

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ARO Properties,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Workers' Compensation Appeal	:	
Board (Guida),	:	No. 1609 C.D. 2009
Respondent	:	Submitted: December 18, 2009

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McGINLEY

FILED: March 3, 2010

ARO Properties (Employer) petitions for review of the Order of the Workers' Compensation Appeal Board (Board) which affirmed the Workers' Compensation Judge's (WCJ) fifty percent penalty for Employer's failure to pay benefits in accordance with the WCJ's April 30, 2008, Decision and Order.

Salvatore Guida (Claimant) was employed as the superintendent of Employer's property. On January 23, 2005, Claimant was clearing snow when he began to experience back pain, which caused him to fall to the ground and strike his right knee. On January 26, 2005, he returned to work, with ongoing low back and right knee pain. On February 15, 2005, while Claimant was on a ladder repairing a leak in Employer's ceiling his right knee gave way and caused him to fall from the ladder. As a result of the second fall, Claimant experienced an increase in his low back and right knee pain.

On February 18, 2005, Claimant filed a claim petition and alleged that he sustained injuries to his low back and right knee in the course and scope of his employment on January 23, 2005, and February 15, 2005. Claimant further alleged that as a result of each incident he was disabled from returning to his duties.

On August 17, 2006, after hearing, WCJ John Libeau granted the claim petition. He found that Claimant suffered a lumbar herniation at the L5-S1 level, intervertebral disc disorder, lumbosacral radiculopathy, meniscal tear of the right knee, strain and sprain of the right knee/leg, sprain of the medial collateral ligament, sprain of the anterior cruciate ligament and extension of the knee. WCJ Libeau directed Employer to pay Claimant medical benefits beginning January 23, 2005, and indemnity benefits beginning February 15, 2005, and ongoing until modified. Employer appealed the August 17, 2006, Order to the Board. On September 25, 2006, the Board denied Employer's request for supersedeas.

On October 26, 2006, Claimant filed a penalty petition seeking penalties for Employer's unilateral refusal to pay medical and indemnity benefits in accordance with the August 17, 2006, order.

On April 2, 2007, the Board affirmed the WCJ's August 17, 2006, Order, and Employer petitioned for review with the Commonwealth Court.

On October 15, 2007, the Commonwealth Court vacated the Board's April 2, 2007, Order and remanded the matter to the WCJ because portions of the decision were unsupported by the record and were based on incompetent medical testimony. Employer stopped paying Claimant compensation benefits after receiving the Commonwealth Court's October 15, 2007, Order.

Due to WCJ John Liebau's retirement, the matter was remanded to WCJ DiLorenzo along with other petitions that were filed during the pendency of the appeals.<sup>1</sup>

On April 30, 2008, WCJ DiLorenzo circulated a decision and order which granted the remanded claim petition. The decision was 21 pages and included 99 findings of fact. WCJ DiLorenzo concluded that Claimant was entitled to workers' compensation benefits for both work injuries and found Employer liable for payment of benefits for the January 23, 2005, work injury. She suspended benefits relative to the February 15, 2005, work injury:

The Judge concludes that as a **result of the Claimant's work injury of January 23, 2005**, and in compliance with the terms of the Pennsylvania Workers' Compensation Act, the Defendant [Employer] is and was liable for the payment of Workers' Compensation Benefits to or on behalf of the Claimant, particularly workers' compensation indemnity benefits at the rate of \$433.33 per week for total disability on the basis of a pre-injury average weekly wage of \$650.00 from February 15, 2005, and until an alteration of them in accordance with the terms of the Pennsylvania Workers' Compensation Act, medical expenses, litigation expenses in accordance with the terms of Provision Number 97 of the Findings of Fact, and statutory interest at the rate of ten percent (10%) per annum on all deferred amounts of Workers' Compensation Benefits. The Judge concludes that the Defendant [Employer] may suspend, and may have suspended, the Claimant's Workers' Compensation Benefits **for the work injury of February 15, 2005**, after February 15, 2005, and in compliance with the terms of the Pennsylvania Workers' Compensation Act. The Judge concludes that the Defendant

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<sup>1</sup> During the pendency of the appeals Claimant filed the aforementioned penalty petitions. Employer filed a petition to terminate, a petition to review medical treatment and a petition to review utilization review determination. These petitions were assigned to the WCJ and consolidated with the remanded claim petition.

[Employer] may take a credit for the paid amounts of Workers' Compensation Benefits against the due amounts of Workers' Compensation Benefits.

WCJ Decision and Order, April 30, 2008, at 20 (Emphasis added).

Employer appealed the April 30, 2008, Order. Claimant also appealed because WCJ DiLorenzo did not address the penalty petitions. On February 9, 2009, the Board vacated WCJ DiLorenzo's April 30, 2008, order and remanded the matter for further findings and a determination on the merits of all petitions.

In the meantime, Employer did not make payment as provided in WCJ DiLorenzo's April 30, 2008, Decision within 30 days. Employer misunderstood WCJ DiLorenzo's Order and believed that it was not required to pay benefits for either injury after February 15, 2005.

On June 17, 2008, Claimant filed a third penalty petition for Employer's failure to pay him compensation benefits in accordance with the April 30, 2008, decision. The June 17, 2008, penalty petition was also assigned to WCJ DiLorenzo although it was not consolidated with the other petitions.

On August 20, 2008, the parties appeared before WCJ DiLorenzo. Employer stipulated that it had last paid Claimant compensation benefits in October 2007, after receiving the Commonwealth Court's October 15, 2007, Opinion and Order. Hearing Transcript (H.T.), August 20, 2008, at 3; Reproduced Record (R.R.) at 4a. Claimant testified he had not been paid compensation benefits since October of 2007. The record reflects that Employer was not granted supersedeas with regard to the April 30, 2008 Decision.

On December 17, 2008, WCJ DiLorenzo granted Claimant's June 17, 2008, penalty petition because Employer failed to make timely payments of indemnity benefits for the work injury of January 23, 2005. She denied Claimant's penalty for Employer's failure to make timely payment of medical benefits for the work injury of January 23, 2005. In rendering this determination, WCJ DiLorenzo found that Claimant satisfied his burden of proving that Employer failed to pay worker's compensation benefits in accordance with the April 30, 2008, Decision, but failed to satisfy his burden of proving that the request for payment of medical benefits was made in accordance with the reporting requirements of the Act. WCJ DiLorenzo's awarded Claimant fifty-percent penalties and unpaid indemnity for the period of February 15, 2005, forward.

Both parties appealed WCJ DiLorenzo's December 17, 2008, Decision to the Board. On January 29, 2009, the Board granted Employer's request for supersedeas with regard to WCJ DiLorenzo's award of a penalty only. On July 21, 2009, the Board affirmed the WCJ's award of a penalty on Employer's non-payment of indemnity benefits and the WCJ's denial of a penalty on Employer's non-payment of medical benefits. The Board also vacated WCJ DiLorenzo's December 17, 2008, Decision to the extent that the WCJ addressed and made findings on evidence that was submitted in support of the prior remanded claim petition, termination petition, penalty petitions, utilization review and medical treatment petitions, noting that these petitions had not been consolidated with the June 17, 2008, penalty petition.

On appeal<sup>2</sup>, Employer asserts that WCJ DiLorenzo and Board erred when the penalty petition was granted. Employer contends that WCJ DiLorenzo's April 30,

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<sup>2</sup> This Court's scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law or whether necessary findings of fact **(Footnote continued on next page...)**

2008, Decision specifically authorized Employer to “suspend benefits” after February 15, 2005. According to Employer, Claimant’s disability occurred *after* the February 15, 2005, injury because Claimant continued to work after his January 23, 2005, injury. Because WCJ DiLorenzo “suspended” benefits after February 15, 2005, Employer asserts this meant that no benefits were due and owing Claimant.

In penalty proceedings, a claimant has the burden of proving that the defendant violated a provision of the Act. Sanders v. Workers’ Compensation Appeal Board (Sanders), 756 A.2d 129 (Pa. Cmwlth. 2000). Section 428 of the Workers’ Compensation Act, 77 P.S. §921<sup>3</sup>, requires the employer to make payments within 30 days of the date its obligation to pay arises. Section 430 of the Act, 77 P.S. §971, requires the employer to make payments provided for in a decision unless supersedeas is granted. An employer violates Section 428 of the Act, 77 P.S. §921, if it does not begin to make payments within thirty days of the date on which its obligation to pay arises. Cunningham v. Workmen’s Compensation Appeal Board (Inglis House), 627 A.2d 218 (Pa. Cmwlth. 1993). Furthermore, the employer is obligated to commence payments to the claimant within thirty days after its supersedeas request has been denied. Id.

Here, Claimant suffered two injuries. The first injury was on January 23, 2005, the second injury occurred on February 15, 2005. WCJ DiLorenzo’s April 30, 2008, Order, clearly ordered payment of disability benefits for the work injury of January 23, 2005, beginning February 16, 2005. WCJ DiLorenzo stated in this regard:

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**(continued...)**

are supported by substantial evidence. Stables v. Workers’ Compensation Appeal Board (Wyatt), 739 A.2d 1084 (Pa. Cmwlth. 1999).

<sup>3</sup> Act of June 2, 1915, P.L. 736, as amended.

“as a result of the Claimant’s work injury of January 23, 2005, ... [Employer] is and was liable for the payment of ... indemnity benefits ... *from February 15, 2005, and until an alteration of them in accordance with the terms of the Pennsylvania Workers’ Compensation Act.*” WCJ Decision and Order, April 30, 2008, at 20 (Emphasis added). WCJ DiLorenzo then suspended benefits related to the February 15, 2005, injury to avoid an award of benefits for the two injuries at the same time. She stated in this regard: “[Employer] may suspend, and may have suspended, the Claimant’s Workers’ Compensation Benefits *for the work injury of February 15, 2005, after February 15, 2005.*” *Id.* Contrary to Employer’s assertion, this did not authorize a suspension of *all* benefits or mean that *no* benefits were due and owing Claimant.

Employer also contends that the June 17, 2008, penalty petition should have been denied because the underlying Order granting benefits had been vacated and sent back to WCJ DiLorenzo for consideration. Employer claims that there was no current entitlement to benefits and no prejudice to Claimant. Again, this Court must disagree.

As emphasized by Claimant, the Board’s Order vacating and remanding DiLorenzo’s WCJ’s April 30, 2008, Order was not issued until February 9, 2009. This does not in any way, shape or form excuse Employer’s failure to timely pay benefits prior to February 9, 2009.

Because the April 30, 2008, Decision explicitly and unambiguously directed Employer to pay indemnity benefits relating to Claimant’s January 23, 2005, work injury at the rate of \$433.33 from February 15, 2005, onward and continuing until modified in accordance with the provisions of the Act, and because Employer failed to

pay compensation benefits awarded on April 30, 2008, the WCJ did not abuse her discretion in assessing a fifty-percent penalty.

Accordingly, the Order of the Board is affirmed.

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BERNARD L. McGINLEY, Judge



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	:	Respondent

**ORDER**

AND NOW, this 3rd day of March, 2010, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby affirmed.

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BERNARD L. MCGINLEY, Judge