IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Petsmart,	:	
Petitioner	:	
	:	
v.	:	
	:	
Workers' Compensation	:	
Appeal Board (Sweeney),	:	No. 370 C.D. 2011
Respondent	:	Submitted: August 19, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: September 14, 2011

Petsmart (Employer), petitions for review of the decision of the Workers' Compensation Appeal Board (Board), which affirmed the decision of the Workers' Compensation Judge (WCJ), who granted the Claim Petition filed by Martina Sweeney (Claimant) and further determined that Employer's contest was unreasonable and awarded counsel fees.

On June 18, 2009, Claimant filed a Claim Petition and alleged that she sustained an injury to her low back on June 2, 2009, during the course and scope of her employment as a groomer for Employer.

Employer filed a timely answer on July 1, 2009, and contested the material allegations of the claim.

A hearing was held on July 29, 2009. Claimant testified that she was employed by Employer as a dog groomer for three-and-a-half years. Notes of Testimony July 29, 2009 (N.T. 7/29/09) at 5; Reproduced Record (R.R.) at 39a. On June 2, 2009, she felt a "pull" in the lower center of her back while trying to control a large dog. N.T. 7/29/09 at 5-6; R.R. at 39a-40a. Claimant reported the injury on September 5, 2009, to the manager on duty. Claimant saw Dr. Bruce Lieberman on September 9, 2009, and he prescribed muscle relaxers and painkillers. N.T. 7/29/09 at 8; R.R at 42a. Claimant believed she was physically incapable of performing dog grooming duties because "I can't bend down. I can't-- it's just shooting pain. I can't sit on one side for a long period of time. I can't stand for a long period of time. I can't sleep. I just can't. It's painful." N.T. 7/29/09 at 10-11; R.R. at 44a-45a.

Claimant presented the deposition testimony of Dr. Norman Stempler, D.O. (Dr. Stempler), a board-certified orthopedic surgeon, who examined Claimant on June, 18, 2009. Dr. Stempler testified that Claimant "couldn't ambulate without a severe limp, favoring her left leg… [s]he had extreme weakness getting up on her heels and toes… [m]y impression was that of an acute lumbosacral radiculopathy." Deposition of Dr. Norman Stempler, D.O., November 5, 2009 (Dr. Stempler Deposition 11/5/09) at 13-14; R.R. at 107a-108a. Dr. Stempler recommended an MRI of the lumbar spine.

Dr. Stempler saw Claimant for a second time on June 23, 2009, and sent Claimant to a neurosurgeon because the MRI revealed acute traumatic herniation with fragmentation of the disc at the L4-5 level, lumbar L4-5. Dr.

Stempler Deposition 11/5/09 at 14 and 16; R.R. at 108a and 110a. Dr. Stempler believed there was a direct causal relationship between the work related incident of June 2, 2009, and the subsequent diagnosis of disc herniation. Dr. Stempler Deposition 11/5/09 at 17; R.R. at 111a. Dr. Stempler based his opinion on the fact that Claimant had no significant prior history of radicular symptoms, and she was working at full functional capacity without difficulty prior to the work injury. Dr. Stempler Deposition 11/5/09 at 18; R.R. at 112a.

Michael Hargis (Hargis), store manager for Employer, testified on behalf of Employer. In June of 2009, Hargis was the operations manager for Employer. On June 5, 2009, Claimant informed Hargis that she was experiencing a great deal of pain in her lower back. Claimant did not mention that her pain was work-related and even indicated that she had previously experienced back pain in November of 2008, and only needed to rest. Notes of Testimony September 9, 2009 (N.T. 9/9/09) at 9; R.R. at 74a.

On February 1, 2010, Employer issued a Notice of Compensation Payable (NCP), wherein it accepted liability for Claimant's June 2, 2009, work injury and agreed to pay Claimant disability benefits from June 5, 2009, onward.

The WCJ determined:

> 3. The claimant testified at the initial hearing of July 29. At the conclusion of the claimant's testimony, counsel for the defendant [Employer] advised that the defendant would seek an independent medical exam and intended to present the testimony of three witnesses. We specifically questioned defense counsel about the relevance of the proposed testimony.

4. At the defendant's [Employer's] request a second hearing was then scheduled for the presentation of these witnesses. We advised counsel "…it will not help your case if they come in here and simply tell me all over again what the claimant already told me."

5. … In large part Mr Hargis essentially confirmed the testimony of the claimant. The claimant promptly reported her pain and difficulties, she did not initially relate them to her employment…

….

8. The defendant [Employer] presented no medical evidence.

….

16. The defendant [Employer] presented no evidence which could have constituted a defense.

17. The defendant [Employer] presented no evidence to significantly challenge claimant's testimony. On the contrary the only testimony provided by the defense essentially corroborated the claimant's testimony.

18. The defendant's [Employer] contest forced the claimant to file a petition, testify at one hearing, cross examine defendant's witness at a second hearing, depose a physician, attend an independent medical evaluation and wait from the date of injury until February 2010 for an acknowledgement that compensation was due.

19. Claimant's counsel has presented an attorney time record [sic] indicated that he invested 15.8 hours of attorney time, for which he would charge $300.00 per hour seeking a total counsel fee of $4,700.40. A fair and reasonable counsel fee in the Bucks County area for what was essentially a straight forward yet essentially uncontested matter in which the defendant's contest was unreasonable because it forced the claimant to present her proofs without a defense ever existing, a fair and reasonable fee is $3,160.00.

20. The defendant's [Employer's] contest was entirely unreasonable.

WCJ's Decision, April 23, 2010, Findings of Fact (F.F.) Nos. 3-5, 8, 16-20 at 3-4 and 5-6; R.R. at 20a-21a and 22a-23a.

The Board affirmed the award of unreasonable contest attorney's fees.

Employer contends[1] that the Board erred when it affirmed the WCJ's determination that Employer engaged in an unreasonable contest.

Section 440(a) of the Workers' Compensation Act, 77 P.S. §996(a)[2], provides:

> In any contested case where the insurer has contested liability in whole or in part, including contested cases involving petitions to terminate, reinstate, increase, reduce or otherwise modify compensation awards, agreements or other payment arrangements or to set aside final receipts, the employe... in whose favor the matter at issue has been finally determined in whole or in part shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred for attorney's fee, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend the proceedings: Provided, that cost for attorney fees may be excluded when a reasonable basis for the contest has been established by the employer or the insurer.

[1] This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

[2] This Section was added by the Act of February 8, 1972, P.L. 25.

An employer's contest is reasonable if the contest was brought to resolve a genuinely disputed issue, not merely to harass the claimant. Dworek v. Workmen's Compensation Appeal Board (Ragnar Benson, Inc.), 646 A.2d 713 (Pa. Cmwlth. 1994). The imposition of attorney fees is a question of law reviewable by the Board and this Court. McGoldrick v. Workmen's Compensation Appeal Board (Acme Markets, Inc.), 597 A.2d 1254 (Pa. Cmwlth. 1991).

Employer argues that its cross-examination of Dr. Stempler and Claimant constituted a reasonable contest. However, Dr. Stempler merely acknowledged that Claimant had a pre-existing back condition on cross-examination and reaffirmed his opinion that Claimant's back condition in no way changed his opinion that Claimant's current injury was work-related. Stempler Deposition 11/5/09 at 28; R.R. at 122a.

Additionally, it is well established that for a contest based on the claimant's medical condition to be reasonable, an employer must "have in its possession at the time of the decision to contest or shortly thereafter medical evidence supporting that position." Yeagle v. Workers' Compensation Appeal Board (Stone Container Corp.), 630 A.2d 558, 560 (Pa. Cmwlth. 1993).

Here, the WCJ determined that Employer presented no evidence which could have constituted a defense as it presented no medical evidence whatsoever and the testimony of fact witness Hargis "essentially confirmed the testimony of the claimant" that her injury was work related. WCJ's Decision, April 23, 2010, F.F. Nos. 16-17 at 5; R.R. at 22a-23a.

This Court finds no error in the determination that Employer's contest was unreasonable.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

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v.	:	
Workers' Compensation Appeal Board (Sweeney), Respondent	:	No. 370 C.D. 2011

O R D E R

AND NOW, this 14th day of September, 2011, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge