IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Vicky Ross,	:	
Petitioner	:	
	:	No. 250 C.D. 2010
v.	:	
	:	Submitted: May 28, 2010
Workers' Compensation Appeal	:	
Board (Slender You of Leola),	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: September 21, 2010

Vicky Ross (Claimant) petitions for review of the February 9, 2010, order of the Workers' Compensation Appeal Board (Board), which reversed the decision of a Workers' Compensation Judge (WCJ) granting Claimant's claim petition on the grounds that Claimant failed to provide timely notice of her work injury. We affirm.

The WCJ's relevant findings are summarized as follows. Claimant worked as a manager of a tanning salon for Slender You of Leola (Employer). Claimant's job duties included scheduling appointments and cleaning tanning beds. On May 25, 2007, Claimant cleaned the tanning beds approximately forty-two times. While cleaning these beds, Claimant experienced excruciating pain in her right shoulder and numbness in her right arm and three fingers of her right hand. Either that day or the following Thursday, Claimant spoke to her supervisor, Sharon

Murphy, regarding her pain and numbness and the need for a new employee to assist with cleaning the tanning beds. Murphy advised Claimant to get her arm checked, but Claimant continued working, taking four Ibuprofen every four hours for the pain and holding her head at an angle to alleviate the pain. Claimant's pain worsened, and, on July 11, 2007, she called Murphy and received permission to leave work early for an appointment with Michael Shirk, M.D., her family physician. (WCJ's Findings of Fact Nos. 2-7.)

Following an examination, Dr. Shirk sent Claimant for x-rays and an MRI. Dr. Shirk also provided Claimant with a note excusing her from work, which Claimant provided to Murphy. Upon review of the MRI results, Dr. Shirk recommended that Claimant see Perry Argires, M.D., a neurosurgeon. Dr. Shirk again provided Claimant with a note excusing her from work, which Claimant forwarded to Employer. On the way home from this appointment, Claimant was upset and called Murphy to ensure that she would still have a job when she is cleared to return to work. Murphy assured Claimant not to worry. (WCJ's Finding of Fact No. 8.)

Claimant first saw Dr. Argires at the end of July, at which time he prescribed six weeks of physical therapy and two epidural shots. Afterwards, Claimant called Murphy and advised her of Dr. Argires' recommended treatment and her follow up appointment with him on October 5, 2007. Claimant's next communication with Employer was a letter from Murphy dated August 30, 2007, indicating that, due to a lack of communication of more than three weeks, Claimant was considered to have voluntarily tendered her resignation as of that date. Claimant responded by letter dated October 11, 2007, stating that she never intended to

terminate her employment and that she was reporting her cervical disc herniation injury as a work-related injury.[1] (WCJ's Findings of Fact Nos. 9-11.)

After the physical therapy and epidural shots failed to work, Dr. Argires ultimately performed surgery on Claimant's neck on November 1, 2007. On November 14, 2007, Claimant filed the present claim petition alleging a May 25, 2007, work injury in the nature of a disc herniation at C6-7 with radiculopathy. In this petition, Claimant alleged that she provided Murphy with oral notice of her work injury on May 31, 2007, and written notice via her October 11, 2007, letter. Employer filed an answer denying these allegations, and the case proceeded with hearings before the WCJ.

Claimant testified as to the facts detailed above. Claimant also testified that Employer had nothing posted at her worksite advising her of the name and address of its workers' compensation insurer or a list of panel physicians with whom she was first required to seek medical treatment. (R.R. at 4a.) Additionally, Claimant indicated that she first learned that her cervical injury was work-related after her appointment with Dr. Argires at the end of July 2007. (R.R. at 39a-40a.) Claimant admitted that, prior to this appointment, she had not mentioned anything to Employer about whether or not her injury was work related. (R.R. at 40a.) Additionally, Claimant acknowledged that her October 11, 2007, letter to Murphy was when she first reported her condition as a work injury. (R.R. at 22a.)

In further support of her petition, Claimant presented the testimony of Melissa Doulin, her coworker on May 25, 2007. Doulin confirmed that after cleaning numerous tanning beds that day, Claimant complained of tingling and numbness in

[1] A copy of this letter was submitted into evidence without objection at a December 20, 2007, WCJ hearing.

her fingers. Doulin also indicated that Claimant subsequently asked her to take over cleaning the beds. (S.R.R. at 72b, 74b.)

In opposition to Claimant's petition, Employer presented the testimony of Murphy, Claimant's supervisor. Murphy testified that she first became aware of Claimant's alleged May 25, 2007, work injury when she received Claimant's October 11, 2007, letter. (S.R.R. at 41b.) Murphy specifically denied that Claimant provided her any notice that her problems were work related prior to this letter. Id. While Murphy did recall Claimant mentioning complaints of neck pain at some point between May 25, 2007, and July 11, 2007, Murphy described the same as ordinary and similar to Claimant's complaints prior to May 2007. (S.R.R. at 44b.)

Murphy also recalled two phone calls from Claimant subsequent to July 11, 2007, both of which followed Claimant's medical appointments. However, Murphy specifically denied that Claimant ever said that her neck problems were related to her work cleaning tanning beds. (S.R.R. at 45b.) Murphy indicated that Claimant was terminated after a month had passed without any further communication from Claimant. Id. On cross-examination, Murphy noted that, during her conversation with Claimant on July 11, 2007, Claimant never stated that her neck pain was the result of cleaning the tanning beds, but instead Claimant focused on the need for the other employee to assist with the cleaning. (R.R. at 25a.) Murphy admitted that, as of May 25, 2007, nothing was posted at Claimant's work site with respect to what to do in the case of a work-related injury. (R.R. at 32a.)

Both parties presented medical evidence. Claimant presented the deposition testimony of Dr. James Argires,[2] who described Claimant's condition and

[2] Dr. James Argires is the father of Dr. Perri Argires and is a neurosurgeon in the same practice.

course of treatment and opined that Claimant suffered from an acute disc herniation at C6-7 that resulted from Claimant's hyper-extended positions while cleaning the tanning beds. Employer presented the deposition testimony of S. Ross Noble, M.D., who performed an independent medical examination of Claimant on April 22, 2008. Dr. Noble agreed that the July 23, 2007, MRI revealed a disc herniation at C6-7, which he described as new and the result of a traumatic or sudden onset. However, Dr. Noble opined that Claimant's C6-7 disc herniation was not related to her work on May 25, 2007.

The WCJ accepted the testimony of Claimant, Doulin, and Dr. James Argires as credible. The WCJ found Claimant's testimony more credible than the testimony of Murphy, specifically indicating that Claimant notified Murphy of her May 25, 2007, work injury on May 31, 2007. Based upon these credibility determinations, the WCJ concluded that Claimant met her burden of proving that she sustained a work-related injury in the nature of a disc herniation at C6-7 on May 25, 2007, which rendered her disabled beginning July 12, 2007, and continuing. Hence, the WCJ granted Claimant's claim petition. Employer appealed to the Board, which reversed the WCJ's decision. The Board concluded that Claimant failed to provide Employer timely notice of her work injury as required by section 311 of the Workers' Compensation Act (Act),[3] and that the record did not support the WCJ's contrary findings.

[3] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §631. This section requires a claimant to provide an employer with notice of a work injury within 120 days after the occurrence of said injury in order to be eligible for compensation.

On appeal to this Court,[4] Claimant argues that the Board erred as a matter of law in concluding that she failed to provide Employer with timely notice of her work injury. We disagree.

In relevant part, section 311 of the Act provides as follows:

> Unless the employer shall have knowledge of the occurrence of the injury, or unless the employe or someone in his behalf, or some of the dependents or someone in their behalf, shall give notice thereof to the employer within twenty-one days after the injury, no compensation shall be due until such notice be given, and, unless such notice be given within one hundred and twenty days after the occurrence of the injury, no compensation shall be allowed.

77 P.S. §631. Whether a claimant has complied with the notice requirements of the Act is a question of fact for the WCJ. Gentex Corporation v. Workers' Compensation Appeal Board (Morack), 975 A.2d 1214 (Pa. Cmwlth. 2009), appeal granted, ___ Pa. ___, 995 A.2d 874 (2010); Storer.

Moreover, section 311 of the Act is mandatory and bars a claim where it is found that appropriate notice of the injury has not been provided to the employer within 120 days of its occurrence. Storer v. Workers' Compensation Appeal Board (ABB), 784 A.2d 829 (Pa. Cmwlth. 2001), appeal denied, 568 Pa. 640, 793 A.2d 912 (2002). The burden is on a claimant to establish that the employer received timely notice of the injury, and receipt of such notice is a prerequisite to a claimant's receipt of compensation. Storer; Gribble v. Workers' Compensation Appeal Board (Cambria

[4] Our scope of review is limited to determining whether findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Meadow Lakes Apartments v. Workers' Compensation Appeal Board (Spencer), 894 A.2d 214 (Pa. Cmwlth. 2006).

County Association for the Blind), 692 A.2d 1160 (Pa. Cmwlth.), appeal denied, 549 Pa. 719, 701 A.2d 579 (1997).

Section 312 of the Act addresses the form of such notice, providing that the notice "shall inform the employer that a certain employe received an injury, described in ordinary language, in the course of his employment on or about a specified time, at or near a place specified." 77 P.S. §632. Section 312, however, does not require a claimant to provide an exact or precise medical diagnosis, but only a reasonable description of the injury. Gentex Corporation; Bolitch v. Workmen's Compensation Appeal Board (Volkswagen of America, Inc.), 572 A.2d 39 (Pa. Cmwlth.), appeal denied, 526 Pa. 639, 584 A.2d 321 (1990).

In the present case, although Claimant spoke to Murphy shortly after first experiencing the pain and numbness in her right shoulder and arm, Claimant did not relate her complaints to her work at that time. Indeed, Claimant admitted that she had not told Employer that her injury was work related prior to the end of July 2007, and she subsequently acknowledged that her October 11, 2007, letter to Murphy was the first time she reported her condition as a work injury. (R.R. at 22a, 40a.) Claimant also acknowledged that she had prior problems with her neck, including complaints of pain and stiffness following a 2005 motor vehicle accident. (R.R. at 20a-21a.) Because the notice provided by Claimant on October 11, 2007, was more than 120 days after Claimant's alleged May 25, 2007, work injury, the Board did not err in concluding that Claimant failed to provide Employer with timely notice of her work injury.

Citing Long v. Workmen's Compensation Appeal Board (Anchor Container Corporation), 505 A.2d 369 (Pa. Cmwlth. 1986), Claimant alternatively argues that the contact she had with Employer sufficiently suggested a nexus between

her condition and her work injury such that specific notice was not necessary herein. However, Claimant's reliance on Long is misplaced. In Long, the claimant's wife reported to the employer that her husband had suffered a heart attack and could not return to work because of fumes in the workplace. This Court concluded that the conversation constituted sufficient notice under sections 311 and 312 of the Act. In the present case, however, the record does not reflect that Claimant's communications with Employer prior to October 11, 2007, similarly suggested a relationship between Claimant's condition and her employment.

Finally, Claimant requests that this Court extend the time for giving notice based upon Employer's failure to post appropriate notice at her worksite advising her of the name and address of its workers' compensation insurer. Section 305(e) of the Act provides as follows:

> Every employer shall post a notice at its primary place of business and at its sites of employment in a prominent and easily accessible place, including, without limitation, areas used for the treatment of injured employes or for the administration of first aid, containing:
>
> > (1) Either the name of the employer's carrier and the address and telephone number of such carrier or insurer or, if the employer is self-insured, the name, address and telephone number of the person to whom claims or requests for information are to be addressed.
> >
> > (2) The following statement: 'Remember, it is important to tell your employer about your injury.'
>
> The notice shall be posted in prominent and easily accessible places at the site of employment, including such places as are used for treatment and first aid of

> injured employes. Such a listing shall contain the information as specified in this section, typed or printed on eight and one-half inch by eleven inch or eight and one-half inch by thirteen inch paper in standard size type or larger.

77 P.S. §501(e). However, Employer's failure to post this notice in no way prohibited Claimant from providing timely notice of her work injury. The Act does not require a claimant to give notice to an employer's insurance carrier or to any specific employee. Travelers Insurance Company v. Workmen's Compensation Appeal Board (Levine), 447 A.2d 1116 (Pa. Cmwlth. 1982). Here, the record indicates that Claimant had several conversations with Murphy regarding her condition but failed to causally connect the same to her work. As noted above, the time period set forth in section 311 of the Act is mandatory.

Accordingly, the order of the Board is affirmed.

PATRICIA A. McCULLOUGH, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Vicky Ross, Petitioner	:	
v.	:	No. 250 C.D. 2010
Workers' Compensation Appeal Board (Slender You of Leola), Respondent	:	

ORDER

AND NOW, this 21st day of September, 2010, the February 9, 2010, order of the Workers' Compensation Appeal Board is hereby AFFIRMED.

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PATRICIA A. McCULLOUGH, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Vicky Ross, Petitioner	:	
v.	:	No. 250 C.D. 2010
Workers' Compensation Appeal Board (Slender You of Leola), Respondent	:	Submitted: May 28, 2010

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY SENIOR JUDGE KELLEY FILED: September 21, 2010

I respectfully dissent. The WCJ's fact finding – supported by substantial evidence of record – controls this matter. Further, Employer's express direction to Claimant to stop telephoning Employer regarding her injuries and treatment, combined with Employer's failure to post the required notice advising employees of their duty to notify an employer of their injury, constitute acts by Employer that prejudiced Claimant.

Whether a claimant has complied with the notice provisions of the Pennsylvania Workers' Compensation Act (Act)[1] is a question of fact to be determined by the fact finder. Socha v. Workers' Compensation Appeal Board (Bell-Atlantic Pennsylvania, Inc.), 566 Pa. 602, 783 A.2d 288 (2001). Neither the Board, nor this Court, in our appellate functions, may overturn a WCJ's factual findings if those findings are supported by substantial evidence[2] of record. Id. In the matter *sub judice*, Claimant, as the party prevailing before the WCJ, is entitled to all reasonable inferences that can be drawn from the evidence. Krumins Roofing & Siding v. Workmen's Compensation Appeal Board (Libby and State Workmen's Ins. Fund), 575 A.2d 656 (Pa. Cmwlth. 1990).

In the instant matter, the WCJ expressly found that Claimant's testimony, found more credible than that of Employer's witnesses, established that Claimant informed her supervisor that she was experiencing the physical problems that were ultimately shown to be caused by her work-related injuries on May 31, 2007, a mere six days following the original injury date of May 25, 2007. The record shows, as the WCJ noted, substantial evidence supporting the WCJ's finding on this point. That testimony includes Claimant's assertions that she discussed with her

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

[2] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Mrs. Smith's Frozen Foods v. Workmen's Compensation Appeal Board (Clouser), 539 A.2d 11 (Pa. Cmwlth. 1988).

supervisor both that she needed help with her duties cleaning tanning beds, and that she was experiencing pain and numbness in her arm. Reproduced Record (R.R.) at 1a-3a. Among her other responses regarding her employees' work duties and Claimant's workload, Claimant's supervisor advised Claimant to seek medical attention. R.R. at 2a-3a. Given the WCJ's credibility findings, and the inferences to be accorded Claimant's testimony as the prevailing party below, this evidence is sufficient to support the WCJ's findings. Socha; Krumins; Mrs. Smith's Frozen Foods. Given the Board's, and this Court's, scope of review in this matter, appellate inquiry into this matter should dispositively end there. Socha. However, several independently dispositive elements further require a reversal of the Board's order.

The WCJ found credible Claimant's testimony that Employer's workplace was not posted with notice to its employees requiring them to give notice to Employer in the case of injury on the job, as required by the Act.[3] R.R. at 56a. Additionally, Claimant was never provided with a copy of an injury report, or a list of panel physicians with which she could treat, in the wake of Claimant's advising of her supervisor of her injury. Further, Employer's witness – Claimant's supervisor - testified that she made a decision not to return Claimant's telephone calls in relation to her injury and job status, and that Claimant's supervisor gave Claimant written notice that Claimant was not to call Employer's workplace. R.R. at 36a, 45a, 54a.

Given Employer's violation of the Act in failing to post its place of employment with the notice required under the Act informing employees of their duty to promptly report any work place injury, as combined with the other facts noted herein that can only be read as implicit and explicit actions on Employer's part serving to intentionally frustrate communication with Claimant on the matter, I would exercise this Court's authority to extend the time under Section 311 of the Act for employer notice of the work-relatedness of the injury in the presence of acts of an employer that prejudice a claimant. See Workmen's Compensation Appeal Board v. Evening Bulletin, 372 A.2d 1262 (1977).

I also note that this Court has held that where a claimant is exposed to continuing multiple trauma, or where an injury is aggravated daily, the injury date can in some circumstances be attributed to the last date of exposure to the condition and/or aggravation of the injury, usually ascribed to the last day of work, which may serve to delay the commencement of Section 311's reporting deadline. See, e.g., Zurn Industries v. Workers' Compensation Appeal Board (Bottoni), 755 A.2d 108 (Pa. Cmwlth. 2000), petition for allowance of appeal denied, 565 Pa. 660, 771 A.2d 1293 (2001); Young v. Workmen's Compensation Appeal Board (Jones & Laughlin Steel Corp.), 509 A.2d 945 (Pa. Cmwlth. 1986). In the instant matter,

(continued…)

[3] See Section 305(e) of the Act, 77 P.S. §501(e).

Claimant's last day of exposure to the work conditions that have been medically related to her injury was at least July 11, 2007, which is within Section 311's 120-day time limit given Employer's concession that it received notice of the work-relatedness of Claimant's injury on October 11, 2007.

Finally, I note that in the absence of the foregoing dispositive analyses, and given the WCJ's credibility determinations and fact finding, as well as Claimant's previous non-work-related history of injury, inquiry is required into whether Claimant should have known of the work-relatedness of her injury prior to the medical diagnosis she received informing her of this fact on October 11, 2007. 77 P.S. §631; Sell v. Workers' Compensation Appeal Board (LNP Engineering), 565 Pa. 114, 771 A.2d 1246 (2001).

I would reverse.

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JAMES R. KELLEY, Senior Judge