IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Rhonda Behe,	:	
Petitioner	:	
	:	
v.	:	No. 1403 C.D. 2008
	:	Submitted: November 7, 2008
Workers' Compensation Appeal	:	
Board (Wawa, Inc.),	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: December 8, 2008

Rhonda Behe (Claimant) appeals from an order of the Workers' Compensation Appeal Board (Board) reversing the Workers' Compensation Judge's (WCJ) decision granting her claim petition in which she alleged that she sustained a work-related hernia while working for Wawa, Inc. (Employer) and granting her penalties and attorney's fees.

This case involves two claim petitions filed by Claimant on May 26, 2006, involving two separate work incidents and injuries. In the first claim petition, Claimant alleged that she sustained a work-related hernia on December 12, 2005,[1]

[1] Claimant's petition set forth December 18, 2005 as the date of injury. However, all of the parties later agreed that the injury occurred on December 12, 2005.

requesting penalties for Employer's failure to issue a Notice of Compensation Payable (NCP) or to properly investigate the claim. In the second claim petition, Claimant alleged that on March 16, 2006, she fell at work and sustained injuries to her low back and right shoulder, a herniated disc at L4-5, and requested penalties for Employer's failure to issue an NCP or properly investigate the claim. Claimant amended her petition to add a neck injury to the injuries already claimed. Employer filed an answer to each petition denying the allegations. The claim petitions were consolidated for a hearing before the WCJ. Because this appeal only involves the claim petition regarding the hernia injury with the exception of attorney's fees for the second claim, only testimony and procedural history relevant to that claim petition is set forth.

At the hearing, Claimant testified that on December 12, 2005, she was working for Employer and was finishing making a series of breakfast sandwiches. She picked up four empty hot trays, which were actually industrial-size cookie sheets, to place in a pile when she felt a pop in her right groin area and doubled over in pain.[2] She reported the incident to her manager and went to her gynecologist, James Mollick, M.D. (Dr. Mollick), who referred her to a general surgeon, Gerald Kofsky, M.D. (Dr. Kofsky). However, she ultimately had hernia repair surgery performed by her own surgeon, Thomas Beetle, M.D. (Dr. Beetle), on January 3, 2006. She stated that she was out of work from December 12, 2005, until she returned to work with

[2] Specifically, Claimant testified: "I had finished making a series of sandwiches and I had four hot trays stacked one on top of the other and I went to pick them up to place them in the hot pile and the best way I can describe it is I felt like something exploded in my right groin area, like a pop. I put the pans on top of the hot pile and I doubled over in a lot of pain." (July 13, 2006 Hearing Transcript at 7.)

Employer at full-duty on February 15, 2006.[3] On cross-examination, Claimant stated that she began working part-time for Employer in August 2005, but that from January 2005 to November 2005, she worked for UPS. She stated that she left the job at UPS because she had to have double hernia surgery in October 2005. She also admitted being at work in January and February 2006 when she had been warned about performing an unsafe act at work on January 31, 2006, and signed off on the warning document on February 1, 2006.

Regarding her hernia injury, Claimant presented the medical records from Dr. Kofsky indicating that he saw Claimant for a hernia injury on December 12, 2005, at which time he recommended a hernia repair.[4] Claimant also presented the medical notes of Dr. Mollick, which mentioned complaints of right groin pain on December 12, 2005, and the operative report of Dr. Beetle.

Employer presented the expert testimony of Richard G. Schmidt, M.D. (Dr. Schmidt), who examined Claimant regarding all of her alleged injuries, but who opined that the December 12, 2005 incident did not result in the hernia. Employer also presented the records of Fernando Bonanni, M.D. (Dr. Bonanni), which indicated that Claimant had requested a letter stating that the hernia repair was work-related,

[3] Claimant also testified regarding her second accident at work on March 16, 2006, when she was restocking cigarettes and fell backwards hitting her back on a counter and ultimately hitting her shoulder and face on the floor. She stated that she suffered pain in her back, neck and shoulder and could not return to her full duties with Employer.

[4] Because the claim for compensation involved less than 52 weeks of disability, Section 422(c) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §835, permitted the submission of medical evidence by reports.

even though Claimant had never given such a history to him. Dr. Bonanni informed Claimant that no letter connecting the hernia to work would be provided to her.

Relying on the medical reports of Claimant's physicians and finding Claimant credible, the WCJ found that Claimant's hernia was a work-related injury she suffered on December 12, 2005, and granted her claim petition awarding partial disability benefits and total disability benefits for the period of December 12, 2005, through February 2, 2006.[5] The WCJ also found that Employer had no reasonable basis for contesting the hernia injury because Claimant advised Employer of the injury at the time it occurred, and Employer violated the Act by failing to issue an NCP or Notice of Compensation Denial (NCD). Employer did not present evidence as to why it denied the claim. The WCJ ordered that Employer had to pay Claimant 50% penalties on past due benefits for her December 12, 2005 injury for its failure to issue an NCP or NCD. Finally, the WCJ awarded counsel fees to Claimant because Employer engaged in an unreasonable contest.

Employer appealed the WCJ's decision to the Board arguing first that Claimant did not prove that she sustained a work-related hernia because she did not present unequivocal medical evidence establishing a causal relationship between the work incident and the injury. The Board agreed based on the medical records which indicated that Claimant's problem with her hernia began well before December 12, 2005, including Dr. Schmidt's report which unequivocally stated that the work incident did not cause the injury. Employer also argued that the WCJ erred in finding

[5] The WCJ also found that Claimant's other injuries were work-related as well and granted Claimant's other claim petition.

that it had not presented a reasonable contest. The Board agreed because Claimant was no longer a prevailing party and was no longer entitled to an award of counsel fees. The Board explained that Dr. Schmidt's report gave Employer a reasonable contest from at least September 27, 2006, forward, but it also believed that his report was not after-acquired medical evidence and also gave Employer a reasonable basis for contesting Claimant's petition. It stated that because Claimant originally alleged a hernia injury on March 16, 2006, Employer had a reasonable contest as to the nature of Claimant's injuries from March 16, 2006, up through July 13, 2006, and it was unprepared to hold that the lapse of a couple of months until the independent medical examination on September 27, 2006, when Dr. Schmidt examined Claimant, rendered Employer's contest unreasonable.

Finally, Employer argued that the WCJ erred by awarding penalties on the basis that it failed to issue an NCP or NCD for the December 12, 2005 injury. Again, the Board agreed with Employer because Claimant never testified to receipt or lack of receipt of either an NCP or NCD for the December 12, 2005 injury. Employer never admitted to the violation and Claimant never requested that the WCJ take administrative notice of the record to establish a violation. Therefore, Claimant did not meet her burden of establishing a violation of the Act. In any event, the Board stated that Claimant was not entitled to penalties in light of its reversal of any award of compensation for the alleged December 12, 2005 injury. This appeal by Claimant followed.[6]

[6] Our scope of review of the Board's decision is limited to determining whether constitutional rights have been violated, whether an error of law was committed, or whether findings of fact are supported by substantial evidence. *Morella v. Workers' Compensation Appeal Board (Mayfield Foundry, Inc.),* 935 A.2d 598 (Pa. Cmwlth. 2007).

I.

Claimant contends that the Board erred in reversing the WCJ because the Board should not have required her to prove there was a causal connection between the incident at work (lifting the trays) and her work injury (hernia). She argues that because the causal connection was obvious, she should not have had to prove the causal connection by medical evidence.[7] Claimant relies on *Northwest Medical Center v. Workers' Compensation Appeal Board (Cornmesser)*, 880 A.2d 753 (Pa. Cmwlth. 2005), to support her position and also for the proposition that "a causal connection is obvious where an individual is doing an act that requires force or strain and pain is immediately experienced at the point of force or strain." *Id.* at 755.

In *Cornmesser*, the WCJ did not require medical evidence and solely relied upon the claimant's testimony to grant benefits. There, the claimant worked as a registered nurse and alleged that he felt something pop in his back when he moved a large patient. He immediately experienced pain and stiffness in his back, his condition worsened throughout the week, and he was ultimately hospitalized and operated on for a herniated disc. Although the claimant apparently had a previous back injury, no mention was made of the date of that injury in the opinion, and the WCJ found that it had resolved itself shortly thereafter and apparently was not relevant to the present injury.

[7] In a workers' compensation case, the claimant has the burden of proving the causal connection between her alleged disability and the injury she sustained at work. *Fotta v. Workmen's Compensation Appeal Board (U.S. Steel/USX Corporation)*, 534 Pa. 191, 626 A.2d 1144 (1993). That burden is satisfied if she proves her alleged disability either results from the injury or is aggravated, reactivated or accelerated by the injury. "In the event there is no obvious causal connection between the alleged disability and the accident, the claimant can only establish the requisite connection by unequivocal medical testimony." *Id.* at 194, 626 A.2d at 1146.

Unlike in *Cornmesser*, where the nurse/claimant was actually moving a large patient and hurt his back, in this case, the causal connection is not so clear because while Claimant stated that she "went to pick them up" – four large empty cookie sheets, she never testified that she was actually picking them up or how heavy they were. Further, the cause of Claimant's condition was not obvious based on her previous hernia surgery only two months earlier. Therefore, unequivocal medical evidence was necessary to prove the causal connection between the incident at work and Claimant's injury. Here, there was no medical evidence to support that Claimant's attempt to pick up trays caused the hernia because no medical reports supported her testimony. In fact, the medical evidence supported the contrary. Specifically:

- Dr. Kofsky's office notes of December 12, 2005, stated that Claimant's chief complaint was a groin hernia which was symptomatic for about four months prior, i.e., beginning in August, 2005. No mention was made that the hernia was related to the work injury on December 12, 2005;

- Operative report of Dr. Beetle dated January 17, 2006. Hernia repair. No mention was made that the hernia was the result of work injury of any date.

- Reading Surgical Associates Patient Telephone Record dated May 19, 2006, memorializing a telephone call from Claimant requesting a letter stating her hernia surgery was work-related; "Pt aware that nothing was stated about work related but is adamant to get something in writing stating work related." "5/31/06 Per Dr. Beetel we may not give Pt letter stating work related we do not have documentation to back that up."

- Dr. Schmidt, who evaluated Claimant on September 27, 2006, asked Claimant if she had any injuries prior to 3/16/06 which she adamantly denied; he stated Claimant's hernia had been present for several months before

> December 12, 2005, and the incident on that date did not cause the hernia.

Because the cause of Claimant's hernia was not obvious and there was no medical evidence to support her claim petition, the Board properly reversed the WCJ's grant of benefits.

II.

Claimant then argues that the Board erred by reversing the award of penalties for Employer's failure to issue an NCP or an NCD for the hernia injury. In a penalty petition, the claimant bears the burden of proving that a violation of the Act occurred and that it appears on the record. *Shuster v. Workers' Compensation Appeal Board (Pa. Human Relations Commission)*, 745 A.2d 1282 (Pa. Cmwlth. 2000). Section 435 of the Act, 77 P.S. §991, provides that employers and insurers may be penalized a sum not to exceed 10% of the amount awarded and interest accrued and payable or 50% in cases of unreasonable or excessive delay.[8] Where a violation of the Act is shown, the imposition of a penalty is discretionary on the part of the judge. *Arnott v. Workmen's Compensation Appeal Board (Sheehy Ford Sales)*, 627 A.2d 808 (Pa. Cmwlth. 1993). An employer has a duty under Section 406.1 of the Act, added by the Act of February 8, 1972, P.L. 25, 77 P.S. §717.1, to investigate a report of a work injury and to issue an NCP or an NCD within 21 days of receiving notice. *Lemansky v. Workers' Compensation Appeal Board (Hagan Ice Cream Co.)*, 738 A.2d 498 (Pa. Cmwlth. 1999).

[8] *See Becerra v. Workmen's Compensation Appeal Board (Leaseway Systems)*, 586 A.2d 485 (Pa. Cmwlth. 1991).

However, Claimant did not sustain her burden because she failed to provide any evidence at the hearing regarding Employer's failure to issue an NCP or an NCD. She failed to request the WCJ to take administrative notice of the Bureau record, and Employer never admitted to any violation. Therefore, Claimant failed to meet her burden of proving that Employer violated the Act, and the Board properly reversed the WCJ's imposition of the award of penalties.

III.

Claimant argues next that the Board should not have reversed the award of attorney's fees on her claim petition for her hernia injury. Section 440(a) of the Act, 77 P.S. §996(a), provides that a successful claimant is entitled to an award of attorney's fees in addition to compensation unless the employer establishes a reasonable contest. *Ramich v. Workers' Compensation Appeal Board (Schatz Electric, Inc.)*, 564 Pa. 656, 770 A.2d 318 (2001). The existence of a reasonable contest is a question of law. *Crouse v. Workers' Compensation Appeal Board (NPS Energy SVC)*, 801 A.2d 655 (Pa. Cmwlth. 2002). However, because Claimant was not successful in her claim petition, she was not entitled to attorney's fees for the December 12, 2005 injury because Employer's contest was reasonable.

IV.

Finally, Claimant argues that the Board erred by reversing the WCJ's award of attorney's fees on her March 16, 2006 claim petition for injuries to her low back, right shoulder and herniated disc for which she was granted benefits. In the WCJ's order, he states:

> AND NOW, this 9th day of July 2007 it is hereby ORDERED that the claimant's petitions for compensation are GRANTED.
>
> * * *
>
> Defendant shall pay claimant's attorney, Joseph A. Prim, Esquire, a *quantum meruit* fee in the amount of $8,328.30.
>
> Joseph A. Prim, Esquire, attorney for claimant is hereby granted a counsel fee of twenty per cent (20%) of this award payable solely out of claimant's share.

We believe that the Board only reversed the WCJ on Claimant's award of attorney's fees relative to her claim petition for her hernia injury on December 12, 2005, as that is what was on appeal by Employer. In its decision, the Board stated the following:

> Preliminarily, we reverse the Judge's award of counsel fees for an unreasonable contest as to the December 2005 injury. Claimant is no longer the prevailing party and is no longer entitled to an award of counsel fees.

(Board's July 9, 2008 decision at 11.)

However, we are unable to determine whether the *quantum meruit* fee agreement was meant to cover both claim petitions for the separate alleged work injuries, was just meant to cover the injuries related to the March 16, 2006 injuries, or was just meant to cover the alleged hernia injury on December 12, 2005. This leads

us to Employer's challenge which the WCJ never addressed pursuant to Workers' Compensation Rule 131.55[9] as to whether the attorney's fees were excessive.

Accordingly, because we are unable to determine which claim petition was addressed by the WCJ's order and the WCJ never ruled on the *quantum meruit* fee agreement, the matter is remanded to the Board to remand to the WCJ for those determinations. The remainder of the Board's order is affirmed.

DAN PELLEGRINI, JUDGE

[9] 34 Pa. Code §131.55 (Special Rules Before Referees) provides the following:

> Under section 440 of the act (77 P.S. §996), in a disputed claim under the act when the employer or insurance carrier has contested liability in whole or in part, the employe or a dependent, in whose favor the proceeding has been finally decided, will be awarded attorney fees and costs against the employer or insurance carrier, unless the employer or insurer had a reasonable basis for contesting the petition, or otherwise tendered payment under section 440 of the act, in which case attorneys fees will not be awarded.

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O R D E R

AND NOW, this 8th day of December, 2008, because we are unable to determine which claim petition was addressed by the Workers' Compensation Judge's order and the Workers' Compensation Judge never ruled on the *quantum meruit* fee agreement relative to the hernia injury, the matter is remanded to the Board to remand to the Workers' Compensation Judge for those determinations. The remainder of the Board's order dated July 9, 2008, at A07-1597, is affirmed.

Jurisdiction relinquished.

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DAN PELLEGRINI, JUDGE