IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Allegheny Ludlum Corporation, Petitioner	:	
v.	:	No. 1347 C.D. 2007
Workers' Compensation Appeal Board (Duball), Respondent	:	Submitted: December 28, 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: June 16, 2008

Allegheny Ludlum Corporation (Employer) petitions for review of an order of the Workers' Compensation Appeal Board (Board) affirming an order of a Workers' Compensation Judge (WCJ). The WCJ's order, in part relevant hereto, granted the Review Petition of John Duball (Claimant), amended the description of Claimant's injury, granted Claimant's Reinstatement Petition, and reinstated Claimant's total disability benefits pursuant to the Pennsylvania Workers' Compensation Act, Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1 - 1041.4; 2501 - 2708. We affirm.

On November 26, 1994, Claimant sustained an injury to his lower back in the course and scope of his work for Employer. The parties, on September 19, 1995, executed a Notice of Compensation Payable (NCP) recognizing the

injury as a low back strain, and Claimant began receiving benefits under the Act.[1] Claimant did not work from September 6, 1995, through September 14, 1997, at which time he returned to work on modified duty. Claimant underwent two back surgeries in the wake of his work-related injury, in November 1995, and on January 23, 1996.[2]

A Supplemental Agreement dated March 30, 2000, was executed and stated that Claimant's benefits were suspended effective February 14, 2000, and that all disability attributable to the work-related injury had ceased. Also on March 30, 2000, Claimant signed an Agreement to Stop Weekly Workers' Compensation Payments (Final Receipt).

After his surgeries and subsequent return to work for Employer, and after Claimant had signed the Supplemental Agreement and Final receipt, Claimant would occasionally miss a day of work after receiving treatment for his injuries. Employer paid Claimant his full wages for those days that he missed work.

On July 30, 2003, Claimant experienced extreme pain in his back at work, for which he took his prescribed pain medication. Following his workday, Claimant went to the hospital. The following day, Claimant saw his treating physician, Dr. Karpen, who issued Claimant a disability slip that Claimant in turn gave to Employer's plant nurse. Employer told Claimant, and subsequently issued

[1] The record to this matter is unclear as to what transpired between Claimant's date of injury, on November 26, 1994, and his receipt of benefits pursuant to the September 19, 1995, NCP. This uncertainty is of no moment to the instant appeal.

[2] Claimant also underwent surgery on his back twice before the November 26, 1994, work-related injury, on February 25, 1983, and on October 10, 1987.

a letter stating, that Claimant's injury was not being accepted as work-related. Claimant has not since returned to work.

On September 29, 2003, Claimant filed a Claim Petition alleging an injury, consisting of multiple level disc herniations and aggravation of degenerative disc disease, with an injury date of July 30, 2003. Employer thereafter filed an Answer denying the material allegations therein, and raising a statute of limitations defense.

On October 1, 2003, Claimant filed the Reinstatement Petition at issue, alleging a worsening of his condition due to an injury on November 26, 1994, that decreased Claimant's earning power, which caused a recurrence of total disability on July 30, 2003. Employer thereafter filed an Answer, and a subsequent Amended Answer, denying the material allegations therein. Employer asserted that Claimant had signed a Final Receipt on March 30, 2000, and that the Reinstatement Petition was not timely filed. On October 1, 2003, Claimant also filed a Penalty Petition, which Employer thereafter Answered, denying all material allegations.

On May 10, 2004, Claimant filed the Review Petition at issue alleging that the description of his November 26, 1994, injury was incorrect, and requesting that the NCP be amended to include multi-level disc herniations and/or bulges and development of degenerative disc disease. Employer thereafter filed an Answer denying the material allegations therein, and asserting a three-year statute of limitations defense.

A series of hearings were thereafter held before the WCJ, at which both parties were represented by counsel, and presented testimony and medical evidence. The WCJ accepted as credible the testimony of Claimant, and of his medical expert, Dr. William W. Frost. The WCJ found, *inter alia*, that Claimant had a worsening of his November 26, 1994, work-related injury as of July 30, 2003, and that Claimant's 1994 injury resulted in a right L3-4 herniation and right L4 and left L5-S1 radiculopathy. The WCJ concluded, *inter alia*, that pursuant to the execution of the March 30, 2000, Supplemental Agreement, Claimant had 500 weeks in which to reinstate his benefits and/or expand the NCP, and that the Supplemental Agreement language reflected a cessation of wage loss but not a full recovery from the work-related injury. The WCJ noted that Claimant continued to receive medical treatment between the execution of the Supplemental Agreement and Final Receipt in March 2000, until he stopped working in July 2003, and that Employer was aware of the continuing treatment relating to Claimant's 1994 injury. As such, the WCJ concluded that the Reinstatement and Review Petitions were not time barred.

The WCJ found Claimant to be totally disabled as of July 30, 2003, as a result of his symptoms associated with the disc herniations, and the degenerative changes resulting from his two surgeries following the 1994 injury. The WCJ concluded that Claimant was entitled to a reinstatement of his benefits under the Act as of July 30, 2003.

By order dated July 26, 2006, the WCJ granted the review Petition and amended the NCP to include a disc herniation at L3-4 and L4-5 with

degenerative disc disease and an L-4 radiculopathy. The WCJ's order further granted Claimant's Reinstatement Petition and reinstated Claimant's total disability benefits beginning on July 31, 2003. Further, the WCJ denied Claimant's Claim and Penalty Petitions.[3]

Employer timely appealed the WCJ's Order to the Board, which heard the matter without receiving additional evidence. Employer argued that the WCJ erred in concluding that the Reinstatement Petition was not barred by the statute of limitations. The Board noted that the WCJ's reliance on the Supplemental Agreement failed to consider the significance of the Final Receipt. Citing to our opinion in Consolidated Freightways v. Workmen's Compensation Appeal Board (Jester), 603 A.2d 291 (Pa. Cmwlth. 1992), the Board noted that a final receipt and a supplemental agreement limiting medical expenses were sufficient to terminate a claimant's benefits. Thusly, the Board reasoned, Claimant's benefits herein could be held to have been terminated by those respective documents as executed under the instant facts, pursuant to Jester.

The Board further concluded, however, that Claimant's credible testimony established that his Reinstatement Petition was not time barred. Noting that Claimant testified that he continued to receive wages for periods of time that he missed work due to the accepted work-related injury, Employer knew, or should have known, that the injury had not terminated as of the time Employer proffered the Final Receipt. Thus, the Board concluded, the period of time in

[3] The WCJ's denial of the Claim and Penalty Petitions was not appealed by Claimant, and is not at issue herein.

which Claimant could timely file for reinstatement was extended, and no error of law was committed in the WCJ's result thereon.

The Board also rejected Employer's argument that the WCJ erred in expanding the description of Claimant's injury, noting that the credible evidence of record was substantial and supported the WCJ's grant of Claimant's Review Petition. By order dated June 19, 2007, the Board affirmed the WCJ's order. Employer now appeals from the Board's order.

This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of Board procedures, and whether necessary findings of fact are supported by substantial evidence. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Mrs. Smith's Frozen Foods v. Workmen's Compensation Appeal Board (Clouser), 539 A.2d 11 (Pa. Cmwlth. 1988).

Employer first argues that the testimony of Claimant's medical expert, Dr. Frost, was not substantial competent evidence. Employer asserts that the fact that Dr. Frost was not Claimant's treating physician, and that Dr. Frost's theory of causation that the L3-4 herniation is related to the prior L4-5 herniation, render his testimony in its entirety evidence that a reasonable mind could not accept as adequate to support any conclusion. We disagree.

We have held that, in workers' compensation cases, whether or not a testifying medical expert was a treating physician, or was a physician who

examined a claimant solely for the purpose of the workmen's compensation litigation, is a matter of evidentiary weight and credibility that is the sole province of the fact finder. Cox v. Workmen's Compensation Appeal Board, 430 A.2d 1009 (Pa. Cmwlth. 1981). It is axiomatic that 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).

Similarly, we have also held that as the ultimate fact finder, it is the sole province of the WCJ to determine the credibility and evidentiary weight to be accorded to medical theories of causation, and that when there is competent evidence to support theories of causation, it is within the purview of the WCJ to resolve such conflict. Bechtel Power Corp. v. Workmen's Compensation Appeal Board, 426 A.2d 1256 (Pa. Cmwlth. 1981). Our review of Dr. Frost's testimony as a whole, accepted as credible by the WCJ, reveals such support for his theory of the causation of Claimant's injuries herein. Reproduced Record (R.R.) at 164a-214a. In our appellate function, we will not review the WCJ's credibility determination of, nor reassess the evidentiary weight to be accorded to, Dr. Frost's testimony. Valsamaki. As such, Employer's arguments on this issue are unavailing.

Employer next argues that Claimant's Review and Reinstatement Petitions were both time barred. In support thereof, Employer cites to Westinghouse Elec. Corp. / CBS v. Workers' Compensation Appeal Board (Korach), 584 Pa. 411, 883 A.2d 579, (2005), for the proposition that while a payment of medical expenses, or payment of wages in lieu of compensation, may toll the statute of repose[4] under Section 315 of the Act,[5] such a payment does not toll the statute of limitations applicable to actions filed under Section 413(a) of the Act.[6]

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[4] A statute of limitations is procedural and extinguishes the remedy rather than the cause of action. A statute of repose, however, is substantive and extinguishes both the remedy and the actual cause of action. Westinghouse.

[5] Section 315 states, in relevant part:

> In cases of personal injury all claims for compensation shall be forever barred, unless, within three years after the injury, the parties shall have agreed upon the compensation payable under this article; or unless within three years after the injury, one of the parties shall have filed a petition as provided in article four hereof ... Where, however, payments of compensation had been made in any case, said limitations shall not take effect until the expiration of three years from the time of making of the most recent payment prior to date of filing such petition ...

77 P.S. § 602.

[6] Section 413(a) states, in relevant part:

> A workers' compensation judge designated by the department may, at any time, modify, reinstate, suspend, or terminate a notice of compensation payable ... upon petition filed by either party with the department, upon proof that the disability of an injured employe has increased, decreased, recurred, or has temporarily or finally ceased, or that the status of any dependent has changed. Such modification, reinstatement, suspension, or termination shall be made as of the date upon which it is shown that the disability of

(Continued....)

We have previously discussed the distinction between these two portions of the Act as addressed in Westinghouse:

> [T]he "critical distinction" [is] between the statute of repose present in Section 315, which acts to bar the filing of a new claim, and the statute of limitations found in Section 413(a), which acts to bar amendments/additions to previously filed claims. . . The interplay of these two statutory provisions has been addressed by both our Supreme Court in Westinghouse, and this Court in Guthrie v. Workers' Compensation Appeal Board (Keystone Coal Co.), 767 A.2d 634 (Pa. Cmwlth. 2001). . . In Westinghouse, the claimant sought to add a psychiatric injury to a previously accepted work injury, which was described in an NCP filed approximately ten years earlier as a "back injury." Our Supreme Court reversed this Court and reasoned that the statute of limitations found in Section 413(a) barred the claimant from adding, over ten years after the initial NCP and three years after the last payment of compensation, a psychiatric injury to a preexisting work-related back injury. Id. at 425, 883 A.2d at 588. The Court determined that the statute of repose found in Section 315 only applies where an employer's liability has not yet ripened (i.e., cannot yet be established through a legally cognizable claim), as opposed to the statute of limitations found in Section 413(a), where an employer's liability has been established and the statute of limitations only extinguishes the right to a remedy. Id. at 429, 883 A.2d

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> the injured employe has increased, decreased, recurred, or has temporarily or finally ceased, or upon which it is shown that the status of any dependent has changed: Provided, That ... no notice of compensation payable, agreement or award shall be reviewed, or modified, or reinstated, unless a petition is filed with the department within three years after the date of the most recent payment of compensation made prior to the filing of such petition....

77 P.S. § 772.

> at 591. In that case, the Court reasoned that the "filing of a Claim Petition pursuant to Section 315 was unnecessary and erroneous, particularly as Claimant was alleging that his psychiatric condition *arose as a direct result* of his work-related back injury." Id. at 428, 883 A.2d at 590 (emphasis added) (citing Jeanes Hosp. v. Workers' Comp. Appeal Bd. (Hass), 582 Pa. 405, 872 A.2d 159 (2005) (Jeanes Hosp. II)). Thus, while ultimately finding the petition to be time-barred, the Court did not view the psychiatric injury as a separate injury, but as part of the underlying and established work-related back injury, and reviewed pursuant to Section 413(a) of the Act.
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> In light of Westinghouse, we must determine if Claimant's claim petition . . . is a new claim (where employer's liability has not yet ripened), which would be subject to Section 315 of the Act, or arose from a preexisting work-injury (where Employer's liability has already been established), which would be analyzed under Section 413(a) of the Act.

Penn Beverage Distributing Co. v. Workers' Compensation Appeal Board (Rebich), 901 A.2d 1097 (Pa. Cmwlth. 2006) (selected citations omitted).

We agree with Employer's assertion, in the matter *sub judice*, that Section 413(a) controls under the instant facts, in that Claimant's injuries inarguably arose from his prior work-related injury, and are not a new claim. We disagree, however, that Westinghouse's general proposition controls this matter. In Westinghouse, the claimant sought to toll the statute of limitations by reliance upon medical payments made by the employer, for an injury not recognized as part of the original compensable injury, some ten years after the parties executed the NCP, and more than three years after employer had made a payment of compensation. Westinghouse, 584 Pa. at 414-416, 429, 883 A.2d at 581-583.

Critically, the statute of limitations under Section 413(a) had already expired, in light of the fact that employer had paid no compensation for over three years, at the time that the claimant sought to use the employer's payment of medical expenses to toll the statute.

In drawing the distinction between whether an employer's payment of medical expenses and/or wage loss benefits would toll Section 413(a)'s statute of limitation, the Supreme Court in Westinghouse[7] relied upon the express language of Section 306(f.1)(9) of the Act, which states:

> The payment by an insurer or employer for any medical, surgical or hospital services or supplies **after any statute of limitations provided for in this act shall have expired** shall not act to reopen or revive the compensation rights for purposes of such limitations.

77 P.S. § 531(9) (emphasis added). Accordingly, another crucial distinction not at issue under the facts of Westinghouse must be drawn in applying the statute of limitations contained within Section 413(a): whether or not the payments made by an employer were made before, or after, the expiration of the statute of limitations. Unlike in Westinghouse, Claimant herein does not seek to reopen or revive any compensation rights; Claimant seeks to continue those rights to compensation implicitly acknowledged by Employer, where Employer has paid both medical expenses and wages in lieu of compensation within the past three years of Claimant's Reinstatement Petition.

[7] See Westinghouse, 584 Pa. at 430, 883 A.2d at 591.

In the case before us, Claimant established with credible evidence that Employer had continuously paid for medical expenses related to Claimant's injury prior to the expiration of the three year statute of limitations set forth in Section 413(a), and that Employer paid wages in lieu of compensation during that same time period, also prior to the limitation expiration. WCJ Findings of Fact 3, 9; R.R. at 90a-91a, 246a-256a. Therefore, we agree with the Board that Claimant's continued receipt of wages for periods of time that he missed work due to his work-related injury, as well as Employer's continued payment of medical expenses therefore, both of which forms of payment commenced prior to the expiration of the limitation of Section 413(a), distinguish this matter from Westinghouse. In light of those payments by Employer, we agree with the Board that Employer knew, or should have known, that Claimant's injury had not terminated, and that thusly, the period of time in which Claimant could timely file for reinstatement was extended. Our conclusion is buttressed by the well-established basic premise that the Act is remedial in nature and intended to benefit the worker, and, therefore, must be liberally construed to effectuate its humanitarian objectives. David Griffiths v. Workers' Compensation Appeal Board (Seven Stars Farm, Inc.), 943 A.2d 242 (Pa. Cmwlth. 2008) (citations omitted). As such, the Board did not err.

Accordingly, we affirm.

JAMES R. KELLEY, Senior Judge

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Workers' Compensation Appeal Board (Duball), Respondent	:	

O R D E R

AND NOW, this 16th day of June, 2008, the order of the Workers' Compensation Appeal Board, dated June 19, 2007, at A06-1874, is affirmed.

JAMES R. KELLEY, Senior Judge