IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Michael Ward, Petitioner	:	
v.	:	No. 1384 C.D. 2009
Workers' Compensation Appeal Board (Snap-On, Inc. and GAB Robbins Risk Management Services), Respondents	:	Submitted: October 30, 2009

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: February 3, 2010

Joseph Ward (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) affirming an order of a Workers' Compensation Judge (WCJ) that denied Claimant's Claim Petition and Penalty Petition 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 February 28, 2007, Claimant filed a Claim Petition under the Act alleging that he suffered an injury in the course and scope of his work for Snap-On Tools, Inc. (Employer), seeking ongoing total disability benefits. Claimant alleged that he suffered a respiratory illness on May 27, 2005, as a result of his exposure to

Employer's Fuel System Cleaning Solution (hereinafter, Solution). Claimant hauled twelve eight-ounce bottles of Solution in his work for Employer, demonstrating the Solution four times in the year preceding his Claim Petition. Claimant alleged further exposure as a result of a leak of the Solution bottles that Claimant hauled in his trailer in the course of his duties. Claimant's asserted injury date of May 27, 2005, represents the date that Claimant first sought medical attention following periods of dizziness and coughing.

On March 1, 2007, Claimant filed a Penalty Petition alleging that Employer was estopped from denying liability due to its failure to issue a notice accepting responsibility under the Act within 21 days, combined with Employer's payment of wages in lieu of compensation, and its payment of certain medical expenses. Claimant asserted that Employer's conduct constituted an admission of liability. Employer timely answered Claimant's Petitions, and hearings ensued before a WCJ.

Following the receipt of evidence and testimony from both parties, the WCJ entered a Decision and Order dated September 29, 2008, concluding that Claimant had failed to meet his burden of proving that he sustained a work-related injury, and denying and dismissing the Claim Petition. Claimant and Employer[1] cross-appealed to the Board.

By order dated June 18, 2009, the Board affirmed. Following its review of the record, the Board concluded that substantial, competent evidence

[1] Employer's cross appeal challenged the WCJ's overruling of Employer's objection to certain evidence presented by Claimant before the WCJ.

supported the WCJ's findings of fact, and that the WCJ had committed no errors of law. In light of its affirmance, the Board did not address Employer's appeal. Claimant now petitions for review.

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).

Claimant presents two issues: 1.) whether Employer's failure to provide timely notice of a denial of Claimant's compensable injury, while making medical payments and payments in lieu of compensation, constitute an admission of liability, and; 2.) whether Employer's contest was unreasonable in light of Employer's denial and concomitant estoppel.

In support of Claimant's first issue, he argues that Employer in this case made two distinct types of payments that operate as admissions of Employer's liability under the Act for Claimant's asserted injuries: 1.) Employer's payment of certain medical bills on behalf of Claimant, and; 2.) Employer's payments under an Employer-funded disability program. We will address these two types of payments seriately.

Claimant testified that Employer voluntarily paid medical bills on his behalf, "for, like, pharmaceuticals and some unpaid doctors visits maybe." Reproduced Record (R.R.) at 51a. In support thereof, Claimant submitted into evidence a series of apparent medical treatment bills, each lacking in definitive

reference to the alleged work-related injury. R.R. at 159a-160a, 224a-262a. Claimant cites to no authority whatsoever for his proposition that Employer's voluntary payment of medical expenses constitutes a binding admission of liability.

In Bailey v. Workers' Compensation Appeal Board (ABEX Corp.), 717 A.2d 17, 19 (Pa. Cmwlth. 1998), we addressed this very assertion:

> In *Bellefonte Area School District v. Workmen's Compensation Appeal Board (Morgan), [] 627 A.2d 250 ([Pa. Cmwlth.] 1993), [] affirmed[,] 545 Pa. 70, 680 A.2d 823 (1994)*, we encouraged employers to continue the practice of voluntarily paying the medical expenses of injured employees without fear of a later penalty for those payments. We quoted our Pennsylvania Superior Court:
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> > Since the early days of workmen's compensation, the insurance carriers have been liberal in paying medical and hospital bills beyond those required by the statute.... The insurers pay for this treatment to help the injured employes regain their health, which minimizes their future disability and reduces the liability of the insurance carrier for future compensation payments. Even if the reason for the insurance carriers' desire to reduce or prevent future disability of injured employes is to save the carriers money, the injured employes are the chief beneficiaries of the practice. Condemning or penalizing the insurance carriers for voluntarily paying these medical and hospital bills would discourage their continuing the practice. Injured employes would suffer most from the abandonment of the practice.
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> *Id., 627 A.2d at 254, quoting, Dennis v. E.J. Lavino & Co., [] 201 A.2d 276, 279 ([Pa. Super.] 1964)*. **Therefore, when an employer voluntarily pays a claimant's medical bills, it should not be considered an "admission" of liability on behalf of the employer.**

> To decide otherwise "would force employers to abandon a long established practice of voluntarily paying medical and hospital expenses of injured employees beyond those required by statute...." *Bellefonte, 627 A.2d at 254*.

(Emphasis added). As such, Claimant's argument on this point is without merit.

Next, Claimant argues that Employer's voluntary self-funded disability payments, made after Claimant's injury, constitute payments made in lieu of workers' compensation, which operate as an admission of liability in the absence of Employer's timely filing of notice, pursuant to the Act,[2] following Claimant's notice to Employer of his injury.

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[2] Section 406.1 of the Act, 77 P.S. § 717.1, added by the Act of February 8, 1972, P.L. 25, as amended, and Section 407 of the Act, 77 P.S. § 731, require either prompt notice of denial or notice of compensation payable and the commencement of payments. Section 406.1 of the Act reads:

> Prompt payment of compensation; interest; credit for excess payment; controversion
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> (a) 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 or pursuant to a notice of temporary compensation payable as set forth in subsection (d), on forms prescribed by the department and furnished by the insurer. The first installment of compensation shall be paid not later than the twenty-first day after the employer has notice or knowledge of the employe's disability. . .
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> (c) If the insurer controverts the right to compensation it shall promptly notify the employe or his dependent, on a form prescribed by the department, stating the grounds upon which the

(Continued....)

right to compensation is controverted and shall forthwith furnish a copy or copies to the department.

(d)(1) In any instance where an employer is uncertain whether a claim is compensable under this act or is uncertain of the extent of its liability under this act, the employer may initiate compensation payments without prejudice and without admitting liability pursuant to a notice of temporary compensation payable as prescribed by the department.

(2) The notice of temporary compensation payable shall be sent to the claimant and a copy filed with the department and shall notify the claimant that the payment of temporary compensation is not an admission of liability of the employer with respect to the injury which is the subject of the notice of temporary compensation payable. The department shall, upon receipt of a notice of temporary compensation payable, send a notice to the claimant . . .

* * *

(3) Payments of temporary compensation shall commence and the notice of temporary compensation payable shall be sent within the time set forth in clause (a).

* * *

(5)(i) If the employer ceases making payments pursuant to a notice of temporary compensation payable, a notice in the form prescribed by the department shall be sent to the claimant and a copy filed with the department, but in no event shall this notice be sent or filed later than five (5) days after the last payment.

* * *

(6) If the employer does not file a notice under paragraph (5) within the ninety-day period during which temporary compensation is paid or payable, the employer shall be deemed to have admitted liability and the notice of temporary compensation payable shall be converted to a notice of compensation payable.

(Continued....)

In support, Claimant cites to numerous precedents, including Mosgo v. Workmen's Compensation Appeal Board (Tri-Area Beverage, Inc.), 480 A.2d 1285 (Pa. Cmwlth. 1984). In Mosgo, the employer's compensation insurer advised the claimant that the employer was accepting the work injury, and was going to start paying him under the Act, notwithstanding the employer's failure to timely issue any documents thereafter. We held that this agreement to pay benefits under the Act, and the payments that followed, bound the employer to such workers'

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77 P.S. § 717.1.

Section 407 of the Act reads, in relevant part:

> Time when agreements as to compensation or commutation of payments may be made; notices of compensation payable; agreements
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> On or after the seventh day after any injury shall have occurred, the employer or insurer and employe or his dependents may agree upon the compensation payable to the employe or his dependents under this act . . .
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> * * *
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> 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. . .
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> * * *
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> All agreements made in accordance with the provisions of this section shall be on a form prescribed by the department, signed by all parties in interest, and a copy or copies thereof forwarded to the department as required by rules and regulations. . .

77 P.S. § 731.

compensation payments and estopped it from later ceasing payments in light of its receipt of conflicting medical evidence.

Mosgo, however, is inapplicable to the instant matter in that Employer herein made no verbal or other agreement, implied or express, to pay Claimant benefits under the Act. Claimant neither addresses, nor disputes, this operative distinguishing fact.

Claimant also cites to Kelly v. Workmen's Compensation Appeal Board (DePalma Roofing), 669 A.2d 1023 (Pa. Cmwlth. 1995), petition for allowance of appeal denied, 546 Pa. 686, 686 A.2d 1314 (1996). In Kelly, the employer directly expressed responsibility for the claimant's injuries, further stating his belief that the claimant had been attacked by another employee. We held such an expression as an intention by the employer to compensate the claimant under the Act, and held him responsible for a continuation of the cash payments undertaken pursuant to his expressly stated acceptance of responsibility.

Again, no comparable facts, words or actions on Employer's part, render Kelly applicable or persuasive towards the instant matter. The remainder of Claimant's string citations for the proposition that Employer's payments in this matter constituted payments in lieu of workers' compensation payments are also distinguishable on their faces, and thus, also inapplicable and unpersuasive.

Employer argues, and the record shows, that the payments made in this case were made pursuant to a Short Term Disability Policy provided by Employer. R.R. at 156a. We have addressed such identical payments, holding plainly that an employer who pays an employee a percentage of his salary,

pursuant to a voluntary short-term disability program, does not concomitantly make an admission that the employee suffered a work-related disability. Holmes v. Workmen's Compensation Appeal Board (Schneider Power Corp.), 542 A.2d 197 (Pa. Cmwlth. 1988). Holmes also held that in light of the claimant's failure to establish any estoppel under this theory, the WCJ did not err in placing the burden of proving a work-related disability upon the claimant.[3] Id. As such, Claimant's argument is without merit.

Claimant attempts to distinguish Holmes on the basis that the disability plan in Holmes was a short-term disability plan, while in the instant matter Claimant was also covered by Employer's long-term disability plan. Further, Claimant argues that Employer's disability plan was Employer-funded, a facet not addressed under the facts of Holmes. Since Claimant fails to advance any argument as to how or why these arguably distinguishing facts render our reasoning in Holmes inapplicable to the instant matter, we will not advance any such theory for him. We note, however, that any conceivable distinguishing factors of a short-term versus long-term plan were irrelevant to our disposition in Holmes, and additionally note that while the funding source of the disability plan in that precedent was not addressed, such funding was also not dispositive. Our reasoning in Holmes was founded on the crucial fact that the disability plan therein was, under the express terms of that plan, available to a worker without regard to

[3] In the case *sub judice*, there is no dispute that the WCJ found Claimant's medical evidence not credible, and correctly concluded therefor that Claimant had failed to satisfy his burden to entitlement of benefits under the Act.

whether the disability was work-related; as such, we reasoned that the employer's payments under the plan in Holmes could not serve as an admission by the employer as to the work-relatedness of the injury at issue. That reasoning is unaffected by the short or long-term nature of the plan, unaffected by the source of the funding of the plan, and unaddressed by Claimant in this matter; Claimant has failed to advance any argument to the contrary.

Claimant does, however, advance an argument that Employer's payments under its disability plan should serve as an admission of Employer's acceptance of a work-related injury, and that therefore Employer's payments under its disability plan must be viewed as payment in lieu of worker's compensation benefits. However, as his sole support for this theory, Claimant cites only to cases employing such reasoning for purposes of determining the timeliness of a claimant's claim under Section 315 of the Act, 77 P.S. § 602.[4] For two

[4] Section 315 reads, in relevant part:

> Claims for compensation; when barred; exception
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> In cases of personal injury all claims for compensation shall be forever barred, unless, within two years after the injury, the parties shall have agreed upon the compensation payable under this article; or unless within two years after the injury, one of the parties shall have filed a petition as provided in article four hereof. In cases of death all claims for compensation shall be forever barred, unless within two years after the death, the parties shall have agreed upon the compensation under this article; or unless, within two years after the death, 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 two years from the time of making of the most recent payment prior to date

(Continued....)

independently dispositive reasons, these cases are inapplicable to the instant matter.

First, the reasoning in the cases cited by Claimant was expressly restricted to an analysis of the procedural issue of the timeliness of a claimant's claim filing, and as such is not applicable to an analysis of the substantive issues underlying a claim, including the claim in the instant matter. See generally Schreffler v. Workers' Compensation Appeal Board (Kocher Coal Co.), 567 Pa. 527, 788 A.2d 963 (2002); Schiavo v. Workers' Compensation Appeal Board (Westinghouse Elec. Corp.), 737 A.2d 832 (Pa. Cmwlth. 1999), petition for allowance of appeal denied, 561 Pa. 704, 751 A.2d 195 (2000); Bergmeister v. Workmen's Compensation Appeal Board (PMA Ins. Co.), 578 A.2d 572 (Pa. Cmwlth. 1990), aff'd, 529 Pa. 1, 600 A.2d 531 (1991). Although Claimant does concede in his brief that no Section 315 timeliness issues exist in this matter, to the extent that Claimant is impliedly requesting that this Court extend our reasoning in

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> of filing such petition: Provided, that any payment made under an established plan or policy of insurance for the payment of benefits on account of non-occupational illness or injury and which payment is identified as not being workmen's compensation shall not be considered to be payment in lieu of workmen's compensation, and such payment shall not toll the running of the statute of limitations. However, in cases of injury resulting from ionizing radiation in which the nature of the injury or its relationship to the employment is not known to the employe, the time for filing a claim shall not begin to run until the employe knows, or by the exercise of reasonable diligence should know, of the existence of the injury and its possible relationship to his employment. The term "injury" in this section means, in cases of occupational disease, disability resulting from occupational disease.

these statute of limitations precedents decided under the procedural dictates of Section 315, to the substantive merits of the instant matter, we decline.

Secondly, even assuming Claimant's application of the reasoning of these statute of limitations analyses to the instant issue *arguendo*, Claimant's argument on this point is still without merit. Claimant argues that under our Supreme Court's analysis and concomitant reasoning regarding filing timeliness pursuant to Section 315 in Schreffler, an employer's payments under a disability plan to a claimant who is totally disabled due to a work injury entitles that claimant to a mandatory rebuttable presumption that those payments are made in lieu of workers' compensation. See Schreffler, 567 Pa. at 540, 788 A.2d at 971. However, in the instant matter it is beyond dispute that there has been no conclusion of total work-related disability in this case, in light of the rejection by the WCJ of Claimant's testimony and medical evidence. WCJ Opinion at 24. As such, were we to extend the reasoning of the Supreme Court in Schreffler to the instant matter – which we decline to do, as noted above – Claimant in this matter would not be entitled to the presumption afforded in that precedent.

Finally, it is axiomatic that it remains a claimant's burden to demonstrate that an employer's disability plan payments were intended to compensate an employee for a loss of earning power due to a work-related injury. See Schreffler; Schiavo; Bergmeister. Claimant has cited to no evidence of record, and to no testimony elicited, that either establishes the precise intent of Employer's disability plan payments under the written plan itself, or establishes Employer's

intent in the absence of such express provisions. Thus, even under Claimant's preferred application of this reasoning, his argument is without merit.

Accordingly, the Board did not err in affirming the WCJ's denial of Claimant's Claim and Penalty Petitions.[5] We affirm.

JAMES R. KELLEY, Senior Judge

[5] Given our disposition of Claimant's first issue, we will not address his second issue arguing that Employer's contest was unreasonable. A claimant is not entitled to an unreasonable contest award of attorney fees where the claimant did not successfully litigate, in whole or in part, the matter at issue. Section 440(a) of the Act, 77 P.S. § 996(a); Pruitt v. Workers' Compensation Appeal Board (Lighthouse Rehabilitation), 730 A.2d 1025 (Pa. Cmwlth. 1999).

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O R D E R

AND NOW, this 3rd day of February, 2010, the order of the Workers' Compensation Appeal Board dated June 18, 2009, at A08-1988, is affirmed.

JAMES R. KELLEY, Senior Judge