IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Metro Staffing, Inc., Petitioner	:	
v.	:	No. 2145 C.D. 2007
Workers' Compensation Appeal Board (Wright, State Workers' Insurance Fund and Continental Casualty Company), Respondents	:	Submitted: April 11, 2008

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: September 5, 2008

Metro Staffing, Inc. (Employer) petitions for review of an order of the Workers' Compensation Appeal Board (Board), which affirmed the decision of a workers' compensation judge (WCJ) granting Samuel Wright's (Claimant) claim petition and determining that Employer, not State Workers' Insurance Fund (SWIF), was responsible for the claim. We affirm.

The facts of this case are as follows. Employer is a temporary employment agency with offices in Pennsylvania and Delaware. Claimant was employed by Employer and assigned by Employer's Delaware Office to work for Tasty Baking Company (Tasty) in Oxford, Pennsylvania. On October 21, 2002, Claimant filed a claim petition seeking total disability benefits for a work-related

shoulder injury, consisting of a partial tear of the rotator cuff, with impingement and an aggravation of previously quiescent arthritis, which occurred in May of 2002, while working as a packer for Tasty in Oxford, Pennsylvania. Claimant also filed two penalty petitions alleging that Employer had violated the Workers' Compensation Act[1] (Act) by failing to promptly investigate the injury, failing to timely accept or deny the claim, and failing to insure payment of worker's compensation. Multiple joinder petitions were filed against SWIF, Continental Casualty Company (CNA), Wilmington Friends School (Friends) and Tasty Baking Oxford, Inc. (Tasty). The joinder petitions against Friends and Tasty were dismissed by interlocutory orders. Hearings before the WCJ then ensued.

At the hearings, Claimant testified and presented the deposition testimony of William A. Newcomb, M.D., an orthopedic surgeon, which was the only medical evidence presented. Employer presented the testimony of lay witnesses. Based upon the testimony and evidence presented, the WCJ made the following relevant findings and conclusions.

The WCJ found that Claimant slipped and fell on May 16, 2002, injuring his right elbow and right shoulder, while working at Tasty through Employer's Delaware Office. Claimant sought treatment with his family physician two weeks later and ultimately came under the care of Dr. Newcomb. The WCJ accepted Dr. Newcomb's testimony that the work accident caused a partial tear of the rotator cuff with impingement and shoulder joint arthritis. The WCJ further credited Dr. Newcomb's opinion that as of his last examination of Claimant on January 28, 2004, Claimant could not return to his pre-injury position, but could perform light-duty work lifting up to 25 pounds, no higher than waist level. The

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

WCJ further found that two employees of Employer testified that while Claimant's petitions were pending, Claimant came in to discuss some jobs that were available. Claimant advised them he was only available for light duty work. Claimant was not considered for the positions due to the pending claims.

With regard to liability, the WCJ found that Employer used an agent, Hare and Chase, to purchase compensation coverage from CNA for Employer's Delaware office. Employer secured workers' compensation coverage for its Pennsylvania office from SWIF. The WCJ found that Employer provided Tasty with a certificate of insurance issued by Hare and Chase. The WCJ found that SWIF's administrative officer testified that he knew Employer had offices in Pennsylvania and Delaware and that SWIF provided workers' compensation coverage for Pennsylvania and for Pennsylvania injuries. However, SWIF did not know that Employer had any employees working at Tasty and did not issue a certificate of insurance or an alternate employer endorsement for Tasty.

The WCJ concluded that Employer at all times, made a reasonable effort to obtain workers' compensation insurance for both the State of Delaware and the State of Pennsylvania. The WCJ concluded that Tasty cannot be responsible because Tasty paid Employer for covered employees and was entitled to rely on the certificate of insurance issued to it. The WCJ concluded that CNA cannot be responsible as they issued a policy of insurance for the State of Delaware only and jurisdiction lies in Pennsylvania.

By decision dated May 9, 2005, the WCJ granted Claimant's claim petition and awarded ongoing disability benefits. The WCJ concluded that Employer properly obtained insurance coverage for both Pennsylvania and Delaware, through SWIF and CNA, respectively; CNA does not provide coverage for Employer outside of Delaware. The WCJ determined that SWIF was

responsible for Claimant's benefits, notwithstanding the fact that Claimant was employed through Employer's Delaware office. The WCJ granted the joinder petition against SWIF, finding that it provided coverage for Claimant's claim. The WCJ dismissed the joinder petition filed against CNA and renewed his dismissal of Tasty as a defendant. The WCJ denied Claimant's penalty petitions upon concluding that no violation of the Act occurred because Employer maintained appropriate insurance coverage at all times.

From this decision, SWIF and Employer filed cross appeals. The Board concluded that the WCJ erred in determining that SWIF was the responsible carrier because SWIF did not intend to cover any temporary employees placed with alternate employers not listed on its contract and thus reversed this portion of the WCJ's decision. Other portions of the decision were affirmed and vacated, and the matter was remanded to the WCJ.

On remand, the WCJ incorporated its previous findings, and by decision dated August 25, 2006, the WCJ again granted Claimant's claim petition and awarded ongoing total disability benefits. However, the WCJ concluded that Employer, not SWIF, was the responsible party for the claim. In the decision, the WCJ expressly noted that he disagreed with the Board's conclusion that SWIF did not provide coverage for the claim.[2] The WCJ awarded Claimant litigation costs, but instructed that payment be deferred pending appeal.

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[2] The WCJ noted:

> "I respectfully disagree with the Board's determination. The Board's conclusion would imply that [Employer] was uninsured at the time of this incident, a conclusion, which is at odds with the findings of my previous Decision, which is incorporated, herein. I found as fact that [Employer] had purchased insurance, and was properly covered. Ultimately, the Commonwealth court will have

(Continued....)

From this decision Employer, SWIF and Claimant filed cross appeals of various aspects with the Board. The Board affirmed in part, reversed in part and modified in part. The Board affirmed the grant of the claim petition and award of ongoing total disability benefits, the conclusion that Employer was responsible for this claim, and the denial of penalties of *quantum meruit* counsel fees. The Board reversed the WCJ's decision to the extent he ordered the reimbursement of litigation costs be stayed pending appeal. The Board modified the WCJ's decision by ordering Employer to reimburse SWIF for benefits that SWIF had paid after the WCJ issued its original order.

From this decision, Employer filed a timely petition for review with this Court. Employer raises the following issues for our review:

1. Whether the Board erred as a matter of law by reversing the WCJ's original determination that SWIF provided coverage for this claim, and subsequently ordering that Employer reimburse SWIF for the monies that it paid to Claimant.

2. Whether the Board erred as a matter of law by affirming the WCJ's determination that CNA did not provide coverage for this claim.

3. Whether the Board erred as a matter of law by affirming the WCJ's conclusion that Claimant was entitled to ongoing total disability benefits even though Claimant effectively admitted that he could return to heavy duty work as of August 16, 2004.

> to determine the responsible party. Unfortunately, as a result of the Board's order, I must impose liability on [Employer].

Reproduced Record (R.R.) at 860a.

First, Employer asserts that the WCJ and Board erred as a matter of law in determining that SWIF was not responsible for Claimant's workers' compensation claim and that Employer had no applicable insurance coverage for this claim because the contract is ambiguous and should be construed in favor of the insured. We disagree.

Generally, the interpretation of insurance contracts is a question of law that properly may be decided by the court rather than a jury. Standard Venetian Blind Co. v. American Empire Insurance Co., 503 Pa. 300, 469 A.2d 563 (1983); Gonzalez v. United States Steel Corp., 484 Pa. 277, 398 A.2d 1378 (1979). Where a provision of a policy is ambiguous, the policy is to be construed in favor of the insured, who typically lacks bargaining leverage regarding the terms of the coverage, and against the insurer, the drafter of the agreement. Rusiski v. Pribonic, 511 Pa. 383, 515 A.2d 507 (1986); Standard Venetian Blind, 503 Pa. at 305, 469 A.2d at 566. Where, however, the language of the contract is clear and unambiguous, a court is required to give effect to that language. Id. A court may neither rewrite the terms of a policy nor bestow upon the words a construction that is belied by the accepted and plain meaning of the language used. Loomer v. M.R.T. Flying Service, Inc., 558 A.2d 103 (Pa. Super. 1989).

The threshold determination of whether a writing is clear and unambiguous necessarily lies with the court. Hutchison v. Sunbeam Coal Corp., 513 Pa. 192, 519 A.2d 385 (1986). A contract is "ambiguous" where "it is reasonably susceptible of different constructions and capable of being understood in more than one sense." Id. at 201, 519 A.2d at 390. Ambiguous terms are subject to "more than one interpretation when applied to a particular set of facts." DiFabio v. Centaur Insurance Co., 531 A.2d 1141, 1143 (Pa. Super. 1987); Techalloy Co. v. Reliance Insurance Co., 487 A.2d 820, 823 (Pa. Super. 1984).

With these principles in mind, we shall examine the insurance contract to determine whether the language is ambiguous as argued by Employer. Here, SWIF's policy lists the insured as "Performance Staffing, Inc." R.R. at 282a. SWIF was aware that this was a fictitious name for Employer and was provided with a copy of the fictitious name filing. R.R. at 236a, 394a-397a. General Section E. of policy provides that it "covers all of your workplaces in Items 1 or 4 of the Information Page; and it covers all other workplaces in Item 3.A. states unless you have other insurance or are self-insured for such workplaces." R.R. at 274a. Item 3.A. of the policy's Information Page provides "WORKERS COMPENSATION INSURANCE: PART ONE OF THE POLICY APPLIES TO THE WORKERS COMPENSATION LAW OF THE STATE OF PENNSYLVANIA." R.R. at 282a.

The workplace listed in Item 1 of the Information Page is the Performance Staffing Inc. office at 6226 Bustleton Avenue, Philadelphia. R.R. at 282a. The workplaces listed in Item 4 are 837 DeKalb Street, Norristown, and 6226 Bustleton Avenue. R.R. at 282a-284a. The Alternate Employer Endorsement provides:

> This endorsement applies only with respect to bodily injury to your employees while in the course of special or *temporary employment by the alternate employer in the state named in Item 2 of schedule*.

R.R. at 302a (emphasis added). Item 2 of the schedule lists various customers to which Employer supplied temporary labor. R.R. 303a-310a, 346a-353a. However, Tasty is not named in Item 2 of the schedule of the Alternate Employer Endorsement. R.R. 243a, 303a-310a, 346a-353a. While Item 3.A. covers all other workplaces in the state of Pennsylvania unless other insurance is secured for such workplaces, the Tasty workplace was insured by the CNA policy. R.R. 710a.

Contrary to Employer's assertions, the policy is not ambiguous. The SWIF policy only covered Employer's workplaces identified in Items 1 and 4, those identified in the Alternate Employer Endorsement, and Pennsylvania workplaces not covered by other insurance. The Delaware office, where Claimant was employed, is not listed in Item 1 or 4. Tasty is not named in Item 2 of the schedule of the Alternate Employer Endorsement. R.R. 243a, 303a-310a, 346a-353a. While the application for the SWIF policy listed an address for Employer in Newark, Delaware and stated that Employer was a Delaware corporation (R.R. at 319a), the Delaware office was not included in the policy.

At the time of the injury, Claimant was an employee of Employer's Delaware office and assigned to Tasty in Oxford, Pennsylvania, where he sustained an injury. Claimant filed a claim petition for workers' compensation in Pennsylvania. Claimant was not an employee of Employer's Pennsylvania workplaces as set forth in the policy and Tasty was not included as an alternate employer on the SWIF policy. While we agree with the WCJ's observation that Employer "at all times, made a reasonable effort to obtain workers' compensation insurance for both the State of Delaware (CNA) and the State of Pennsylvania (SWIF)," unfortunately, Employer's efforts fell short of securing the necessary coverage for Claimant's Pennsylvania claim. For these reasons, this Court concludes that the Board did not err in determining that Employer was responsible for the claim.

Alternatively, Employer contends that the WCJ and Board erred in determining that CNA is not responsible for this claim. We disagree.

Employer's Delaware office secured workers' compensation insurance through CNA for its Delaware employees. A certificate of liability was issued to Tasty indicating that workers' compensation insurance was provided by

CNA. R.R. at 710a. However, the CNA policy applies to the workers' compensation law of Delaware only. R.R. at 609a. Claimant's claim was not filed under Delaware's workers' compensation law, but under Pennsylvania's. As a result, CNA is not responsible for this claim. Nevertheless, we note that had Claimant filed a claim petition for workers' compensation benefits in the state of Delaware, Claimant may have been eligible for benefits pursuant to 19 Del.C. §2303[3] and CNA may have been liable for the claim, even though the injury occurred in Pennsylvania. Unfortunately, that is not the case here.

Finally, Employer asserts that the WCJ erred in determining that Claimant established that he was entitled to ongoing disability benefits. We disagree.

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[3] Section 2303 provides:

> (a) If an employee, while working outside the territorial limits of this State, suffers an injury on account of which the employee, or in the event of the employee's death the employee's dependents, would have been entitled to the benefits provided by this chapter had such injury occurred within this State, such employee, or in the event of the employee's death resulting from such injury the employee's dependents, shall be entitled to the benefits provided by this chapter, provided that at the time of such injury:
>
> (1) The employee's employment is principally localized in this State; or
>
> (2) The employee is working under a contract of hire made in this State in employment not principally localized in any state; or
>
> (3) The employee is working under a contract of hire made in this State in employment principally localized in another state whose workers' compensation law is not applicable to the employee's employer; … .

Pennsylvania contains a corresponding provision at Section 305.2 of the Act, added by the Act of December 5, 1974, P.L. 782, 77 P.S. §411.2.

In a claim petition contest, the claimant has the burden of establishing all of the necessary elements to support an award, and included therein is the burden to establish the duration and extent of the disability alleged. Inglis House v. Workmen's Compensation Appeal Board (Reedy), 535 Pa. 135, 634 A.2d 592 (1993); Bryn Mawr Hospital v. Workers' Compensation Appeal Board (O'Connor and Self-Insured c/o Qualmed/Comptek), 701 A.2d 805 (Pa. Cmwlth. 1997).

Here, the WCJ found that Claimant had established ongoing disability. The WCJ relied upon the testimony of Claimant and his medical expert, Dr. Newcomb, which the WCJ found credible. Claimant testified before the WCJ that he slipped and fell at work injuring his right shoulder and that he could no longer work as a result of this injury. By deposition testimony dated March 23, 2004, Claimant testified that he was still treating with Dr. Newcomb for continuing problems with his right shoulder. By deposition testimony dated September 1, 2004, Dr. Newcomb testified that Claimant sustained a work-related injury to his right shoulder, and that as of his examination on January 28, 2004, Claimant could no longer do heavy work or above-shoulder work due to increased symptoms and could no longer perform his time of injury job. R.R. at 743a-748a. While Dr. Newcomb testified that he had not seen Claimant since January 28, 2004 and recognized the possibility that Claimant could be fully recovered from his injury (R.R. at 755a), such a concession does not undermine Dr. Newcomb's unequivocal testimony as of the date of his examination that Claimant could no longer perform his time of injury job. Shaffer v. Workmen's Compensation Appeal Board (Weis Markets), 667 A.2d 243 (Pa. Cmwlth. 1995), petition for allowance of appeal denied, 544 Pa. 618, 674 A.2d 1079 (1996) (even if a medical expert admits to uncertainty, reservation or lack of information with respect to medical details, the testimony remains unequivocal so long as the expert expresses a belief that, in

his or her professional opinion a fact exists). Neither Employer nor SWIF or CNA presented any medical evidence regarding Claimant's condition to dispute Dr. Newcomb's testimony.

Employer further argues that Claimant's own conduct suggests that as of August 2004 he was not disabled because he applied for two positions with Employer in August 2004 that required heavy lifting. Employer directs our attention to the testimony offered by Employer's witnesses, George Dyke and Kristen Floyd, that Claimant applied for these heavy lifting positions and did not mention any medical restrictions to them. The WCJ found that once Mr. Dyke realized Claimant had a pending claim against Employer, Mr. Dyke would not consider Claimant for any jobs, notwithstanding that Claimant advised him that he was available for some light duty work. R.R. at 832a. Claimant did not go to work at any of the heavy jobs discussed. We, therefore, conclude that the WCJ did not err in determining that Claimant was entitled to ongoing disability benefits.

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

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O R D E R

AND NOW, this 5th day of September, 2008, the order of the Workers' Compensation Appeal Board, at A06-2124 and A06-2125, dated October 24, 2007, is AFFIRMED.

JAMES R. KELLEY, Senior Judge