IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Rosemarie Mixter, Petitioner	:	
v.	:	No. 1387 C.D. 2010
	:	Submitted: October 8, 2010
Workers' Compensation Appeal Board (Lowe's Home Centers, Inc. and Specialty Risk Services), Respondents	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: December 21, 2010

Rosemarie Mixter (Mixter) petitions for review of the June 23, 2010, order of the Workers' Compensation Appeal Board (WCAB), which reversed the decision of a Workers' Compensation Judge (WCJ) denying a petition to modify or review compensation benefits filed by Lowe's Home Centers, Inc. (Lowe's) and Specialty Risk Services (collectively, Employer). At issue is whether the wages that Mixter received for part-time work, prior to the injury she sustained in the course of her full-time employment, should have been considered in calculating her average weekly wage (AWW). We reverse.

The parties stipulated before the WCJ as follows. Lowe's hired Mixter on September 10, 2007, first as a temporary employee and as a part-time employee thereafter. Mixter became a full-time employee on April 19, 2008. A full-time

employee of Lowe's is scheduled to work thirty-nine hours per week but can work forty hours per week without further approval. Mixter sustained her injury on April 28, 2008. At that time, her rate of pay was $9.09 per hour. (Certified Record (C.R.), Stipulation, Nos. 1-6, Reproduced Record (R.R.), at 62a; Findings of Fact, No. 5.)

Employer issued a Notice of Compensation Payable (NCP), dated June 10, 2008, which provided that Mixter suffered a left buttock strain and left hip strain on April 28, 2008. The NCP set forth Mixter's AWW as $363.90, with a weekly compensation rate of $327.51. This document further provided that the compensation rate was merely an estimate pending receipt of further information.[1] Thereafter, Employer issued a Corrected NCP, dated June 12, 2008, which set forth an AWW of $258.62 and a corresponding compensation rate of $232.75 based on Mixter's actual wages, including her previous part-time earnings. The Bureau of Workers' Compensation rejected the Corrected NCP by letter dated June 25, 2008.[2] (Findings of Fact, Nos. 6-8.)

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[1] This NCP stated:

> Compensation rate is an estimate based on the hourly wage as reported by her employer. I am attempting to secure wages from her employer of 52 weeks of gross earnings to confirm the correct [AWW] & Compensation Rate. A "CORRECTED" NCP may be filed at a later date if her AWW & CR differ.

(C.R., NCP at 2; R.R. at 72a.)

[2] This letter stated:

> A [NCP] . . . was previously filed with the Bureau on the above claim, which established a higher [AWW] and/or Compensation Rate and/or established an injury. Therefore, a Supplemental Agreement

(Footnote continued on next page…)

On August 7, 2008, Employer filed a Petition to Modify and/or Review Compensation Benefits, alleging that Mixter's AWW had been miscalculated, resulting in an overpayment of her benefits. Employer also sought a credit for the alleged overpayment. Mixter filed an Answer denying the allegations of Employer's petition. (Findings of Fact, Nos. 1-2.)[3]

At the September 11, 2008, hearing before the WCJ, Claimant did not testify, and the parties entered into the written stipulation set forth above. Employer filed a copy of the Statement of Wages referencing Claimant's AWW of $258.62 and weekly compensation rate of $232.75.[4] Employer also filed a computerized statement of Claimant's work hours and wages, as well as a contract of employment between Mixter and Lowe's. (Findings of Fact, Nos. 3-4, 9-11.) After considering the record,

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> for Compensation for Disability or Permanent Injury . . . must be filed with the Bureau to lower the [AWW] and/or Compensation Rate and/or change the injury information.

(C.R., Notice of Rejected Document-Improperly Filed at 1; R.R. at 75a.)

[3] Mixter pleaded in her Answer that she was expected to work "at least" forty hours per week and that her salary was $9.09 per hour. (C.R., Answer at 1; R.R. at 8a.) She further asserted, based on, *inter alia*, *Hannaberry HVAC v. Workers' Compensation Appeal Board (Snyder, Jr.)*, 575 Pa. 66, 834 A.2d 524 (2003), that "a fair and accurate calculation of [her] earnings and earnings potential results in an AWW of $363.90 and a weekly compensation rate of $327.51 ($363.90 x 90% = $327.51)." (C.R., Answer at 1; R.R. at 8a.)

[4] This wage statement was based on two thirteen-week calendar pay periods between October 23, 2007, and April 28, 2008. (C.R., Statement of Wages at 1; R.R. at 76a.)

the WCJ concluded that Employer failed to prove Mixter's AWW and accompanying compensation rate should be modified and denied Employer's petition. Relying on, *inter alia*, *Hannaberry HVAC v. Workers' Compensation Appeal Board (Snyder, Jr.)*, 575 Pa. 66, 834 A.2d 524 (2003), the WCJ specifically reasoned: "This matter is in line with the cases that interpret Section 309(d.1) [of the Workers' Compensation Act (Act)][5] most favorably to a claimant who has changed from a part-time position to a full time [sic] position for the defendant employer based upon the reasonably projected earnings of a claimant." (WCJ's decision, April 29, 2009, at 2.)[6]

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[5] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §582(d.1).

[6] Although the WCJ cited to section 309(d.1), ostensibly because that section was relied upon for the result in *Hannaberry*, we agree with Employer that the WCJ actually applied the calculation set forth in section 309(d.2) of the Act, 77 P.S. §582(d.2), by "multiplying the hourly rate of pay by 40 hours of work per week." (Employer's brief at 9.) Thus, the WCJ calculated Mixter's AWW based on her reasonably projected earnings rather than on her actual wages.

Section 309 of the Act, 77 P.S. §582, specifically provides:

> (d) If at the time of the injury the wages are fixed by any manner not enumerated in clause (a), (b) or (c), the [AWW] shall be calculated by dividing by thirteen the total wages earned in the employ of the employer in each of the highest three of the last four consecutive periods of thirteen calendar weeks in the fifty-two weeks immediately preceding the injury and by averaging the total amounts earned during these three periods.
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> (d.1) If the employe has not been employed by the employer for at least three consecutive periods of thirteen calendar weeks in the fifty-two weeks immediately preceding the injury, the [AWW] shall be calculated by dividing by thirteen the total wages earned in the employ of the employer for any completed period of thirteen calendar weeks immediately preceding the injury and by averaging the total amounts earned during such periods.

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On appeal, the WCAB reversed, accepting the accuracy of the Corrected NCP based on Employer's evidence.[7] Mixter's petition for review to this court followed.

On appeal here,[8] Mixter argues that the WCAB erred by reversing the WCJ's decision because the original NCP contained no material mistake of law or fact and correctly reflected Mixter's pre-injury ability to generate future wages. Mixter specifically contends that, but for the injury, she would have continued working full-time and, therefore, "[t]o include wages for earnings calculated when [she] was a part-time employee would undervalue her earnings potential and, in effect, would serve to punish [her] by basing her earnings potential upon a job

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> (d.2) If the employe has worked less than a complete period of thirteen calendar weeks and does not have fixed weekly wages, the [AWW] shall be the hourly wage rate multiplied by the number of hours the employe was expected to work per week under the terms of employment.

[7] In doing so, the WCAB concluded that, because Mixter was not employed for three consecutive periods of thirteen calendar weeks prior to her injury, section 309(d.1) controlled the calculation, resulting in an averaging of the total amounts earned for any completed period of thirteen calendar weeks immediately preceding the injury. The WCAB also determined that *Hannaberry* was factually inapposite.

[8] Our scope of review is limited to determining whether findings of fact are supported by substantial evidence, an error of law has been committed or constitutional rights have been violated. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704. The determination of a claimant's AWW is a question of law, over which we exercise plenary review. *Lahr Mechanical v. Workers' Compensation Appeal Board (Floyd)*, 933 A.2d 1095, 1098-99 (Pa. Cmwlth. 2007).

classification which she no longer holds and which resulted in less earnings." (Mixter's brief at 11.) Mixter cites *Hannaberry* as controlling because, there, as here, the claimant's job classification changed from part-time to full-time shortly before the work-related injury at issue occurred. After review of the record and the relevant case law, we now agree with Mixter that the principles enunciated by our supreme court in *Hannaberry* guide the result here.

In *Hannaberry*, the claimant had worked part time for the employer during high school. While he worked part time, his hours varied greatly, and his paychecks increased as graduation approached. The claimant assumed his full-time position on June 20, 1996. After the claimant assumed his full-time job, his AWW increased more than four times over. The claimant worked full time until a devastating work injury rendered him quadriplegic on September 20, 1996, just three months after his full-time position began. 575 Pa. at 68-69, 834 A.2d at 525.

During litigation involving the amount of the claimant's benefit, the employer contended that the claimant's AWW should be calculated on the highest three quarters of employment in the previous year, two of which were part-time employment periods. By contrast, the claimant argued that his AWW should be calculated based only on the quarter that coincided with his full-time job, which also was the most recent quarter. The claimant argued that inclusion of his part-time high school employment in the calculation of his AWW artificially decreased the wages he earned while working full time, when he was injured, and would result in inadequate compensation. The WCJ agreed with the claimant and based the claimant's AWW solely on his last calendar quarter of work. *Id.* at 69, 834 A.2d at 525-26.

On appeal, the WCAB affirmed. However, this court reversed, determining that nothing in the legislative history of section 309(d), as amended by the Act of June 24, 1996, P.L. 350 (Act 57), suggested the General Assembly had considered the part-time to full-time employment scenario presented therein. *Id.* at 69-70, 834 A.2d at 526. Thereafter, our supreme court reversed this court's decision and reinstated the WCJ's order, reasoning in pertinent part as follows:

> Since Section 309 does not address the part-time to full-time paradigm presented here, and a reading of the statute as requiring dilution of the benefit would be contrary to the overall humanitarian purpose of the Act, resort to principles of statutory construction is appropriate. Those principles dictate that appellant's part-time wages not be permitted to dilute the benefit due to him as a result of an injury suffered after he became, and had been for some time, a full-time employee. Consideration of the "occasion and necessity" for the 1996 amendment, "the circumstances under which it was enacted," the mischief it sought to remedy, the object it sought to attain, and the former law, 1 Pa. C.S. §1921(c)(1)-(5), all weigh in favor of calculating appellant's [AWW] based upon his quarter of full-time employment. The change effected in the legislation, as noted above, was aimed at ensuring more, not less, accuracy in the computation of [AWW]. . . .
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> By our holding today, we do not resurrect the former law, which specified that the most favorable quarter to the employee be the measure of [AWW]. New- subsection (d) remains the governing law for those work paradigms for which it was intended, and averaging of the designated work periods is the formula. Nor, contrary to employer's argument, are we approving of appellant's "own private formula" for calculating his [AWW]. We merely hold that subsection (d) does not control the calculation in a circumstance, such as this one, where it would lead to a grossly and demonstrably inaccurate measure of a worker's

> [AWW]. At bottom, this case involves a circumstance, not uncommon in this complicated age, where the General Assembly did not specifically contemplate a certain factual scenario.

575 Pa. at 81-83, 834 A.2d at 533-34.

As in *Hannaberry*, Mixter's compensation benefit would be unfairly diluted by considering her part-time earnings in the calculation of her AWW. Essentially, under the WCAB's application of section 309(d.1), Mixter would receive less of a compensation benefit having gone from part-time work to full-time work than if she had not worked at all before beginning her part-time position. Such a result is not warranted by either the Act or the relevant case law. As our supreme court explained in *Colpetzer v. Workers' Compensation Appeal Board (Standard Steel)*, 582 Pa. 295, 313, 870 A.2d 875, 886 (2005) (emphasis in original): "*Hannaberry* highlights the humanitarian purpose of the Act and the clear legislative intention that injured workers entitled to benefits be paid a fair benefit based upon an **accurate** calculation of their actual history of earnings and earning capacity." Moreover, an earlier case, *Triangle Building Center v. Workers' Compensation Appeal Board (Linch)*, 560 Pa. 540, 746 A.2d 1108 (2000), "recognized the same crucial points, *i.e.*, that the Act is humanitarian and remedial and, with respect to calculating AWW, it was designed with an eye toward 'the economic reality of a claimant's recent pre-injury earning experience.'" *Colpetzer*, 582 Pa. at 313, 870 A.2d at 886 (quoting *Triangle*, 560 Pa. at 548, 746 A.2d at 1112).

Therefore, the WCJ properly determined that Employer did not meet its burden of proving that Mixter's benefit should have been modified to reflect her

earlier part-time wages and that the NCP as originally issued was incorrect. The WCAB erred in concluding otherwise. Accordingly, we reverse.[9]

ROCHELLE S. FRIEDMAN, Senior Judge

[9] We note that our result today is consistent with our supreme court's statement in *Reifsnyder v. Workers' Compensation Appeal Board (Dana Corporation)*, 584 Pa. 341, 356-57, 883 A.2d 537, 546 (2005) (emphasis in original), that section 309(d.2) does not contain a look-back period but, rather, "provides for a **prospective** calculation of potential earnings." Because section 309(d) of the Act does not contemplate Mixter's precise scenario, *i.e.*, failure to work a complete period of thirteen calendar weeks in a full-time job prior to injury, the WCJ correctly held that the Employer's original NCP, multiplying the hours Mixter was expected to work by her hourly rate of pay, was perfectly proper.

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O R D E R

AND NOW, this 21st day of December, 2010, the order of the Workers' Compensation Appeal Board, dated June 23, 2010, is hereby reversed.

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ROCHELLE S. FRIEDMAN, Senior Judge