

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

George Group, :  
Petitioner :  
 :  
v. : No. 1710 C.D. 2007  
 : Submitted: December 21, 2007  
Workers' Compensation Appeal :  
Board (Asplundh Tree Experts), :  
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE DAN PELLEGRINI, Judge  
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE McCLOSKEY

FILED: January 29, 2008

George Group (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board which reversed, in part, an order of a Workers' Compensation Judge (WCJ) and denied Claimant's penalty petition pursuant to the provisions of the Pennsylvania Workers' Compensation Act (Act).<sup>1</sup> We affirm.

Claimant was employed by Asplundh Tree Experts (Employer) for approximately forty-three years. On July 20, 2003, he was cutting a tree with a chain saw, when the chain saw became stuck in the tree. While pushing on the chain saw to loosen it, Claimant heard a crack in his back. The following day he sought medical treatment for back pain. Claimant's back pain persisted. Nevertheless, he continued to work.

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<sup>1</sup> Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§1-1041.4; 2501-2626.

On July 20, 2004, Employer issued a notice of compensation denial (NCD). Employer acknowledged liability for a work-related low back strain, but asserted that Claimant was not disabled within the meaning of the Act. At the time the NCD was issued, Claimant was still working for Employer. Claimant continued to work until August 10, 2004, at which time Claimant's doctor determined that Claimant was unable to work.

On February 4, 2005, Claimant filed a claim petition alleging that he sustained a work-related back injury. On December 9, 2005, Claimant filed a review petition and a reinstatement petition. The review petition sought to amend the acknowledged work-related injury to include spondylolisthesis and aggravation of degenerative disc problems. The reinstatement petition alleged that Claimant's injury caused a decrease in his earning power such that he was entitled to total disability benefits as of August 10, 2004.

On December 9, 2005, Claimant also filed a penalty petition, which alleged that Employer had violated the Act in issuing a NCD. Claimant alleged that Employer should have issued a notice of compensation payable (NCP) acknowledging liability for medical benefits only. Employer then filed a termination petition, alleging that Claimant had fully recovered from his work-related injury by September 9, 2004.

The five petitions were consolidated before the WCJ and a hearing was held. Following the conclusion of testimony, the WCJ found that Claimant was entitled to an award of total disability benefits beginning on August 10, 2004. The WCJ also determined that Claimant met his burden of proof as to the review petition. As such, Claimant's accepted work-related injury was amended to include spondylolysis and aggravation of degenerative disc problems. The WCJ further held that Claimant had met his burden of proof as to his reinstatement petition.

As to Claimant's petition for penalties, the WCJ determined that Employer had violated the Act by issuing a NCD. The WCJ found that Employer should have issued a NCP acknowledging liability for medical benefits only. The WCJ found that Employer was aware that Claimant had sustained an injury, yet refused to pay Claimant wage loss benefits. The WCJ awarded Claimant twenty-five percent of the past-due benefits. Additionally, Employer's termination petition was denied.

Employer appealed the denial of its termination petition and the grant of Claimant's claim, review, reinstatement and penalty petitions to the Board. The Board affirmed the decision of the WCJ as to the termination, claim, review and reinstatement petitions. However, the Board reversed the WCJ's determination as to Claimant's penalty petition.

As to the penalty petition, the Board noted that on July 20, 2004, Employer issued the NCD, acknowledging that Claimant had sustained a work-related injury, but denying benefits on the basis that Claimant's injury had not resulted in a disability. At the time the NCD was issued, Claimant was working. Claimant did not allege that he was unable to work due to his work-related disability until August 10, 2004.

The Board stated that at the time Employer issued the NCD, a requirement had been in place for barely two months obligating Employer to issue a medical only NCP. The WCJ stated that it was assessing a penalty based on Employer's unreasonable delay in paying benefits. However, the Board determined that Employer's "delay in paying Claimant's wage loss benefits was not due to its filing of the improper bureau document, but was due to its contesting the work-relatedness of Claimant's disability, which had not yet occurred or been established." (R.R. at 28). While the Board concluded that Employer had technically violated the Act in filing the NCD, it concluded that this did not cause a delay in paying Claimant's benefits. The Board

concluded that the delay actually occurred due to Employer's reasonable contest of Claimant's disability. Therefore, Employer's error in filing the wrong form was de minimis.

Claimant now appeals the Board's decision reversing the WCJ's award of penalties to this Court. Claimant alleges that the Board failed to provide valid reasons for overturning the award of penalties and erred in reversing the award of penalties without discussing whether or not said award constituted an abuse of the WCJ's discretion.

The WCJ determined that Employer was obligated to file a NCP, based on this Court's decision in Ruth Family Medical Center v. Workers' Compensation Appeal Board (Steinhouse), 718 A.2d 397 (Pa. Cmwlth. 1998). However, in Ruth Family Medical Center, we did not address the applicability of a NCD.

In Ruth Family Medical Center, a claimant sustained injuries in a motor vehicle accident and the employer contested liability. The WCJ determined that the claimant had suffered a work-related injury and was entitled to payment of medical expenses. However, the WCJ determined that the claimant had not established that the injury had caused a loss of earnings. As such, the WCJ granted a suspension of compensation benefits as of the date of the injury. The WCJ's opinion was affirmed by the Board.

On appeal to this Court, the employer argued that the WCJ erred in granting the claim and suspending benefits, as the claimant had failed to establish that she had sustained a disability due to the work-related injury. We disagreed, concluding that if it is established that a claimant has suffered a work-related injury entitling her to the payment of medical expenses, but is unable to establish any loss of earnings, it is proper to grant a suspension of benefits.

In the present action, the Board determined that Employer was obligated to file a NCP, as opposed to a NCD, based on a new NCP promulgated by the Bureau of Workers' Compensation on May 29, 2004, and discussed in Orenich v. Workers' Compensation Appeal Board (Geisinger Wyoming Valley Medical Center), 863 A.2d 165 (Pa. Cmwlth. 2004), petition for allowance of appeal denied, 584 Pa. 682, 880 A.2d 1242 (2005).

In Orenich, an employer failed to issue a NCP or a NCD within twenty-one days of receiving notice of a claimant's injury, but the WCJ did not impose a penalty. The WCJ found that the employer was not obligated to issue a NCP or a NCD as the claimant had sustained an injury, but not a disability, due to the fact that a loss of earning power was not alleged. On appeal to this Court, we determined that employer was required to file a NCP or a NCD within twenty-one days of receiving notice of an alleged injury. As such, we concluded that the WCJ had abused his discretion in finding that the employer was only obligated to issue a NCP or a NCD where a disability had occurred.

We further noted in Orenich that, in 2004, a new NCP form added a checkbox that permitted an employer to check that it was providing compensation for medical treatment, but not for wage loss. We stated that employers were now obligated to use this form when accepting liability for "medicals only." This was not applicable to the claimant in Orenich as his injury had occurred in 2000.

However, in a recent opinion in Armstrong v. Workers' Compensation Appeal Board (Haines & Kibblehouse, Inc.), 931 A.2d 827 (Pa. Cmwlth. 2007), we distinguished our ruling in Orenich and concluded that it was also proper for an employer to file a NCD when accepting an injury, but disputing disability, as long as the employer set forth the nature of the injury that was being accepted.

In Armstrong an employer issued a notice of temporary compensation payable (TNCP) indicating that the claimant had sustained a work-related injury to his left lower arm and left shoulder. The employer later issued a notice stopping the NTCP and issued a NCD indicating that the employee had sustained a work-related injury, but was not disabled as a result of the injury within the meaning of the Act.

The employer later sought utilization review (UR) of the claimant's chiropractic treatment. The WCJ determined that the treatment was not medically necessary. The claimant appealed, alleging that the employer was not legally permitted to seek UR while contesting the claimant's disability status. The Board disagreed and the claimant appealed to this Court. On appeal, the claimant alleged that in filing a NCD, the employer had failed to properly acknowledge his injuries. The claimant alleged that the employer improperly requested UR, because employer failed to issue a "medical only" NCP.

This Court explained that following notice of an injury, an employer has twenty-one days in which to issue a NCP or a NCD. We noted that "[a]n employer may properly file an NCD when, although it acknowledges that a work-related injury has occurred, there is a dispute regarding the claimant's disability." Armstrong, 931 A.2d at 829-30. We further noted that "[o]n the NCD form prescribed by the Department-LIBC-496, the employer is given the option of acknowledging the occurrence of a work-related injury but declining to pay worker's compensation benefits because the employee is not disabled as a result of his injury within the meaning of the Act." Armstrong, 931 A.2d at 830.

However, while we determined in Armstrong that the filing of a NCD was permissible, we stated that when an employer accepts an injury pursuant to a NCD, the

employer must state the nature of the injury that is being accepted. We explained as follows:

In this case, Employer, while choosing to pay for medicals only, did not file a ‘medical only’ NCP. Instead, Employer issued an NTCP, which fully described the injury, followed by an NCD, which while contesting the claim for loss of earning power, did acknowledge and accept the injury previously described in the NTCP. Employer utilized this procedure due to the initial uncertainty as to whether Claimant’s injury amounted to a loss of earning power. While employer could have issued a medical only NCP, the issuance of a NTCP followed by an NCD, challenging the length and extent of disability, not the injury itself, was proper under the circumstances, and ultimately served the same objective as filing a medical only NCP-accepting liability for the medical component of the work injury.

Armstrong, 931 A.2d at 832. We explained that as the NTCP contained a full description of the injury, the employer was entitled to seek UR. We noted that if the nature of the work-related injury had not been established in the NTCP, the employer would not have been able to seek UR, as the nature of the work injury was not stated in the NCD.<sup>2</sup>

In the present case, Employer did not issue a NTCP. However, in the NCD, Employer acknowledged that an injury took place and described the nature of the injury as a “Strain Low Back.” (R.R. at 70). As such, Employer properly described the injury and, therefore, did not violate the Act in filing a NCD.

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<sup>2</sup> In Orenich, the employer did not issue a timely NTCP, NCP or NCD. As such, no description of the accepted injury was provided.

As the Act was not violated, Claimant was not entitled to an award of penalties. Accordingly, the order of the Board is affirmed.<sup>3</sup>

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JOSEPH F. McCLOSKEY, Senior Judge

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<sup>3</sup> The Board reversed the award of penalties based on its determination that the NCD was improperly filed, but did not delay the case. We reject this determination by the Board, concluding instead that the NCD was not improperly filed. However, we affirm the order of the Board, as we are permitted to affirm on grounds different than those relied on by the Board, as long as such grounds appear in the factual record of the case. Motor Coils MFG/WABTEC v. Workers' Compensation Appeal Board (Bish), 853 A.2d 1082 (Pa. Cmwlth. 2004), affirmed, 590 Pa. 109, 912 A.2d 212 (2006).



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**ORDER**

AND NOW, this 29<sup>th</sup> day of January, 2008, the order of the Workers' Compensation Appeal Board is affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge