

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Harry F. Carr,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1267 C.D. 2007
	:	
Workers' Compensation Appeal Board	:	
(Philadelphia Gear Corporation),	:	
Respondent	:	
	:	
Philadelphia Gear Corporation,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1297 C.D. 2007
	:	Submitted: January 25, 2008
Workers' Compensation Appeal Board	:	
(Carr),	:	
Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

*OPINION NOT REPORTED*

MEMORANDUM OPINION  
BY JUDGE SMITH-RIBNER FILED: April 24, 2008

Claimant Harry F. Carr and Employer Philadelphia Gear Corporation cross-petition for review of a decision made by the Workers' Compensation Appeal Board (Board) to affirm denial of temporary partial disability benefits to Claimant; to affirm a \$10,000 unreasonable contest attorney fees award entered on remand by Workers' Compensation Judge (WCJ) Hines regarding Claimant's reinstatement petition; and to modify the description of his work injury. Claimant's reinstatement petition was granted by WCJ Nathanson after he found that Claimant sustained work injuries in the nature of "four pelvic fractures, four rib fractures, a fracture of the left big toe, exacerbation of arthritic changes in the left foot, rocker foot

condition in the left foot, and cellulite-like condition in the left foot as a result of the January 12, 1999 work injury." WCJ Decision circulated December 10, 2003, Conclusion of Law 2.

In its June 2007 opinion, the Board referred to its opinion and order circulated September 20, 2004 in which it affirmed WCJ Nathanson's decision to grant the reinstatement petition but modified it to include "bilateral lower extremity lymphatic insufficiency" in the list of his work injuries. It also indicated that Claimant's correct average weekly wage was \$2397.34, corrected the WCJ's decision to show that the maximum weekly compensation rate for 1999 was \$588, affirmed the WCJ's order denying partial disability payments to Claimant pursuant to Section 306(b)(1) of the Workers' Compensation Act (Act)<sup>1</sup> and reversed the finding that Employer presented a reasonable contest, thereby requiring remand for consideration of Claimant's *quantum meruit* fee evidence.<sup>2</sup>

The statement of questions presented by Claimant includes whether the Board erred in denying him partial disability benefits when he earned less than

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<sup>1</sup>Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §512(b)(1). Section 306(b)(1) states in relevant part:

(1) For disability partial in character caused by the compensable injury or disease ... sixty-six and two-thirds per centum of the difference between the wages of the injured employe ... and the earning power of the employe thereafter; but such compensation shall not be more than the maximum compensation payable. ... [I]n no instance shall an employe receiving compensation under this section receive more in compensation and wages combined than the current wages of a fellow employe in employment similar to that in which the injured employe was engaged at the time of the injury.

<sup>2</sup>The Court's scope of review is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether Board procedures were violated and 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 (Pa. Cmwlth. 2003).

his pre-injury average weekly wage, even though earnings exceeded the maximum compensation allowable rate and whether the Court should affirm the Board's decision to modify the list of work injuries to include lymphatic insufficiency and to affirm the unreasonable contest attorney fees award. Employer's statement of questions presented includes whether Claimant is entitled to any partial disability benefits when he experienced no compensable wage loss after the work injury; whether Employer presented a reasonable contest in the case before WCJ Nathanson when conflicting medical evidence existed as to the extent of Claimant's work injury and disability; and whether the WCJ's Conclusion of Law 2 reflects the entire work injury description as of Claimant's injury date.

On January 12, 1999, Claimant suffered a work-related injury when he fell while working as a field service engineer for Employer. WCJ Nathanson stated in Conclusion of Law 2 that Claimant sustained the injuries as described above. Employer failed to file a Notice of Compensation Payable (NCP) or an Agreement for Compensation, but the parties entered into a February 2, 1999 supplemental agreement, which provided that Claimant's disability status changed because he received full wages in lieu of compensation. Claimant filed his reinstatement petition (deemed to be a claim petition) and a petition to review compensation on January 10, 2002 stating that his condition worsened, that his injury caused decreased earning power, that no NCP was filed, that he was paid in lieu of compensation and that total disability recurred January 7, 2002.

WCJ Nathanson found, *inter alia*, that Employer paid Claimant his regular base wage of \$1560 per week in lieu of compensation and that this amount was less than his average weekly wage of \$2394, which included overtime. He also found that the \$1560 base wage was in excess of the maximum compensation

rate of \$562 per week for injuries sustained in 1999 and that from January 25, 1999 forward Employer paid Claimant \$1560 in wages for each and every week that he missed work, which amount exceeded the maximum compensation rate allowable.

Claimant testified that he has not recovered from the 1999 injury and that he has "pain and swelling in his legs below the knees, pain in both of his feet, and pain in his lower back with discomfort in his pelvic area on sitting for long periods of time." WCJ Finding of Fact 18. Employer's human resources manager testified that the reason for Claimant's decrease in overtime was due to a decline in the amount of work that was available for field representatives. The WCJ credited Dr. Wayne Arnold (Claimant's medical witness), who opined that Claimant sustained a work injury in the nature of lymphatic insufficiency in the lower extremities (left worse than right), but the WCJ did not include this condition in the work injury description. In his December 2003 decision, WCJ Nathanson granted the reinstatement petition and dismissed the review petition as moot after concluding that Claimant failed to prove entitlement to compensation for wage loss benefits at any time relevant after his 1999 work injury, that Employer should pay reasonable and necessary medical expenses related to the work injury and that Employer's contest was reasonable. Claimant challenged Conclusions of Law:

3. At all times relevant to Claimant's January 12, 1999 work injury, Employer has paid Claimant wages in lieu of compensation in an amount that exceeded the rate of compensation to which Claimant is entitled under the Act for his 1999 work injury.

6. Claimant failed to establish that at any time relevant to his January 12, 1999 work injury he has been entitled to additional compensation for wage loss benefits.

10. Employer's contest was reasonable.

WCJ Conclusions of Law 3, 6, 10.

As noted, the Board held in its opinion circulated September 20, 2004 that WCJ Nathanson erred in failing to include the bilateral lower extremity lymphatic insufficiency in the description of Claimant's work injury in Conclusion of Law 2, and it accordingly modified the WCJ's decision to this extent along with rejecting Claimant's argument that he was entitled to partial disability benefits for weeks during which he earned less than his average weekly wage. His receipt of full wages in lieu of compensation benefits greatly exceeded the maximum weekly compensation of \$588, and he was not entitled to receive more than this rate.

Referring to Section 440 of the Act, 77 P.S. §996, which provides for an award of attorney's fees in any contested case where no reasonable basis existed for the contest, the Board noted Dr. Marc Alpert's testimony (Employer's medical witness) that the venous insufficiencies in Claimant's legs with peripheral edema did not relate to his work injury. The WCJ specifically rejected this testimony as neither credible nor persuasive. Also, the Board concluded that Employer offered no evidence that the work injury did not occur and thus failed to make a reasonable contest of the claim petition that Claimant was forced to file because Employer did not issue an NCP or Agreement for Compensation. *See Waldameer Park, Inc. v. Workers' Compensation Appeal Board (Morrison)*, 819 A.2d 164 (Pa. Cmwlth. 2003). It cited *Kuney v. Workmen's Compensation Appeal Board (Continental Data Sys.)*, 562 A.2d 931 (Pa. Cmwlth. 1989), and *General Carbide Corp. v. Workmen's Compensation Appeal Board (Daum)*, 671 A.2d 268 (Pa. Cmwlth. 1996), for the propositions that reasonableness of a contest depends on whether it was prompted to resolve a genuinely disputed issue or simply to harass a claimant and that to determine reasonableness courts must consider the total circumstances, as reasonableness may not depend solely upon a conflict in the evidence.

Claimant argues that he was entitled to partial disability benefits because there were weeks when he returned to work and earned less than his pre-injury average weekly wage and that his case should be remanded for the WCJ to make findings and conclusions regarding this claim. As support, Claimant cites *Harper & Collins v. Workmen's Compensation Appeal Board (Brown)*, 543 Pa. 484, 672 A.2d 1319 (1996), and no other caselaw, and he contends that his argument has been mischaracterized by the Board as he only argues that he should have received partial compensation pursuant to Section 306(b)(1) of the Act during those periods when his "actual earnings" were less than his pre-injury wages. In short, he did not receive payments in lieu of compensation during those periods when he "actually" worked modified duty or reduced hours because of residuals from his injuries. Also, he submits, the Board was correct in modifying the WCJ's decision and in affirming the award for unreasonable contest attorney fees.

Employer argues that Claimant sustained no wage loss and that to receive partial disability benefits he must have a wage loss. Citing *Yeager v. Workmen's Compensation Appeal Board (Schneider, Inc.)*, 657 A.2d 1372 (Pa. Cmwlth. 1995), and *Westmoreland Regional Hosp. v. Workers' Compensation Appeal Board (Stopa)*, 789 A.2d 413 (Pa. Cmwlth. 2001), Employer asserts that Claimant may not receive partial disability benefits when maximum compensation for the year has been exceeded. He received wages in lieu of compensation that exceeded the 1999 maximum rate by almost \$1000 per week and to pay partial disability would produce an absurd result. Also, 1996 amendments to the Act prohibit him from receiving "more in compensation and wages combined than the current wages of a fellow employe in employment similar to that in which the injured employe was engaged at the time of injury." Section 306(b)(1).

In connection with the unreasonable contest attorney fees, Employer argues that it presented evidence regarding the nature of Claimant's injury and that the dispute in the underlying case concerned his entitlement to partial disability benefits. Employer contends that its medical evidence was contrary to Claimant's description of his work injury and that the WCJ's decision to credit Claimant's medical evidence over Employer's evidence is not dispositive of whether it presented a reasonable contest. Rather, the question is whether Employer had a reasonable basis to contest the issues. After reviewing its evidence, including the supplemental agreement acknowledging the work injury and the testimony of its representative and medical witness, Employer posits that WCJ Nathanson accepted parts of the medical testimony that he determined to be credible and made specific findings regarding Claimant's injuries, which did not include the bilateral lower extremity lymphatic insufficiency. Employer submits that the Board erred in including this condition in the list of Claimant's injuries rather than remanding the matter for the WCJ to make additional findings in this regard, and because it failed to do so the lymphatic insufficiency injury cannot be included.

In regard to the first issue as to whether Claimant is entitled to any partial disability benefits, the Court concludes that the Board did not err in denying this claim. At all times relevant to Claimant's January 1999 work injury, Employer paid full wages to Claimant in an amount exceeding the maximum compensation rate of \$588 for those weeks he missed work due to the work injury. *See Reliable Foods, Inc. v. Workmen's Compensation Appeal Board (Horrocks)*, 660 A.2d 162 (Pa. Cmwlth. 1995) (citing *Yeager* and reiterating the principle that there is no proscription against a claimant's receiving simultaneous compensation entitlements so long as the total weekly compensation does not exceed the statutory maximum).

Claimant's reliance on *Harper & Collins* is misplaced in that it did not involve a case where the claimant at all relevant times received wages in lieu of compensation in excess of the statutory maximum allowable rate. The parties there stipulated that overtime was available to the claimant prior to her work injury, and she received \$427.12 in total disability benefits based on a \$640.68 average weekly wage. The difference between her light-duty and pre-injury earnings was due to economic conditions that made overtime unavailable, but she argued nonetheless that her earning power upon return to light-duty work was less than her pre-injury average weekly wage and that the parties' supplemental agreement created a presumption that her residual disability was causally related to the injury.

The Supreme Court held that although the loss in earnings resulted from economic conditions, the claimant continued to be entitled to partial disability benefits as she had not fully recovered from the work injury, could not resume her pre-injury job and did not presently earn wages equal to or greater than her pre-injury average weekly wage. The court's holding in *Harper & Collins* related to the calculation of an hourly employee's average weekly wage based on overtime earnings received prior to the work injury and how the loss in earnings due to economic conditions impacted upon her entitlement to partial disability benefits. That case did not involve a claim for partial disability benefits where, as here, the claimant at all relevant times received wages in lieu of compensation in excess of the statutory maximum. *See Westmoreland Regional Hosp.* (discussing, *inter alia*, *Reliable Foods* and stating that simultaneous entitlements were not precluded so long as the total compensation based upon the average weekly wage does not exceed statutory maximum allowable benefits).



With regard to the unreasonable contest attorney fees issue, the Court agrees that the Board did not err in upholding the \$10,000 award due to Employer's unreasonable contest. The reasonableness of an employer's contest depends upon whether there was a genuinely disputed issue. *Kuney*. Employer offered medical testimony that Claimant suffered venous insufficiencies with peripheral edema but that the condition was not directly related to the work injury, which the WCJ did not believe. Employer's medical expert conceded that venous insufficiencies were related to the work injury to the extent that it resulted from prolonged bed rest following the injury and later de-conditioning of the muscle pump in Claimant's legs. Also, Claimant was forced to file a claim petition because Employer failed to issue an NCP or an Agreement for Compensation, and the supplemental agreement contained no description of the injury. *See Waldameer Park* (stating that employer may be liable for attorney fees when it fails to issue NCP or denial and forces claimant to litigate compensability of injury, unless contest was reasonable).

Finally, the Board was correct in modifying the WCJ's description of the work injury to include the lymphatic insufficiency. The WCJ found credible Dr. Arnold's testimony that Claimant suffered lymphatic insufficiency that caused edema, which was directly related to the work injury, and the WCJ therefore erred in failing to list the condition in Conclusion of Law 2. The Court accordingly finds no error in the Board's decision to deny partial disability benefits to Claimant; to hold Employer liable for unreasonable contest attorney fees; and to modify the description of Claimant's work injury based upon the WCJ's own findings. The Court therefore affirms.

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DORIS A. SMITH-RIBNER, Judge

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v.	:	
	:	
Workers' Compensation Appeal Board	:	
(Carr),	:	
Respondent	:	

***ORDER***

AND NOW, this 24th day of April, 2008, the order of the Workers' Compensation Appeal Board is affirmed.

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DORIS A. SMITH-RIBNER, Judge