

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Wilkes-Barre, :
Petitioner :
v. : No. 146 C.D. 2008
Workers' Compensation : Submitted: April 25, 2008
Appeal Board (Lukasavage), :
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: August 14, 2008

The City of Wilkes-Barre (Employer) petitions for review of the order of the Workers' Compensation Appeal Board (Board) affirming, as modified, the decision of a Workers' Compensation Judge (WCJ) dismissing as moot the claim petition of Kenneth Lukasavage (Claimant) filed pursuant to the provisions of the Pennsylvania Workers' Compensation Act.¹ We affirm.

The facts of this case are not in dispute. On October 2, 2004, Claimant was involved in a motor vehicle accident while working as a Sergeant in Employer's police department. As a result of the accident, Claimant has been

¹ Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1 – 1041.4, 2501 – 2708.

diagnosed with a central, left paramedical and intraforaminal shallow herniation at the L5-S1 level, with no compromise of the dural sac or existing roots, and a tear of the annulus fibrosis at the L5-S1 and L4-L5 levels , with a very shallow central herniation at the L4-L5 level associated with minimal protrusion and no compromise of the central canal or existing roots.

Claimant stopped working from October 2, 2004 through February 9, 2005 due to his work-related injuries, when he returned to work in a modified duty capacity with no loss of earnings. Claimant stopped working again on June 28, 2005, and continues to be out of work due to his work-related injuries.

As a result of his work-related injuries, Claimant is receiving medical benefits from Employer pursuant to the statute that is commonly referred to as the Pennsylvania Heart and Lung Act.² Likewise, from October 2, 2004 through

² Act of June 28, 1935, P.L. 477, as amended, 53 P.S. §§ 637 – 638. Section 1 of the Heart and Lung Act states the following, in pertinent part:

(a) [A]ny policeman ... of any city ... who is injured in the performance of his duties ... and by reason thereof is temporarily incapacitated from performing his duties, shall be paid ... by the ... municipality, by which he is employed, his full rate of salary, as fixed by ordinance or resolution, until the disability arising therefrom has ceased.... During the time salary for temporary incapacity shall be paid ... by the ... city ... any workmen's compensation, received or collected by any such employe for such period, shall be turned over ... to such ... city ... and paid into the treasury thereof, and if such payment shall not be so made by the employe the amount so due ... the ... city ... shall be deducted from any salary then or thereafter becoming due or owing.

* * *

(c) In the case of any person receiving benefits pursuant to this act, the statutes of limitations set forth in sections 306.1, 315, 413 and 434 of the [Workers' Compensation Act] shall not begin to run until the expiration of the receipt of benefits pursuant to this act....

(Continued....)

February 9, 2005, and from June 28, 2005 onward, Claimant has received wage benefits from Employer equaling his full salary pursuant to the Heart and Lung Act.

However, Employer did not issue a notice of compensation payable (NCP) recognizing the work-related injuries as compensable under the Workers' Compensation Act, and Claimant did not receive benefits under the Act.³ As a result, on June 8, 2006, Claimant filed the instant claim petition for benefits under the Workers' Compensation Act. In the petition, he alleged, inter alia, that he has suffered disability as a result of the work-related injury for the period of October 3, 2004 through February 7, 2005, and from June 28, 2005 to the present. Hearings before the WCJ ensued. During the pendency of proceedings on Claimant's petition, on September 6, 2006, Employer issued an NCP recognizing Claimant's work-related injuries.

On January 26, 2007, the WCJ issued a decision and order disposing of the petition in which the WCJ noted that the case was scheduled for litigation on December 5, 2006 at which time the parties entered into a stipulation of the facts of this case. Based upon the stipulated facts, the WCJ found, inter alia:

4. Although the foregoing Stipulation recognizes that the Claimant has suffered a legitimate work injury for which a Notice of Compensation Payable has now been issued, the Claimant continues to receive full benefits pursuant to the Pennsylvania Heart and Lung Act from a self-insured entity, thus, no workers' compensation benefits are currently being paid.

53 P.S. § 637(a) & (c).

³ Employer is self-insured for purposes of the Workers' Compensation Act and uses the professional services of Excalibur Insurance as a third-party administrator.

WCJ Decision at 2.

Based on the foregoing, the WCJ made the following relevant conclusions of law:

2. Because the parties have entered into a Stipulation acknowledging that the Claimant suffered a work injury on October 2, 2004, and [Employer] has issued a Notice of Compensation Payable, the outstanding Claim Petition is moot and the parties should be controlled by the Stipulation and Notice of Compensation Payable they have entered into.

3. Because [Employer] is self-insured and is currently paying the Claimant pursuant to the Pennsylvania Heart and Lung Act, there are no workers' compensation benefits being paid to the Claimant. Should circumstances change and the Claimant become eligible for workers' compensation benefits instead of Heart and Lung Benefits, he will be paid in accord with the [Act], minus the attorney fee that he has agreed to pay his counsel.

Id. at 3. Based on the foregoing, the WCJ issued an order dismissing Claimant's claim petition filed pursuant to the Workers' Compensation Act as moot. Id.

On February 15, 2007, Claimant appealed the WCJ's decision to the Board. In his appeal to the Board, Claimant alleged: (1) the WCJ erred in dismissing his claim petition under the Workers' Compensation Act as moot, thereby denying his attorney the fees agreed to under a fee agreement; and (2) the WCJ erred in concluding that he was not eligible for Workers' Compensation benefits, thereby denying his attorney the fees agreed to under a fee agreement.

On December 24, 2007, the Board issued an Opinion and Order disposing of Claimant's appeal. With respect to Claimant's first allegation of error, the Board stated the following, in pertinent part:

Section 442 of the Act, 77 P.S. § 998⁴, provides that counsel fees agreed upon by a claimant and [his] attorney for services performed in matters before a WCJ or the Board shall be approved by a WCJ or the Board providing the fee does not exceed twenty percent.

The WCJ found that because the parties entered into a Stipulation, and [Employer] issued an NCP, Claimant's Claim Petition was moot, and dismissed it. In doing so, the WCJ failed to specifically approve Claimant's Fee Agreement.

Upon review, we believe a modification is warranted. Claimant sustained his work injury on October 2, 2004. He filed his Claim Petition on June 8, 2006, and per the Stipulation negotiated by the parties, [Employer] issued an NCP on September 6, 2006. During this time, Claimant was required to retain Counsel to litigate his claim and negotiate with [Employer] as to the terms of the Stipulation. Counsel presented a Fee Agreement before the WCJ, which Claimant signed. Because the Fee Agreement provides for a twenty percent fee, it is per se reasonable. As such, we will modify the Decision and Order to reflect approval of the Fee Agreement.

Board Opinion at 3-4 (citations and footnote omitted).

With respect to Claimant's second allegation of error, the Board stated the following, in pertinent part:

The WCJ, in this instance, concluded that "should circumstances change and Claimant become eligible for

⁴ Section 442 of the Workers' Compensation Act provides, in pertinent part:

All counsel fees, agreed upon by claimant and his attorneys, for services performed in matters before any workers' compensation judge or the board, whether or not allowed as part of a judgment, shall be approved by the workers' compensation judge or board as the case may be, providing the counsel fees do not exceed twenty per centum of the amount awarded....

workers' compensation benefits instead of Heart and Lung Benefits, he will be paid in accord with the terms of the [Workers' Compensation Act], minus the attorney fee that he agreed to pay his counsel." However, the payment of Heart and Lung benefits does not relieve [Employer] from liability for the payment of workers' compensation benefits. Instead, an employer's obligation to pay Heart and Lung benefits is concurrent with, not in lieu of, its obligation pursuant to the workers' compensation scheme. City of Erie v. WCAB (Annunziata), [575 Pa. 594, 838 A.2d 598 (2003)]. While the Heart and Lung Act provides that any workers' compensation received or collected by the employee for the period of injury shall be turned over to the employer, that Act does not relieve the employer from its continuing obligation to pay workers' compensation benefits for the work injury. Id. Therefore, to the extent that the WCJ phrased his conclusion in terms of "eligibility" for workers' compensation benefits, this conclusion was in error as Claimant remains "entitled" to both Heart and Lung benefits and workers' compensation benefits. Instead the Heart and Lung Act merely requires that he turn over all workers' compensation benefits to [Employer] so long as he is receiving benefits under the Heart and Lung Act.

With respect to the payment of attorney's fees, in Organ [v. Pennsylvania State Police], 535 A.2d 713 (Pa. Cmwlth. 1988)], the claimant was receiving both workers' compensation benefits and gross salary continuation benefits under the Heart and Lung Act. Id. Twenty percent of the claimant's workers' compensation benefits were paid directly to the claimant's attorney, and the balance of the workers' compensation benefits received by the claimant were returned to the claimant's employer, the State Police, as required by the Heart and Lung Act. Id. At issue was whether the fees paid to the claimant's attorney were constructively received by the claimant and thus subject to recovery by the employer under the Heart and Lung Act. Id. The Court concluded that because the claimant was required to relinquish his workers' compensation benefits to the employer, he did not actually, or constructively, receive them, and

therefore, the employer was not entitled to recover the attorney's fees paid out of those benefits. Id.

Although the Court in Organ did not specifically address the issue before us, whether an attorney is entitled to payment of his fee out of the amount of workers' compensation benefits to be returned to the employer, we nonetheless apply its reasoning to conclude that Counsel's fee should be deducted from the amount of workers' compensation benefits that Claimant is entitled to, with the remaining portion to be returned to [Employer]....

Board Opinion at 4-6.

Based on the foregoing, the Board issued the instant order affirming, as modified, the WCJ's order "[t]o reflect approval of the Fee Agreement between Claimant and Counsel, and to allow for the deduction of Counsel's fee from Claimant's workers' compensation benefits with the remainder of Claimant's workers' compensation benefits to be returned to employer until such time as Claimant's Heart and Lung benefits end...." Id. at 7. Employer then filed the instant petition for review.⁵

In this appeal, Employer claims that the Board erred in concluding that workers' compensation attorney fees are payable to a claimant's attorney from a self-insured employer, in addition to Heart and Lung benefits being paid to the claimant where, as here, there is no violation of the Workers' Compensation Act found, or penalty petition granted by, the WCJ.⁶ However, the foregoing claim

⁵ This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, 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).

⁶ Section 440 of the Workers' Compensation Act provides, in pertinent part:

(Continued...)

demonstrates Employer's misapprehension regarding why attorney fees were awarded in this case.

In City of Erie, the Pennsylvania Supreme Court considered the interplay between a claimant's entitlement to both Workers' Compensation Act benefits and Heart and Lung Act benefits, and stated the following, in pertinent part:

[T]he unambiguous language of Section 1(a) of the Heart and Lung Act ... clearly contemplates the ability of an injured employee to seek workmen's compensation. That section provides that any workers' compensation **received or collected** by [the employee for the period of the injury] shall be **turned over**.... 53 P.S. 637(a) (emphasis added). See 1 Pa.C.S.1921 (b) ([w]hen the words of a statute are clear and free from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit"). This language does not estop an injured employee from **seeking** workers' compensation, only from **retaining** monies collected pursuant to a workers' compensation Claim Petition. While the effect of this dichotomy may ultimately be rendered hollow by the set-off, as discussed below, nonetheless the Heart and Lung Act does not relieve the employer from its "continuing obligations to pay workers' compensation benefits for the work injury...." *City of Erie [v. Workers' Compensation Appeal Board (Annuziata)]*, 799 A.2d 946, 952 (Pa. Cmwlth. 2002)]. Likewise, nothing in the Workers' Compensation Act eliminates the responsibility

(a) In any contested case where the insurer has contested liability in whole or in part, ... the employe or his dependent ... 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.... Provided, That cost 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).

of an employer to pay workers' compensation to an injured employee who is receiving Heart and Lung benefits. We agree with the Commonwealth Court that the employers obligation to pay Heart and Lung benefits "is **concurrent with**, not in lieu of, its obligation" pursuant to the workers' compensation scheme. *Id.* (emphasis in original).⁷

* * *

7. Nevertheless, in circumstances where the employer is self-insured, it would be an exercise in futility to mandate that the employer pay benefits to the claimant and then require the claimant to turn around and remit them back to the employer. To avoid this absurdity, in such a situation, it would be proper for the employer to issue a revised NCP and refuse to pay benefits.

City of Erie, 575 Pa. at 604-605, 838 A.2d 604-605.⁷

Likewise, as noted above, Employer is self-insured. Thus, Employer should have issued a notice of compensation recognizing Claimant's injuries, and then the City of Erie principles should have been applied. However, Employer failed to issue the required NCP thereby compelling Claimant to initiate the instant proceedings with his counseled claim petition.

In addition, in Organ, this Court considered whether the attorney fees as part of a Workers' Compensation Act award are recoverable by a self-insured government employer from a claimant under Section 1(a) of the Heart and Lung Act, and stated the following, in pertinent part:

The issue is whether the portion of the workmen's compensation benefits paid directly to the [claimant's]

⁷ See also Tyson v. Workmen's Compensation Appeal Board (City of Chester), 446 A.2d 733, 734 (Pa. Cmwlth. 1982) ("[W]hen a Claimant's disability brings him within the purview of both the Heart and Lung Act and the Workmen's Compensation Act, the ultimate obligation for compensation lies under the Workmen's Compensation Act.") (citations omitted).

attorney] was constructively received by [the claimant] and was therefore subject to recovery by the Commonwealth [as employer] under the Heart and Lung Act.

Because the rules of statutory construction require a literal reading of the statute and because [the claimant] never actually received the portion of the workmen's compensation benefits paid directly to his attorney, nor any benefit therefrom greater than what the Commonwealth [as employer] received, that portion is not subject to recovery by the Commonwealth....

* * *

Although a Heart and Lung Act beneficiary is not required to recover workmen's compensation, if the employee recovers workmen's compensation benefits, he must relinquish them to the employer. Therefore, proceeds which a Heart and Lung Act beneficiary receives from workmen's compensation may inure to the benefit of the employer, at least if insurance is involved, as is the case with respect to many municipal employers of Heart and Lung Act beneficiaries. To make [the claimant] also responsible for the 20% of the workmen's compensation award paid directly to the attorney would penalize pursuance of a process which tends to benefit employers.⁶

* * *

6. In this case the Commonwealth, through the state police, apparently bears the cost of the workmen's compensation payments as well as the Heart and Lung Act payments. Thus, the Commonwealth argues that it did not receive any benefit from [the claimant]'s recovery of workmen's compensation payments. However, because insurance may be involved in many instances as noted above, that argument does not meet the broader implications.

Organ, 535 A.2d at 714, 715.

Based on the foregoing, it is clear that the Board did not err in affirming, as modified, the WCJ's decision in this case. Under City of Erie, it is clear that Claimant was entitled to the issuance of an NCP recognizing his work-related injuries as compensable under the Workers' Compensation Act even though he was receiving Heart and Lung Act benefits. Because Employer failed to issue such an NCP, Claimant was required to retain counsel and initiate the instant workers' compensation proceedings. In addition, under Organ, this Court has specifically recognized that a self-insured employer, such as Employer, must bear the cost of attorney fees related to a workers' compensation award rather than the claimant who is receiving both Workers' Compensation Act benefits and Heart and Lung Act benefits.

Thus, contrary to Employer's assertion, the fact that it is required to pay the attorney fees flowing from the instant workers' compensation award is not based upon the grant of a penalty petition filed pursuant to Section 440 of the Workers' Compensation Act, 77 P.S. § 996(a). Rather, in this case, Employer cannot be reimbursed for the portion of the Workers' Compensation benefits comprised of attorney fees, awarded pursuant to Section 442 of the Workers' Compensation Act, 77 P.S. § 998, because such fees are not recoverable from Claimant. In Organ, this Court specifically recognized that in a case with such a self-insured employer, the payment of the 20% attorney fee should devolve to the self-insured employer rather than be borne by the injured claimant. This allocation of the relative costs is particularly appropriate where, as here, the workers' compensation proceedings were the result of Employer's failure to fulfill its duty to issue an NCP recognizing Claimant's work-related injuries as compensable

under the Workers' Compensation Act.⁸ In short, Employer's allegation of error in this regard is patently without merit.

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

⁸ See Organ, 535 A.2d at 715 (“[P]roceeds which a Heart and Lung Act beneficiary receives from workmen’s compensation may inure to the benefit of the employer, at least if insurance is involved, as is the case with respect to many municipal employers of Heart and Lung Act beneficiaries. To make [the claimant] also responsible for the 20% of the workmen’s compensation award paid directly to the attorney would penalize pursuance of a process which tends to benefit employers.... In this case the Commonwealth ... apparently bears the cost of the workmen’s compensation payments as well as the Heart and Lung Act payments. Thus, the Commonwealth argues that it did not receive any benefit from [the claimant]’s recovery of workmen’s compensation payments. However, because insurance may be involved in many instances as noted above, that argument does not meet the broader implications.”).

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ORDER

AND NOW, this 14th day of August, 2008, the order of the Workers' Compensation Appeal Board, dated December 24, 2007 at No. A07-0337, is AFFIRMED.

JAMES R. KELLEY, Senior Judge