IN THE COMMONWEALTH COURT OF PENNSYLVANIA

XTL Trucking, Inc., Petitioner	:	
v.	:	No. 2194 C.D. 2007
	:	Submitted: April 11, 2008
Workers' Compensation Appeal Board (Tenuto and State Workers' Insurance Fund), Respondents	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: May 23, 2008

XTL Trucking, Inc. (Employer) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) granting James Tenuto's (Claimant) reinstatement petition and awarding him penalties. In doing so, the Board affirmed the decision of the Workers' Compensation Judge (WCJ) in all respects, including the WCJ's decision to dismiss the State Workers' Insurance Fund (SWIF) as a party, leaving Employer solely liable for reinstatement of Claimant's benefits.

The factual background to this case is complex. Claimant was employed by Employer as a truck driver when, on August 3, 2001, he fell while unloading a truck and fractured his hip. Claimant was hospitalized for six weeks and underwent a hip replacement. Employer reported the August 3, 2001, incident to SWIF. On December 3, 2001, SWIF issued a notice of denial that acknowledged liability for Claimant's medical bills but denied liability for wage loss benefits. Reproduced

Record at 91a (R.R. ___). In this notice, SWIF identified Employer as "UJEX," the entity that administered Employer's workers' compensation program.

On behalf of Employer, UJEX paid Claimant disability benefits in the amount of $644 a week and medical bills. In November 2001, UJEX advised Employer that it would make no further payments until it received reimbursement from SWIF. Thereafter, Employer began direct payment of workers' compensation to Claimant.

Claimant continued to receive a weekly disability check from Employer. However, when Claimant arrived to pick up his check on April 29, 2004, Employer's bookkeeper informed him that there was going to be a deduction for Claimant's pension and social security benefits.[1] Claimant filed a reinstatement petition against Employer and SWIF seeking reinstatement as of June 1, 2004; he also filed a penalty petition.

On June 25, 2004, SWIF filed an answer to Claimant's reinstatement and penalty petitions stating that it had no knowledge as to the truth of the allegations. R.R. 7a, 13a. Thereafter, on July 13, 2004, the law firm of Zarwin, Boum, DeVito, Kaplan, Schaer & Todd, P.C. (Zarwin), entered its appearance in the reinstatement proceeding and advised Employer that it had been retained by SWIF to represent Employer in the matter. Pursuant to a July 13, 2004, notice, a hearing was held on August 26, 2004, without a record being made.

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[1] Claimant had been a member of the Teamsters Union for 53 years and had worked for Employer for less than two years at the time of the accident. His pension was based on 47 years of work with other employers, and Claimant began receiving his pension prior to the work injury. Claimant also began receiving social security benefits in 1999, when he turned seventy, which was two years before his work injury.

On September 9, 2004, Zarwin filed a joinder petition seeking to add Employer as an additional defendant. The petition alleged that SWIF did not provide coverage for Employer on the date of Claimant's injury and, therefore, SWIF was not a party to the reinstatement proceeding.

On September 10, 2004, Claimant's counsel sent a letter to Employer and to UJEX, stating that he had been informed that SWIF had not insured Employer at the time of Claimant's injury. On November 5, 2004, Claimant's counsel sent another letter to Employer, stating that according to the Pennsylvania Compensation Rating Bureau (Rating Bureau), no insurance carrier in Pennsylvania had insured Employer on the date of Claimant's injury. The letter also stated that at the next hearing on December 7, 2004, Claimant would present his evidence, including a certified statement from the Rating Bureau that Employer was not insured for the August 3, 2001, incident and request for judgment against Employer and UJEX. On November 19, 2004, Claimant's counsel wrote to Zarwin, questioning why Zarwin would be present at the December 7, 2004, hearing when SWIF had not insured Employer when Claimant was injured. On November 23, 2004, Claimant's counsel sent another letter to Zarwin, outlining Claimant's case for the December 7, 2004, hearing, and noting that "[i]t would be important for [Employer] to have a representative present at the next hearing of December 7, 2004, at 9:30 a.m., before [the WCJ], since the attorney representing SWIF does not represent [Employer's] interest." R.R. 42a. Employer was copied on the two letters Claimant's counsel sent to Zarwin.

At the December 7, 2004, hearing, SWIF moved to be dismissed as a party because it had not insured Employer on the date of the injury. The remainder of the hearing concerned Claimant's case, consisting of the above-described

correspondence; a certified statement from the Rating Bureau that there was no record that any carrier insured Employer on the date of Claimant's injury; and copies of payments made to Claimant by UJEX and Employer. Claimant's counsel noted on the record that Employer had been notified of the hearing and had not appeared. Counsel stated that although he had not had direct contact with Employer, his letters to Employer had not been returned as undeliverable.

On December 9, 2004, the WCJ issued an interlocutory order dismissing SWIF as a party to Claimant's reinstatement and penalty petitions. On December 10, 2004, the WCJ dismissed SWIF's joinder petition as moot.

On April 25, 2005, the WCJ issued a decision granting Claimant's reinstatement and penalty petitions. The WCJ found that, *inter alia*, none of the notices of assignments or hearing notices forwarded to Employer were returned by the U.S. Postal Service as undeliverable; Employer did not appear at any of the scheduled hearings directly or by counsel; Employer did not have workers' compensation insurance coverage for the period January 1, 2001, to October 23, 2001; Claimant had sustained a work-related injury during that period and had received payments for workers' compensation benefits; the offsets claimed by Employer were not supported by fact or law; and Employer violated the Workers' Compensation Act[2] by unilaterally terminating Claimant's workers' compensation benefits. On these facts, the WCJ concluded that Claimant sustained his burden of proof. The WCJ ordered Employer to pay Claimant's past due disability as well as future disability benefits, without any offset for pension and social security; a fifty percent penalty on all due and owing wage loss benefits; his reasonable and necessary

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

medical expenses; Claimant's costs of litigation; and payment of Claimant's attorney fees for Employer's unreasonable contest.

Employer did not appeal the WCJ's April 25, 2005, decision and order, and Employer did not obey the WCJ's order. On September 16, 2005, Claimant filed a new penalty petition asserting Employer's violation of the April 25, 2005, order. The petition named SWIF as Employer's insurance carrier.

On October 4, 2005, SWIF answered the penalty petition and denied the allegations contained therein. The answer specifically denied that SWIF was Employer's insurance carrier on the date of Claimant's injury and stated that it had been dismissed from the case by the WCJ's order dated December 9, 2004. Inexplicably, Zarwin entered an appearance on behalf of Employer on October 17, 2005. The penalty petition was subsequently marked as withdrawn by another WCJ, after Employer made the payments directed by the WCJ's order of April 25, 2005.

On January 27, 2006, Employer filed a petition with the Board, seeking leave to appeal the WCJ's April 25, 2005, decision *nunc pro tunc.* Employer asserted that SWIF and Zarwin had lulled Employer into a belief that it had coverage for Claimant's work injury and that it had representation for the reinstatement and penalty proceeding. Petition ¶¶21, 22; R.R. 87a. On February 14, 2006, SWIF responded by its counsel, Zarwin, who stated that he represented SWIF only with respect to Employer's request for a *nunc pro tunc* appeal.

The Board granted Employer's request for a *nunc pro tunc* appeal. Addressing the merits of Employer's appeal, the Board rejected Employer's request for a remand in order to allow Employer to make a record to support its contention that SWIF was its carrier in August 2001 and had made payments on behalf of Employer to Claimant and other employees. The Board rejected Employer's

argument that SWIF should be held responsible for payment of Claimant's compensation benefits simply because it had briefly provided Employer with legal representation in the proceeding. Finally, the Board concluded that the Rating Bureau's certified statement that SWIF was not Employer's carrier on the date of Claimant's injury supported the WCJ's factual finding that Employer was solely liable for Claimant's workers' compensation benefits. The present appeal followed.[3]

Employer contends that SWIF is estopped from denying liability for Claimant's ongoing workers' compensation benefits. Its first issue is that the Board erred in affirming the WCJ's decision without giving any consideration to Employer's argument that the actions of SWIF and Zarwin had lulled it into believing it had been represented at the hearing. Second, Employer asserts that the WCJ erred in imposing liability on Employer because SWIF was liable and estopped from claiming otherwise.

Employer did not use the term "estoppel" in its *nunc pro tunc* petition, but Employer did assert that improper conduct on the part of SWIF and Zarwin had "lulled" Employer into a belief that it had coverage and legal representation. Petition ¶¶21, 22; R.R. 87a. The Board treated Employer's issue to be misrepresentation, which is an element of estoppel. We cannot say that the Board did not address Employer's issue; it simply framed the issue as one of misrepresentation.

On the issue of Employer's belief that it had insurance coverage with SWIF and legal representation from Zarwin, Employer argues that it relied on Zarwin's letter stating that it had been retained by SWIF to represent Employer.

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[3] This Court's review of an order of the Board is limited to determining whether the necessary findings of fact were supported by substantial evidence, constitutional rights were violated, or errors of law were committed. *Borough of Heidelberg v. Workers' Compensation Appeal Board (Selva)*, 894 A.2d 861, 863 n.3 (Pa. Cmwlth. 2006).

Zarwin made the statement twice: in the reinstatement and penalty petitions and in Claimant's second penalty petition.[4] R.R. 100a, 123a-124a. Zarwin never informed Employer that it was withdrawing its representation of Employer or advised Employer that it needed independent counsel. Accordingly, Employer was severely prejudiced. It did not participate in the proceedings before the WCJ, and the WCJ ruled against it. Because of these lapses by SWIF's agent, Zarwin, Employer contends that SWIF cannot be allowed to abandon its original position and must be estopped from denying coverage.

Equitable estoppel acts to preclude one from doing an act differently than the act it has induced another, by word or deed, to expect. *Novelty Knitting Mills, Inc. v. Siskind*, 500 Pa. 432, 435, 457 A.2d 502, 503 (1983). It

> arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.

In re Estate of Tallarico, 425 Pa. 280, 288, 228 A.2d 736, 741 (1967) (quotation omitted). When estoppel is established, the person inducing the belief cannot deny the existence of certain facts and cannot act contrary to those facts. *Id.* at 288, 228 A.2d at 741. The person asserting estoppel must prove

[4] We will not address Zarwin's action in the subsequent penalty petition. The subsequent penalty petition was filed on September 16, 2005, after Employer failed to comply with the WCJ's April 25, 2005, decision and order, and Zarwin's actions in the subsequent penalty petition matter could have had no possible effect on Employer's actions during the pendency of the prior reinstatement and first penalty petitions.

> an inducement by the party sought to be estopped to the party who asserts the estoppel to believe certain facts to exist-and the party asserting the estoppel acts in reliance on that belief.

Westinghouse Electric Corp./CBS v. Workers' Compensation Appeal Board (Korach), 584 Pa. 411, 422, 883 A.2d 579, 586 (2005) (quotation omitted). In the absence of "concealment, misrepresentation, or other inequitable conduct," there can be no estoppel. Estoppel cannot be predicated on errors of judgment by the one invoking estoppel. *Tallarico*, 425 Pa. at 289, 228 A.2d at 741 (quotation omitted).

Here, the record shows that SWIF answered Claimant's reinstatement and penalty petitions with a denial of any knowledge of the facts as pled. In July 2004, Zarwin entered its appearance and informed Employer that it had been retained by SWIF to represent Employer. Two months later, however, Zarwin notified Employer that SWIF was not its carrier when Claimant was injured by filing a petition to join Employer to the reinstatement proceeding. Zarwin could have highlighted the significance of the joinder petition by sending an explanatory letter to Employer. However, it cannot be inferred that SWIF or Zarwin concealed or misrepresented the facts. To the contrary, SWIF, by its agent, Zarwin, came forward with the correct information as it became known and made the information known to Employer in the joinder petition.

Reliance is another problem with Employer's estoppel theory. Employer does not contend that it did have workers' compensation insurance with SWIF or with any carrier from January 1, 2001, through October 23, 2001. Further, Employer paid Claimant's workers' compensation benefits for over two years. Such conduct is inconsistent with reliance on a belief that it was insured by SWIF, or by any carrier.

Notwithstanding this backdrop, Employer claims to have relied upon Zarwin's statement that it was its representative in the reinstatement proceeding and

upon the failure of Zarwin to withdraw from representation of Employer. However, the joinder petition states that SWIF was not Employer's workers' compensation carrier on the date of the injury, and Employer was served with this petition. Employer also received, from Claimant's counsel, a certified statement from the Rating Bureau indicating that there was no workers' compensation coverage on the date of the injury as well as a copy of a letter stating that "[i]t would be important for [Employer] to have a representative present at the next hearing of December 7, 2004, at 9:30 a.m., before [the WCJ], since the attorney representing SWIF does not represent [Employer's] interest." R.R. 42a. Based on these facts, Employer's continued reliance on Zarwin's early entry of appearance was not reasonable.

It appears that Employer's failure to participate in the underlying litigation was purely a result of its own will and judgment. Employer simply ignored the litigation proceedings. It may have been Employer's oversight or mistake. Employer may not assert estoppel as a way to avoid the consequences of its own mistake, intentional or otherwise. *Tallarico*, 425 Pa. at 289, 228 A.2d at 741.

Employer relies heavily upon *Overhead Door Co. of Lewistown, Inc. v. Workers' Compensation Appeal Board (Gill)*, 819 A.2d 635 (Pa. Cmwlth. 2003). In that case, the issue became which of three insurers was the responsible insurer. SWIF became an additional defendant in a joinder petition and contested the fact that the claimant suffered a compensable injury, but it did not deny that it was the insurer during the relevant time period. Indeed, counsel stated on the record several times that SWIF was the responsible insurer. SWIF then sent the claimant to an IME; conducted depositions; and appeared at several hearings where it presented its own medical witness and cross-examined the claimant and his witnesses. Only after 18 months of strenuous litigation did SWIF decide that it was not the claimant's insurer.

This Court found that under these circumstances, SWIF was estopped from denying liability notwithstanding the absence of contractual liability; it would cause significant prejudice to the claimant to relitigate the case.

Overhead Door is easily distinguished. Here, SWIF learned that it was not the responsible carrier approximately two months after SWIF answered the petitions, and then it served Employer with a joinder petition. Neither Zarwin nor SWIF took any steps to prepare a defense for Employer. Employer had notice from Claimant's counsel of the hearing and that Employer would not be represented at that hearing. Instead of taking steps to defend, Employer decided to invoke estoppel as the way to obtain insurance coverage after-the-fact.

Finding no merit to Employer's invocation of estoppel, the adjudication of the Board is affirmed.

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MARY HANNAH LEAVITT, Judge

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ORDER

AND NOW, this 23rd day of May, 2008, the order of the Workers' Compensation Appeal Board dated October 26, 2007, in the above-captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge