Cohen v. Workers' Compensation Appeal Board (City of Philadelphia)*, 589 Pa. 498, 500 n.1, 909 A.2d 1261, 1262 n.1 (2006). The injured employee receives full salary.

The next month, in December 1995, Employer filed a petition to terminate disability benefits, asserting that Claimant had fully recovered from her work injury as of October 20, 1995. In the alternative, Employer requested a suspension of benefits. The matter was litigated, and the WCJ found, on the basis of Employer's medical evidence, that Claimant was fully recovered as of October 20, 1995. The WCJ dismissed the suspension petition as moot. Claimant appealed, and the Board vacated and remanded the matter to the WCJ on procedural grounds.[2]

On remand, the WCJ issued a new decision, again terminating benefits as of October 20, 1995. Claimant appealed, and the Board affirmed. This Court, however, reversed. *Butler v. Workers' Compensation Appeal Board (City of Philadelphia)*, (Pa. Cmwlth., No. 52 C.D. 2005, filed July 7, 2005). We held, relying upon our Pennsylvania Supreme Court's decision in *Beissel v. Workmen's Compensation Appeal Board (John Wanamaker, Inc.)*, 502 Pa. 178, 465 A.2d 969 (1983), that Employer was required to prove that Claimant's work-related disability had resolved sometime *after* the date the NCP was issued, *i.e.*, November 7, 1995. Employer's medical evidence that Claimant's work-related disability had resolved *prior* to the date of the NCP could not support a termination of benefits. However, we remanded the matter for the WCJ to rule on Employer's suspension petition, which the WCJ had previously dismissed as moot.

On remand, the WCJ again found that Claimant did not suffer any residual disability from her work injury and was capable of returning to work. He also found, as fact, that Employer had offered Claimant a desk job at her pre-injury

[2] Specifically, the Board had been unable to determine whether the WCJ had ruled on preserved objections or had allowed the parties the opportunity to file briefs before he issued his decision.

wages at the end of October 1995, after she had been cleared for work by her treating physician. The WCJ rejected as not credible Claimant's testimony that she was not capable of doing the offered job. The WCJ further found that Employer had offered Claimant a job within her physical capabilities on October 31, 1995, and again on September 25, 1997, and that Claimant did not, in good faith, respond to either job offer. The WCJ suspended Claimant's benefits as of September 25, 1997, apparently because it was a date that fell after the issuance of the NCP on November 7, 1995.

Claimant appealed, and the Board reversed. Relying on this Court's remand opinion, the Board held that Employer was required to show that Claimant's physical condition improved after Employer issued the NCP. Because Employer's medical evidence showed that Claimant had recovered from her minor injuries before the issuance of the NCP, the Board held that the evidence could not support a suspension, even though the effective date of the suspension postdated issuance of the NCP. Employer then petitioned for this Court's review.[3]

On appeal, Employer presents one issue for our consideration.[4] Employer argues that the Board misapplied the Supreme Court's decision in *Beissel* as well as this Court's prior remand order. Employer argues that it has proved what it was required to prove in order to suspend Claimant's disability compensation, namely that she was recovered and able to work. It agrees that it cannot repudiate the

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[3] This Court's review of an order of the Board is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether Board procedures were violated, whether constitutional rights were violated or an error of law was committed. *City of Philadelphia v. Workers' Compensation Appeal Board (Brown)*, 830 A.2d 649, 653 n.2 (Pa. Cmwlth. 2003).

[4] This case also involves two penalty petitions; however, they are not at issue on appeal.

substantive contents of an NCP, but the date an NCP is issued, Employer argues, is not dispositive.

Notice of Compensation Payable.

Sections 406.1 and 407 of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§717.1, 731, establish the requirements of an NCP. Section 406.1 of the Act states, in relevant part, as follows:

> 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*…

77 P.S. §717.1(a) (emphasis added).[5] In turn, Section 407 states, in relevant part, as follows:

> *Where payment of compensation is commenced without an agreement*, the employer or insurer shall simultaneously give *notice of compensation payable to the employe* or his dependent, *on a form prescribed by the department*, identifying such payments as compensation under this act and shall forthwith furnish a copy or copies to the department as required by rules and regulations.

77 P.S. §731 (emphasis added). Regulations address the prescribed form at 34 Pa. Code §121.7.[6] Notably, neither statute nor regulation attaches any significance to the issuance date of an NCP.

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[5] Section 406.1 was added by the Act of February 8, 1972, P.L. 25, No. 12, §3.

[6] The regulation requires the employer to send the NCP, a form LIBC-495, to the employee; file the NCP with the Bureau; and pay compensation. It states, in relevant part:

(Footnote continued on the next page . . .)

An NCP acknowledges the existence of a work injury, and it can limit this acknowledgement to a "medical only" NCP, meaning that the injury did not result in a loss of earning power. *Forbes Road CTC v. Workers' Compensation Appeal Board (Consla)*, 999 A.2d 627, 629 (Pa. Cmwlth. 2010). An NCP can acknowledge that the work injury requires both medical compensation and disability compensation. *See, e.g., Penn Beverage Distributing Co. v. Workers' Compensation Appeal Board (Rebich)*, 901 A.2d 1097 (Pa. Cmwlth. 2006).

The NCP frames the issues where an employer seeks to terminate or suspend benefits. A termination of compensation, which ends both medical and disability benefits, will not be granted unless the claimant is recovered from each and every injury listed in the NCP. *Central Park Lodge v. Workers' Compensation Appeal Board (Robinson)*, 718 A.2d 368 (Pa. Cmwlth. 1998). A suspension of disability benefits is appropriate where the claimant continues to need medical treatment for the injuries listed in the NCP but is able to work. *See generally Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.)*, 516 Pa. 240, 532 A.2d 374 (1987).

(continued . . .)

> (a) If an employer files a Notice of Compensation Payable, Form LIBC-495, the employer shall do all of the following simultaneously and no later than 21 days from the date the employer had notice or knowledge of the disability:
>
> (1) Send the Notice of Compensation Payable, Form LIBC-495, to the employee or the employee's dependent.
>
> (2) Pay compensation to the employee or to the employee's dependent.
>
> (3) File the Notice of Compensation Payable, Form LIBC-495, with the Bureau.

34 Pa. Code §121.7(a).

Beissel v. Workmen's Compensation Appeal Board.

The question presented in this appeal is how the *date* of the NCP that Employer issued to Claimant affects Employer's ability to terminate or suspend Claimant's benefits. Central to this inquiry is our Supreme Court's ruling in *Beissel*, 502 Pa. 178, 465 A.2d 969.

In *Beissel*, the claimant slipped and fell at work in May 1975. In June 1976, she underwent back surgery. Thereafter, the claimant filed a claim petition for workers' compensation benefits, alleging that her fall at work had caused her back pain and necessitated her June 1976 back surgery. After litigation commenced, the parties settled. In accordance with that settlement, the employer issued an NCP, acknowledging liability for the claimant's lower back injury, her surgery and loss of wages.

Two years later, the employer filed a termination petition alleging that the claimant's back problems were not related to her May 1975 work injury. The WCJ terminated benefits, finding that the claimant's back problems in 1976, which had led to her surgery and disability, were caused by a coughing and laughing spell, and not by her May 1975 injury. The Board and this Court affirmed, and the Pennsylvania Supreme Court reversed.

In doing so, the Supreme Court noted that the employer pursued a termination of benefits because it believed "*we should have never placed her on compensation* … what we are saying is that the condition that she has now is in no way related to this fall in 1975." *Beissel*, 502 Pa. at 182 n.5, 465 A.2d at 971 n.5 (emphasis in original). The Court rejected the notion that, after-the-fact, the employer could challenge its own admission of liability. The Court explained that

> in the case of an agreement or a notice of compensation payable, [an employer] has the burden of showing that the employe's disability has changed *after* the date of the agreement or the notice of compensation payable…. It is clear that [the employer] has sought to prove, not that [the claimant's] disability has terminated since 1977, but that [the claimant's] current disability, which has remained unchanged since March, 1976, was *never* related to [the claimant's] fall in May, 1975.

Id. at 182, 465 A.2d at 971 (emphasis in original). The employer's evidence did not show that claimant had recovered from the work-related disability identified in the NCP; rather, it showed that the NCP was erroneous and that the claimant had not suffered a work-related injury. The Supreme Court held that the employer was not entitled to a termination of benefits based on evidence that repudiated the employer's own NCP.

Here, Claimant emphasizes *Beissel*'s statement that there must be a change in the claimant's condition "after the date of the … notice of compensation payable." *Id.* The context of that statement is equally important. The claimant in *Beissel* agreed to withdraw her claim petition in reliance upon the employer's agreement to accept liability for her back surgery and loss of earning power. The employer's agreement was documented in the NCP, which was made of record when it filed its NCP with the Bureau. This was the context of *Beissel.*

The principle established in *Beissel* is that an employer is bound by the contents of its own NCP. The employer cannot seek a termination on the basis that the injury, described in the NCP and for which the employer accepted liability, was not work-related.[7] It is *Beissel's* principle, not a single sentence taken out of context by Claimant, that guides our analysis in this case.

[7] This is not to say that an NCP issued on the basis of fraud can never be amended.

Employer's Appeal.

In its termination and suspension petition, Employer did not assert that Claimant had not suffered a disabling work injury, as did the employer in *Beissel.* Employer did not repudiate the contents of its NCP. Rather, it sought only to prove that Claimant had fully recovered from the work injury described in the NCP.

By regulation, an employer is required to file an NCP no later than 21 days after it learns of a claimant's work injury. 34 Pa. Code §121.7(a). Employer missed this deadline because it did not issue its NCP until November 7, 1995, which it describes as a "procedural matter" because it had accepted liability for Claimant's medical treatment and salary, the latter by paying Injured on Duty benefits. Employer's Brief at 5. Employer is correct about the procedural necessity of an NCP. Under Section 413 of the Act,[8] benefits cannot be terminated unless and until an injury is acknowledged in some manner, such as by the employer's filing of an NCP. *MPW Industrial Services v. Workers' Compensation Appeal Board (Mebane)*, 871 A.2d 318, 322 (Pa. Cmwlth. 2005) (holding that a WCJ cannot entertain a petition under Section 413 when there is no existing NCP or agreement).

Employer's NCP acknowledged that Claimant suffered a disabling work injury. The NCP does not provide a starting date for compensation because Employer paid Claimant Injured on Duty benefits "in lieu of workers'

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[8] It states, in relevant part:

> A workers' compensation judge designated by the department may, at any time … terminate a notice of compensation payable, an original or supplemental agreement or an award of the department or its workers' compensation judge ….

77 P.S. §772.

compensation." R.R. 1a. The NCP does not state that Claimant was disabled as of November 7, 1995.

Employer cannot show that Claimant's condition changed after November 7, 1995, because it is not consistent with the truth. Claimant has been found by the WCJ to be fully recovered as of October 20, 1995, several times in the course of the last 15 years. It does not advance sound policy, or any provision of the Act, to have the date of an NCP's issuance stand as a barrier to a termination of benefits for a claimant who is fully recovered.

First, such a holding exalts form over substance. The substance of the NCP is that Claimant was disabled and entitled to benefits. The NCP did not identify a starting date of compensation because Employer paid her Injured on Duty benefits, and the NCP did not recite that Claimant was unable to work on November 7, 1995. Had it done so, the outcome might be different.

Second, the Act provides for penalties where an employer violates the Act. Employer's failure to issue the NCP in accordance with the deadline in the regulation may subject it to a penalty. However, nowhere does the Act or its regulation provide that failure to issue a timely NCP can result in a permanent award of disability benefits, notwithstanding a claimant's full recovery.

Third, preventing an employer from proving a claimant's recovery prior to the date an NCP issued will discourage employers from issuing NCPs. There are times where a work injury will have such a short duration that it would be impossible to issue an NCP before the claimant has recovered. If the employer is punished for

issuing an NCP in this circumstance, then the employer has no reason to issue one.[9] This will force claimants to pursue benefits by filing a claim petition. One of the elements of a claimant's burden is to prove that her disability continues throughout the pendency of the claim petition proceeding. *Innovative Spaces v. Workmen's Compensation Appeal Board (DeAngelis)*, 646 A.2d 51, 54 (Pa. Cmwlth. 1994).

Here, had Employer simply refused to issue an NCP, Claimant would have had to pursue a claim for benefits. The WCJ could have then granted the claim for a closed period, terminating benefits as of October 20, 1995, or suspending them as of the October 31, 1995, job offer. This is because the WCJ is empowered to terminate or suspend the claimant's benefits if the evidence in the claim proceeding shows that claimant has recovered or that a suitable job was made available to her. *Vista International Hotel v. Workmen's Compensation Appeal Board (Daniels)*, 560 Pa. 12, 28 n.11, 742 A.2d 649, 658 n.11 (1999); *Montgomery Hospital v. Workers' Compensation Appeal Board (Armstrong)*, 793 A.2d 182, 189-190 (Pa. Cmwlth. 2002).

Employer proved that Claimant recovered from the work-related injury identified in the NCP. This is all Employer was required to prove.

Conclusion.

We hold that the date of an NCP does not preclude an employer from obtaining a termination, suspension or modification by proving that the claimant's disability had resolved before the issuance of the NCP.[10] The panel erred in holding

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[9] Indeed, Employer here has paid a heavy price for issuing its NCP, *i.e.*, paying Claimant workers' compensation benefits for 15 years after she fully recovered.

[10] The dissent would otherwise hold on the basis of a single sentence in *Beissel*, as urged by Claimant. However, the dissent does not respond to the majority's analysis of *Beissel*. Likewise,
(Footnote continued on the next page . . .)

otherwise in *Butler v. Workers' Compensation Appeal Board (City of Philadelphia)*, (Pa. Cmwlth., No. 52 C.D. 2005, filed July 7, 2005). This Court, acting *en banc*, has the power to reverse the holding of a panel. *LaChance v. Michael Baker Corporation*, 869 A.2d 1054, 1056 n.4 (Pa. Cmwlth. 2005). Accordingly, we vacate the Board's decision and order disapproving Employer's suspension petition.[11] We reinstate the WCJ's decision of December 19, 2007, granting Employer's suspension petition, but it is modified with an effective date of October 31, 1995.[12]

MARY HANNAH LEAVITT, Judge

(continued . . .)

the dissent does not consider the ramifications of making the issuance of an NCP after a claimant's recovery fatal to a termination of benefits, notwithstanding the claimant's ability to work.

[11] As previously noted, Claimant was also awarded a penalty and the outcome of that portion of the litigation has not been appealed. Therefore, the relief we are currently granting is not intended to alter the penalty, only to reinstate the WCJ's prior grant of a suspension.

[12] In order to obtain a suspension of benefits, the employer must establish job availability, even where the claimant has been released to work with no restrictions. *Landmark Constructors, Inc. v. Workers' Compensation Appeal Board (Costello)*, 560 Pa. 618, 632, 747 A.2d 850, 858 (2000); *Consol PA Coal Co. - Enlow Fork Mine v. Workers' Compensation Appeal Board (Whitfield)*, 971 A.2d 526, 531-532 (Pa. Cmwlth. 2009). Here, although Claimant was medically determined to have no remaining disability as of October 20, 1995, Employer's offer of employment was effective October 31, 1995.

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v.	:	No. 1245 C.D. 2009
Workers' Compensation Appeal Board (Butler), Respondent	:	

ORDER

AND NOW, this 16th day of December, 2010, the order of the Workers' Compensation Appeal Board dated May 27, 2009, in the above captioned matter is hereby VACATED IN PART, inasmuch as it reversed the grant of the suspension petition. The Workers' Compensation Judge's December 19, 2007, decision granting the suspension petition filed by the City of Philadelphia is reinstated but is modified to provide that the effective date of the suspension is October 31, 1995.

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MARY HANNAH LEAVITT, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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v.	:	No. 1245 C.D. 2009
	:	Submitted: June 23, 2010
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BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
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HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

DISSENTING OPINION
BY JUDGE PELLEGRINI FILED: December 16, 2010

Because the majority opinion goes against our Supreme Court's precedent in *Beissel v. Workmen's Compensation Appeal Board (John Wannamaker, Inc.)*, 502 Pa. 178, 465 A.2d 969 (1983), I respectfully dissent.

Beissel holds very clearly that "in the case of an agreement or a notice of compensation payable [the employer] has the burden of showing that the employe's disability has changed *after* the date of the agreement or the notice of compensation payable." *Id*. at 182, 465 A.2d at 971 (emphasis in original). Here, it is undisputed that the notice of compensation payable was filed on November 7, 1995, while the petition to terminate benefits was filed on December 19, 1995, and asserted that Rita

Butler (Claimant) had recovered from her work injury as of October 20, 1995, more than two weeks *prior* to the filing of the notice of compensation payable. In addition, all of the City of Philadelphia's (Employer) evidence went to show that Claimant had recovered as of the earlier date, which means that Employer presented no evidence that the status of Claimant's disability changed after November 7, 1995. As such, Employer failed to meet its burden of proof that Claimant's injuries had terminated after that date.

Employer still could have prevailed on its suspension petition if it had provided evidence that it offered Claimant a job she was capable of doing within her limitations at the same salary as her pre-injury job. *Lukens, Inc. v. Workmen's Compensation Appeal Board (Williams),* 568 A.2d 981 (Pa. Cmwlth. 1989), *appeal denied,* 527 Pa. 656, 593 A.2d 426 (1990). However, the testimony of Christina Bleistine, Claimant's supervisor, showed that she made such an offer to Claimant at the end of October 1995 but had not subsequently made any further offers. (Reproduced Record at 148a-153a.) Again, because this date was *before* Employer filed its notice of compensation payable, it does not satisfy Employer's burden of proof.

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DAN PELLEGRINI, JUDGE