IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Weis Markets, Inc., Petitioner	:	
v.	:	No. 1330 C.D. 2007
Workers' Compensation Appeal Board (Johnson), Respondent	:	Submitted: December 7, 2007

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: January 15, 2008

Weis Markets, Inc. (Employer) petitions for review of an order of the Workers' Compensation Appeal Board (Board) affirming the Workers' Compensation Judge's (WCJ) order granting Paulette Johnson's (Claimant) claim and penalty petitions. We affirm.

Claimant was employed by Employer as a bakery clerk. On or about April 28, 2005, Claimant filed a claim petition alleging that she suffered a work-related injury on January 4, 2005. Therein, Claimant described her injuries as a "ruptured tendon in left foot and left knee." Claimant also alleged that: (1) she was a bakery clerk for Employer; (2) she sustained her injuries when she slipped on water and fell; and (3) she gave notice of her injuries to the assistant manager on or about January 5, 2005. Claimant sought wage loss benefits, medical bills and

counsel fees. Employer filed an answer to the claim petition denying the averments contained therein.

Claimant simultaneously filed a penalty petition alleging that Employer failed to respond to her report of injury within 21 days and that Employer's denial of her claim was an unreasonable contest. Claimant requested penalties and counsel fees for Employer's violation of the Pennsylvania Workers' Compensation Act (Act).[1]

Previously, on April 25, 2005, Employer denied liability, pending a medical investigation, for Claimant's January 4, 2005 injuries via a Notice of Workers' Compensation Denial. Reproduced Record (R.R.) at 1a. After Claimant filed the claim and penalty petitions, Employer issued a second Notice of Workers' Compensation Denial dated May 31, 2005. Id. at 2a. Therein, Employer indicated that it declined to pay workers' compensation benefits to Claimant because medical documentation substantiated only a work-related left knee injury as a result of a slip and fall on January 4, 2005. Id. Employer indicated further that it specifically denied all treatment to Claimant's left leg and foot as unrelated to the knee injury sustained on January 4, 2005. Id.

Claimant's claim and penalty petitions were consolidated and hearings before a WCJ ensued. In support of her petitions, Claimant testified on her own behalf and presented the testimony of a lay witness, Jennie Grover. In further support of her petitions, Claimant submitted the deposition testimony of Stephen A. Brigido, Doctor of Podiatric Medicine, as well as documentary evidence. In opposition to the petitions, Employer presented the deposition testimony of Scott Natfulin, Doctor of Osteopathic Medicine.

[1] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1 - 1041.4; 2501-2626.

The WCJ accepted Claimant's testimony as credible including her testimony regarding the manner in which she fell and the left foot pain she experienced subsequent to her injury. Claimant testified that she experienced pain in her left foot, particularly the top of her left foot, from January 4, 2005 through March 2005. Claimant also testified that as of the May 2005 hearing before the WCJ, her knee was no longer painful. Claimant testified that in late March 2005, she contacted her family physician because of her continuing foot pain and her observation that her foot was turning blue. Claimant testified that due to her continued complaints of pain, her family physician directed her to see a podiatrist. Claimant testified that she contacted Employer's workers' compensation representative who directed Claimant to Coordinate Health. As a result, Claimant scheduled an appointment with Dr. Brigido, her medical expert. Claimant testified that she was scheduled to undergo foot surgery performed by Dr. Brigido on April 28, 2005, but that the surgery was cancelled at Employer's direction. The WCJ accepted Claimant's testimony as fact.

The WCJ also accepted Jennie Grover's testimony as credible and as fact. Ms. Grover testified that she accompanied Claimant on her visit to Dr. Naftulin and witnessed Claimant explain to the doctor how she fell on January 4, 2005.

With regard to the medical testimony offered by each party, the WCJ found that Dr. Brigido's testimony both credible and more persuasive than Dr. Naftulin's testimony. Dr. Brigido testified that he first examined Claimant on April 11, 2005 after which he initially diagnosed Claimant with a possible diastasis, meaning a separation of her first and second metatarsal bases as well as her first and second cuneiforms on her left foot. Dr. Brigido ordered an MRI and from that test he determined that Claimant had sustained a Lisfranc injury or a tear of the ligament. Dr. Brigido placed Claimant on restrictions to address her injury and recommended

surgery. Dr. Brigido scheduled Claimant for surgery on April 28, 2005; however, the surgery was not performed.

Dr. Brigido testified further that he was not surprised that Claimant was able to perform her job duties from the time of her January 4, 2005 injury until April 2005, but that from his own personal experience with the same injury, Claimant worked in pain. Dr. Brigido opined that the mechanism or action of Claimant's fall on January 4, 2005 would have caused the Lisfranc injury, that the treatment he provided and recommended to Claimant was reasonable, necessary and causally related to her injury and that his prognosis if she did not undergo the surgery would be continued pain and discomfort and accelerated degeneration and arthritis of the complex.

Dr. Naftulin performed an independent medical examination (IME) of Claimant on August 4, 2005. Dr. Naftulin took a history from Claimant and noted that Claimant could not recall exactly how she injured her foot. Dr. Naftulin noted that Claimant complained of left foot pain that was aggravated by prolonged standing and walking and relieved by sitting and non-weight bearing. Dr. Naftulin noted that Claimant's left knee pain had resolved within one to two weeks of her January 4, 2005 injury. Dr. Natfulin testified that his review of Claimant's treating physician's notes revealed that the January 14, 2005 note only listed complaints of a left knee contusion and pain and that the March 31, 2005 note did not list any complaints of left leg or foot pain.

As a result of his examination of Claimant, Dr. Naftulin opined that Claimant sustained a left foot Lisfranc joint injury and status post left knee contusion, the latter diagnosis being work related and resolved. Dr. Naftulin opined that Claimant's Lisfranc injury did not occur on January 4, 2005 because when such injury occurs, there is an immediate acute onset of pain in the foot, not a delayed

onset of pain later on. Dr. Naftulin indicated that the only accepted treatment for a Lisfranc injury is fixation surgery using screws for stabilization.

The documentary evidence submitted into the record by Claimant showed that Claimant underwent surgery on her left foot on January 11, 2006. The surgery showed that there was a diastasis present, consistent with that of a Lisfranc's injury along with a rupture of the Lisfranc's ligament. The parties stipulated that should the WCJ find that the January 2006 surgery was causally related to Claimant's January 4, 2005 slip and fall while working for Employer, then Employer would be responsible for the surgery and related disability.

Based on the credibility determinations, the WCJ concluded that Claimant met her burden of proof on the claim petition. The WCJ found that Claimant sustained a left foot Lisfranc injury as diagnosed by Dr. Brigido and that Claimant sustained a left knee injury which was resolved as of Dr. Naftulin's August 2005 IME of Claimant. The WCJ found further that Claimant's January 2006 surgery was causally related to her January 4, 2005 fall at work. Accordingly, Employer was liable for the surgery and related disability. Therefore, the WCJ granted Claimant's claim petition.

The WCJ further found that Employer's contest of was not reasonable until the August 4, 2005 IME by Dr. Naftulin. The WCJ found that at the time Employer issued its denials, Employer had not obtained an IME nor did it have any medical information, save possible information from Claimant's family physician and from Dr. Brigido, who did relate Claimant's left foot injury to her January 4, 2005 fall.

Finally, the WCJ concluded that given the facts of this case regarding Employer's failure to accept or deny Claimant's claim in accordance with the Act, Claimant met her burden of proof on the penalty petition. Therefore, the WCJ

granted the penalty petition and awarded a penalty of fifty percent (50%) of the indemnity benefits owed Claimant as of the original date for closing the record, specifically, February 24, 2006.

Both Employer and Claimant appealed the WCJ's decision to the Board. Upon review, the Board affirmed and this appeal by Employer followed.[2]

Herein, Employer raises the following issues:[3]

> (1) Whether the medical evidence supports a foot injury and disability as of January 4, 2005;
>
> (2) Whether the finding of an unreasonable contest is erroneous given Claimant's medical history and the medical testimony; and
>
> (3) Whether the WCJ abused his discretion in awarding the most severe penalty permitted by the Act.

In support of the first issue raised, Employer argues that the medical evidence does not support the WCJ's finding that Claimant suffered an injury to

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[2] Initially, we note that this Court's review of the Board's decision is set forth in Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704, which provides that the Court shall affirm unless it determines that the adjudication is in violation of the claimant's constitutional rights, that it is not in accordance with law, that provisions relating to practice and procedure of the Board have been violated, or that any necessary findings of fact are not supported by substantial evidence. See Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995). An adjudication cannot be in accordance with the law if it is not decided on the basis of law and facts properly adduced; therefore, appellate review for the capricious disregard of material, competent evidence is an appropriate component of appellate consideration if such disregard is properly before the reviewing court. Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002). When determining whether the Board capriciously disregarded the evidence, the Court must decide if the Board deliberately disregarded competent evidence that a person of ordinary intelligence could not conceivably have avoided in reaching a particular result, or stated another way, if the Board willfully or deliberately ignored evidence that any reasonable person would have considered to be important. Id.

[3] In the interest of clarity, we have reordered the issues raised by Employer in this appeal.

her left foot when she slipped and fell while at work on January 4, 2005. Employer contends that the notes of Claimant's treating physician do not mention that she injured her left foot at the time of her slip and fall. Employer contends that the treating physician only treated Claimant for a left knee injury and it was not until March 21, 2005 that Claimant called the treating physician's office complaining of pain in her foot. Although Claimant testified that she informed her treating physician from the first visit on the day of the work-related incident that her foot was hurting, there is nothing in the medical records to support Claimant's testimony. Employer contends further that Ms. Grover's testimony that Claimant complained of foot pain every day from the day of the slip and fall is also not supported by the medical evidence. Therefore, Employer contends, Claimant's testimony and that of Ms. Grover simply was not credible and the WCJ erred by crediting Claimant's and Ms. Grover's testimony over the obviously credible records of Claimant's treating physician. Employer states that it is not asking this Court to reweigh the evidence or to make new credibility determinations but simply to evaluate the testimony which was presented and determine if it is consistent with the WCJ's findings.

While Employer professes that it is not challenging the WCJ's credibility determinations, we conclude that Employer is in actuality challenging said determinations. It is well settled that determinations as to witness credibility and evidentiary weight are not subject to appellate review. Hayden v. Workmen's Compensation Appeal Board (Wheeling Pittsburgh Steel Corp.), 479 A.2d 631 (Pa. Cmwlth. 1984). Moreover, it is irrelevant whether the record contains evidence to support findings other than those made by the WCJ; the critical inquiry is whether there is evidence to support the findings actually made. Hoffmaster v. Workers'

Compensation Appeal Board (Senco Products, Inc.), 721 A.2d 1152 (Pa. Cmwlth. 1998).

The WCJ found as a fact that Claimant suffered a work-related injury to her left foot on January 4, 2005. This finding is based on the testimony of Claimant, Ms. Grover and Dr. Brigido. Claimant testified that she experienced pain in her foot from the day she injured it on January 4, 2005. In addition, the WCJ rejected Dr. Naftulin's testimony and found Dr. Brigido's testimony credible that Claimant injured her left foot on January 4, 2005 when she slipped and fell at work. The WCJ, as the ultimate fact finder in workers' compensation cases, has exclusive province over questions of credibility and evidentiary weight, and is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part. General Electric Co. v. Workmen's Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), petition for allowance of appeal denied 529 Pa. 626, 600 A.2d 541 (1991). In addition, the WCJ fully explained his reasons why he accepted the testimony of Claimant, Ms. Grover, and Dr. Brigido as credible and why he rejected Dr. Naftulin's testimony. Accordingly, we reject Employer's invitation to reevaluate the evidence.

Next, Employer argues that the WCJ erred when he determined that Employer's contest of Claimant's claim petition was partially unreasonable. Employer contends that its contest was reasonable from the beginning and the fact that it did not secure an IME until after it denied Claimant's claim does not change a reasonable contest into an unreasonable one. Employer argues that it is the rare case in which an IME can be accomplished within the denial period. Employer argues further that requiring employers to acquire an IME before denying a claim would make most claims into at least partial unreasonable contests. Employer

argues that the reasonableness of its denial was affirmed by the IME making the contest reasonable.

Section 440 of the Act provides, in pertinent part, as follows:

> (a) In any contested case where the insurer has contested liability in whole or in part, . . . the employe . . . 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: Provided, That costs for attorney fees may be excluded when a reasonable basis for the contest has been established by the employer or the insurer.

77 P.S. §996(a). Therefore, a denial of attorney's fees is proper only when the employer has a reasonable basis for contesting the claim. White v. Workmen's Compensation Appeal Board (Gateway Coal Company), 520 A.2d 555 (Pa. Cmwlth. 1987). Whether or not an employer's contest has a reasonable basis is a question of law. Id. In determining the reasonableness of an employer's contest, the primary question is whether or not the contest was brought to resolve a genuinely disputed issue or merely for purposes of harassment. Id.

To reasonably contest a claim, an employer must have in its possession at the time the decision to contest is made, or shortly thereafter, medical evidence supporting its position. Yeagle v. Workmen's Compensation Appeal Board (Stone Container Corp.), 630 A.2d 558 (Pa. Cmwlth. 1993). It has been held that an examination of a claimant by an employer's doctor eight months after a claim arises cannot provide a reasonable basis for contest. Jones & Laughlin Steel Corp. v. Workmen's Compensation Appeal Board (White), 500 A.2d 494 (Pa. Cmwlth. 1985). In a similar case, an unreasonable contest was found when the employer had a claimant examined three months after the filing of a claim

petition. MacNeil v. Workers' Compensation Appeal Board (Denny's, Inc.), 548 A.2d 680 (Pa. Cmwlth. 1988). An unreasonable contest may become reasonable at some later point in the proceedings thereby ending an employer's exposure to unreasonable contest attorney's fees for fees incurred after it produces evidence to support a finding of a reasonable contest. Crouse v. Workers' Compensation Appeal Board (NPS Energy SVC), 801 A.2d 655 (Pa. Cmwlth 2002). Apportionment of counsel fees is allowable when a portion of an employer's contest is reasonable. The Budd Co. v. Workers' Compensation Appeal Board (Kan), 858 A.2d 170 (Pa. Cmwlth. 2004).

In the present case, at the time Employer first denied Claimant's claim on April 25, 2005 "pending medical investigation", she was being treated by Dr. Brigido. Claimant began treating with Dr. Brigido, a panel physician, after she was directed by Employer to Coordinated Health. At the time of the April 25, 2005 denial, Dr. Brigido had determined that Claimant's injury to her left foot was work-related, recommended surgery, and scheduled surgery on Claimant's left foot for April 28, 2005. The record shows that the surgery was cancelled at Employer's direction. Accordingly, at the time Employer first denied Claimant's claim it did not have in its possession any medical information that the injury to Claimant's left foot was not work-related. To the contrary, Employer had information available to it from a panel doctor indicating that Claimant's injury was work-related. Moreover, Employer did not obtain medical information indicating otherwise until almost four months later. As such, Crouse is instructive in this matter.

In Crouse, a claimant filed a claim petition alleging several injuries, which the employer initially denied. Six months into litigating the claim petition, the employer finally obtained a medical report, following an IME, disputing the extent of the claimant's injuries. Ultimately, the WCJ granted benefits and awarded

attorney fees for the entire length of the employer's contest. On the employer's appeal, the Board affirmed, but modified the amount of attorney fees awarded, concluding the employer's contest became reasonable on the date of the IME.

On appeal, this Court affirmed. We concluded the evidence obtained from the IME, if found credible, was sufficient to support the cessation of the claimant's benefits. Therefore, we accepted the Board's fee modification because the employer was only liable for unreasonable contest fees until the date of the IME.

Crouse controls this matter. Here, as in Crouse, Employer initially denied Claimant's claim without obtaining medical evidence to support its position. However, Employer subsequently obtained medical evidence indicating that Claimant's injury to her left foot was not work related. As in Crouse, Employer's medical evidence, if found credible, was sufficient to support a denial of benefits. Thus, Employer's evidence obtained from the IME raised a genuinely disputed issue as to the extent of Claimant's injury. As in Crouse, Employer had a reasonable basis to contest Claimant's claim as of the date of the IME as a matter of law.

While Crouse does not stand for the proposition that an employer must order an IME whenever a claim petition is filed, the totality of the circumstances in this case supports the WCJ's determination that Employer's contest was unreasonable until it obtained the IME on August 4, 2005. Therefore, we discern no error in the WCJ's decision to award counsel fees based on a partial unreasonable contest.

Finally, Employer takes issue with the amount of the penalty imposed for its violation of the Act. Employer contends that the WCJ abused its discretion by imposing the most severe penalty under the Act. Employer argues that it

inadvertently misplaced or lost the initial accident report and had Claimant complete another report on April 9, 2005. Employer argues therefore, its denial on April 25, 2005 was with 21 days as required by the Act. In spite of the fact that Employer recognizes that the WCJ accepted Claimant's testimony that she filed an accident report in January 2005, Employer argues that the evidence reveals that she continued working until April 2005 and only started to treat for the disputed foot injury at the end of March 2005. Employer argues further that while the denial may have been untimely under the facts as accepted by the WCJ, there was only inadvertence on the part of Employer and no clear prejudice to Claimant during the interim period that would warrant the Act's most severe sanction.

Section 435(d)(i) of the Act, 77 P.S. §991(d)(i), provides that an employer may be penalized 10% of the amount awarded for its failure to comply with the Act and that, in cases of unreasonable or excessive delays, the penalties may be increased up to 50%. A claimant who files a penalty petition must first meet her initial burden to prove that a violation of the Act occurred. Shuster v. Workers' Compensation Appeal Board (Pennsylvania Human Relations Commission), 745 A.2d 1282 (Pa. Cmwlth. 2000). Thereafter, the burden shifts to the employer to prove that a violation of the Act had not occurred. Id. at 1288. The decision to impose penalties as well as the amount of penalties is within the discretion of the WCJ. Brutico v. Workers' Compensation Appeal Board (US Airways, Inc.), 866 A.2d 1152 (Pa. Cmwlth. 2004). The WCJ's decision regarding penalties will not be disturbed on appeal absent an abuse of discretion. Department of Pub. Welfare v. Workers' Compensation Appeal Board (Overton), 783 A.2d 358 (Pa. Cmwlth. 2001).

An employer violates Section 406.1 of the Act,[4] if it fails to issue an notice of compensation payable, a notice of compensation denial or a notice of temporary compensation payable within 21 days of receiving notice of a work-related injury. Johnstown Housing Auth. v. Workers' Compensation Appeal Board (Lewis), 865 A.2d 999 (Pa. Cmwlth. 2005). Specifically, the 21 days an Employer has to file one of these documents is calculated from the date it is notified of the claimant's injury, not the date she actually begins experiencing an earnings loss. Brutico, 866 A.2d at 1155.

Accordingly, under the facts of this case as found by the WCJ, Employer clearly violated the Act by not issuing a notice of compensation denial within 21 days of when Claimant initially reported her accident on January 5, 2005. Employer's alleged "inadvertence" in misplacing or losing the report does not excuse its violation of the Act nor does the fact that Claimant continued working despite her injury excuse Employer's failure to comply with the Act. As such, the WCJ did not abuse its discretion in awarding a 50% penalty.

The Board's order is affirmed.

JAMES R. KELLEY, Senior Judge

Judge Simpson dissents.

[4] Added by Act of February 8, 1972, P.L. 25, as amended, 77 P.S. §717.1.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Weis Markets, Inc., Petitioner	:	
v.	:	No. 1330 C.D. 2007
Workers' Compensation Appeal Board (Johnson), Respondent	:	

O R D E R

AND NOW, this 15th day of January, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

JAMES R. KELLEY, Senior Judge