IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Cos-Win, Inc. and Gallagher Bassett Services, Inc., Petitioners	:	
v.	:	No. 389 C.D. 2009
	:	Submitted: August 28, 2009
Workers' Compensation Appeal Board (Robinson), Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON[1] **FILED: December 16, 2009**

In this fact-sensitive workers' compensation appeal, we are asked whether a timely answer to a claim petition, filed by the employer's previous insurer, which denies all allegations but states the insurer no longer represents the employer and did not insure the employer at the time of the alleged injury, excuses the employer's failure to file a separate timely answer under Section 416 of the Workers' Compensation Act (Act).[2]

In particular, Cos-Win, Inc., and its third-party administrator, Gallagher Basset Services, Inc. (GBS) (collectively, Employer) petition for review

[1] This case was reassigned to the author on November 4, 2009.

[2] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §821.

of an order of the Workers' Compensation Appeal Board (Board) affirming an order granting Mark Robinson's (Claimant) Yellow Freight motion[3] and claim petition. For the following reasons, we reverse and remand.

In June, 1984, Claimant, while working for Employer as a welder and fabricator, suffered a work injury while loading a truck. A 400-pound steel beam struck Claimant's left shoulder and landed on his left foot. The beam severed Claimant's big toe, the next two toes, and a portion of his fourth toe. Employer's workers' compensation insurance carrier at the time, Erie Insurance Group (Erie), paid Claimant specific loss benefits pursuant to a notice of compensation payable (NCP) describing the injuries as an amputation of three toes of the left foot. Claimant returned to work for Employer as a welder and later as a part-time plant manager. He continued to work for Employer until October, 2005.

In February, 2006, more than 21 years after the injury, Claimant filed a review petition seeking to expand the NCP to include a crush injury to the left foot caused by the work injury. Erie filed an answer denying Claimant's allegations. In his March, 2007 decision denying the review petition, the Workers' Compensation Judge (WCJ) credited Claimant's testimony that he suffers some pain symptoms, but concluded that Claimant failed to establish any additional injuries related to the 1984 work incident. Id. at 5a.

[3] See Yellow Freight Sys., Inc. v. Workmen's Comp. Appeal Bd. (Madara), 423 A.2d 1125 (Pa. Cmwlth. 1981) (holding an employer's failure to timely file an answer constitutes an admission of the factual allegations in the petition and the right to consideration of the employer's answer is lost absent adequate excuse).

In April, 2007, Claimant filed a claim petition describing the alleged injury as follows: "As previously found by [the WCJ's] Decision of March 6, 2007, Claimant suffered pain in his neck, mid back, left shoulder, left arm, right shoulder, hips, foot and heel." Id. at 6a. Claimant now seeks total disability benefits for a cumulative trauma injury caused by the "physical activity of his job through his last day of employment," which he alleged to be "10/00/2005." Id.

Claimant's petition again identified Erie as Employer's insurer. Id. On May 3, 2007, the Workers' Compensation Bureau (Bureau) mailed a notice of assignment to Employer, GBS and Erie. Pursuant to Section 416 of the Act, Employer had 20 days to file a timely answer. 77 P.S. §821.

GBS' Branch Manager responded to the notice of assignment by remitting a May 11 letter indicating Employer might be a client, but GBS' database did not have a client named "Cos-Win." R.R. at 19a. GBS further stated it did not, in any manner, administrate workers' compensation claims for Erie. Id. GBS' letter also stated:

> We have copied all parties to this action to see if they have any additional information that would assist us in locating this particular employer as our client. We are inquiring as to how [GBS] was noted as a participating defendant in this action. If you have an Insurance Carrier name and policy number we can again search our data base to determine coverage for this employer.

Id.

On May 16, Erie filed a timely answer to the claim petition stating "Defendant" denies all allegations. Id. at 8a-10a. Erie's answer further stated, with emphasis added:

> Defendant asserts credit for any occupational or non-occupational benefits and unemployment compensation that may have been paid as well as applicable subrogation return and/or credit for recovery from any third-party responsible for Claimant's alleged injury, reserving the right to set forth such additional defenses as may be deemed appropriate upon receipt and review of complete file and investigation materials.
>
> Defendant further raises the statute of repose, doctrines [of] res judicata and/or estoppel. Defendant reserves the right to raise other defenses through the course of litigation.
>
> Wherefore the defendant requests that the Claim Petition be dismissed or in the alternative disallowed.
>
> Our appearance is being entered only on behalf of Erie Insurance Group. Erie Insurance Group did not carry Workers' Compensation coverage for this Employer on the alleged date of injury.

Id. at 9a.

On the same date, Erie sent a letter to the WCJ indicating it would request dismissal from further proceedings at the scheduled May 17 hearing. Id. at 12a. Erie's letter also stated, "Enclosed please find Answer to Claim Petition, which we ask to be filed of record." Id. (emphasis added).

On May 17, the WCJ entered an interlocutory order dismissing Erie from any liability. Id. at 15a. Also, at the May 17 hearing, Claimant, through

counsel, made a Yellow Freight motion to deem the allegations in the claim petition admitted. The WCJ continued the matter and scheduled a second hearing for June 14, 2007. Neither Employer nor GBS appeared through counsel at the June 14 hearing or filed an answer.

By letter dated June 15, 2007, Westport Insurance Corporation (Current Insurer) and GBS advised the WCJ they were the proper insurer and third-party administrator. R.R. at 17a-18a. They argued that Erie's timely answer was sufficient to defeat the pending Yellow Freight motion. Id. They further argued GBS' May 11 letter seeking assistance in identifying the proper defendants tolled Section 416's 20-day period to file an answer. Id. The letter also asserted Claimant's separation from employment resulted from poor work performance and had nothing to do with any real or claimed work injury. Id.

The June 15 letter also enclosed an "amended answer" alleging Employer terminated Claimant in October, 2005 for heroin addiction and that Claimant entered a drug rehabilitation clinic in October, 2005. Id. at 20a. The answer further alleged Claimant never reported any October, 2005 injuries to his supervisor and that as a shop foreman, Claimant did very little physical labor. Id.

The WCJ admitted the June 15 letter and amended answer into evidence as Claimant's Exhibits C-3 and C-4. However, in his June 29, 2007 decision, the WCJ found the letter and answer were filed late. R.R. at 26a. The WCJ granted Claimant's Yellow Freight motion and deemed the following admitted:

> a. Claimant suffered a work injury on or about October 1, 2005 in the form of pain in his neck, mid-back, left shoulder, left arm, right shoulder, hips, foot and heel.
>
> b. At the time of his work injury, Claimant's average weekly wage was $1,510.84. This yields a compensation rate of $716.00 per week.

Id. at 26a-27a. The WCJ therefore awarded Claimant ongoing benefits in the amount of $716.00 beginning October 1, 2005. Id.

Employer appealed to the Board and requested a supersedeas, which the Board denied. Employer again asserted Erie filed a timely answer on its behalf. The Board agreed, citing Manalovich v. Workers' Compensation Appeal Board (Kay Jewelers, Inc.), 694 A.2d 405 (Pa. Cmwlth. 1997) (the Act treats an employer and its workers' compensation carrier as a single complex entity for purposes of defending against a claim). The Board reasoned as follows (with emphasis added):

> [W]here, as here, the carrier identified by the Bureau as the responsible carrier filed an answer, the employer is not required to file a second Answer. To require both the carrier and the employer to file an answer would be unnecessary and redundant given their status as a single entity.
>
> We believe this is true even though [Erie] ultimately prevailed on its assertion that it was not the carrier on the risk at the time of the alleged injury. [Erie's] Answer denying the allegations contained in the Claim Petition put Claimant on notice that his claim was being challenged and that he would have to present evidence to prevail. Contrary to Claimant's assertion, [Erie's] contention that it did not cover Employer at the time of the alleged injury and entered its appearance only on behalf of itself does not indicate it did not intend to

> file the Answer on behalf of Employer. On the contrary, the word "Defendant" is used throughout the Answer and the Certificate of Service accompanying the Answer indicated that it was the "Defendant's Answer."

Bd. Dec., 04/23/08 at 3-4; R.R. at 39a-40a.

Thereafter, Claimant filed a petition for rehearing, which the Board granted. In its February 2009 decision, the Board reversed itself on the Yellow Freight issue and affirmed the WCJ's order awarding Clamant benefits. In so doing, the Board reasoned:

> The answer filed by [Erie], although purportedly filed on behalf of [Employer] pursuant to the preprinted language of the form, contained the following closing paragraph: "Our appearance is being entered only on behalf of [Erie]. [Erie] did not carry workers' compensation coverage for this Employer on the alleged date of injury." Our prior opinion does not appear to have considered the significance of this language, which effectively limits the answering averments, denials and defenses to [Erie]. On reconsideration, we agree that the pleading was not filed on behalf of [Employer], and thus does not constitute a timely answer by [Employer].

Bd. Dec., 02/11/09, at 4-5; R.R. at 49a-50a.

Employer petitions for review.[4] Employer contends: Erie filed a timely answer on its behalf; GBS' May 11, 2007 letter to the WCJ tolled the timely

[4] This Court's review is limited to determining whether the WCJ's findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Minicozzi v. Workers' Comp. Appeal Bd. (Indus. Metal Plating, Inc.), 873 A.2d 25 (Pa. Cmwlth. 2005).

answer period; the Board erred in finding a remand was not warranted; and, res judicata barred Claimant's April, 2007 claim petition.

As more fully discussed below, we discern two errors. First, we conclude that the averments of the claim petition, even if admitted, are insufficient to support the award. Second, we conclude Employer raised an issue of adequate excuse sufficient to warrant a hearing on that issue. Accordingly, we reverse and remand.

Remand Warranted

In arguing a remand is warranted, Employer asserts that in every claim proceeding, the claimant bears the burden of proving all elements necessary to support an award of compensation, including proof the injury arose in the course of employment. See Bensing v. Workers' Comp. Appeal Bd. (James D. Morrissey, Inc.), 830 A.2d 1075 (Pa. Cmwlth. 2003) (failure to file a timely answer is not tantamount to a default judgment; a claimant is still required to prove all elements necessary for an award).

Employer points out Claimant's claim petition lists the date of injury as "10/00/2005," a date that clearly does not exist. Thus, Employer argues that even assuming it filed a late answer, Claimant nevertheless bore the burden of proving all elements necessary to establish a compensable injury, including a correct date of injury; and, it is beyond the scope of the WCJ's jurisdiction to assume facts not in evidence in allotting a viable date of injury to the claim petition. Therefore, Employer contends the Board erred in affirming the WCJ's award.

We agree. Failure to file a timely answer admits only facts, not conclusions of law. Bensing. Whether a claimant was in the course and scope of employment when injured is a conclusion of law. Id. Claimant's claim petition relevantly provides (with emphasis added):

> 3. Give date of injury or onset of disease 10 00 2005
>
> * * *
>
> 6. Notice of your injury or disease was served on your employer on 10 00 2005 ….
>
> * * *
>
> 9. Did this problem cause you to stop working? X Yes …. If Yes, give date 10 00 2005
>
> * * *
>
> 14. I am seeking payment for (check all that apply)
> X Loss of wages ….
>
> * * *
>
> X Full disability from 10 00 2005 to PRESENT

R.R. at 6a-7a. Thus, Claimant's petition alleges a nonexistent date as the date he stopped working, the date he gave Employer notice of injury, and the date his disability began.

As a matter of common sense, Employer cannot be deemed to admit notice of injury or an injury occurring on a nonexistent date. Moreover, as a matter of computation of benefits, Employer cannot be deemed to admit a work injury without a discrete onset date.

At the very least, a deemed admission of a "10/00/2005" injury does not support the WCJ's conclusion that "Claimant suffered a work injury on or

about October 1, 2005."[5] See WCJ Dec., 06/29/07, at 1; R.R. at 26a. If the deemed admission doctrine is to be strictly enforced against an employer, it should also be strictly enforced against the pleader. In other words, the pleader should be held to his exact averment, not something close to it. Because the exact averments do not establish with sufficient detail all necessary elements of a compensable injury, it cannot support the WCJ's award. Bensing.

Erie's Answer

Employer also contends Erie's May 17, 2007 answer constitutes a timely answer filed on Employer's behalf. Claimant's claim petition named Erie as Employer's insurer. R.R. at 6a. Erie's answer listed itself as Employer's insurer. Id. at 8a. It denied all of Claimant's allegations. Id. at 8a-9a. Erie also defended Employer against Claimant's review petition, which the WCJ denied in March, 2007. Employer argues it is not uncommon for an insurer to be served with a petition involving an employer it does not insure. Some insurers, such as Erie, file a precautionary answer on behalf the employer. Thus, Employer contends it could rely on Erie's answer to defeat Claimant's Yellow Freight motion.

Further, Employer contends Erie's use of the term "defendant" throughout its answer, entitles Employer's representatives to rely on Erie's answer, or at the least, testify as to whether they felt Erie filed its answer on Employer's behalf. Erie used the correct Bureau form, LIBC-374, which uses the terms "defendant" and "employer" interchangeably. An employer and its insurer are considered a single entity for purposes of defending a claim. Manolovich.

[5] We also note October 1, 2005, was a Saturday.

Claimant counters Erie's answer could not be clearer, it did not carry workers' compensation insurance for Employer in October, 2005, and Erie's counsel entered their appearance solely on Erie's behalf. Erie's only reason for filing an answer was to be dismissed from the case. Therefore, Claimant maintains Erie's answer did not constitute a timely answer on Employer's behalf.

Section 416 of the Act provides, with emphasis added:

> Within twenty days after a copy of any claim petition or other petition has been served upon an adverse party, he may file with the department or its [WCJ] an answer in the form prescribed by the department.
>
> Every fact in a claim petition not specifically denied by an answer so filed by an adverse party shall be deemed to be admitted by him. But the failure of any party or of all of them to deny a fact alleged in any other petition shall not preclude the [WCJ] before whom the petition is heard from requiring, of his own motion, proof of such fact. If a party fails to file an answer and/or fails to appear in person or by counsel at the hearing without adequate excuse, the [WCJ] hearing the petition shall decide the matter on the basis of the petition and evidence presented.

77 P.S. §821. Within the context of this case, we must decide whether confusion as to the correct insurer and reliance on Erie's timely answer combine to raise an adequate excuse for Employer's delay in responding to the claim petition. As this issue tracts the statutory language, we deem it to raise a question of law subject to de novo review. See Penn Square Gen. Corp. v. County of Lancaster, 936 A.2d 158 (Pa. Cmwlth.), appeal denied, 598 Pa. 14, 952 A.2d 1169 (2007) (standard of review for a question of law is de novo, and scope of review is plenary).

In view of the unique circumstances here, we conclude that Employer proffered an adequate excuse; therefore, the WCJ improperly granted Claimant's Yellow Freight motion without affording Employer an opportunity to prove its assertions.

Res Judicata

Employer also contends res judicata bars Claimant's claim petition because the WCJ denied Claimant's review and reinstatement petitions alleging the same injuries. In particular, it asserts Claimant, in his review petition, alleged his ongoing pain in his neck, mid back, left shoulder, left arm, right shoulder, hips, foot and heel, were causally related to his June, 1984 work injury. In March, 2007, the WCJ denied Claimant's review petition. In his April, 2007 claim petition, Claimant alleged, "As previously found by [the WCJ's] Decision of March 6, 2007, Claimant suffered pain in his neck, mid back, left shoulder, left arm, right shoulder, hips, foot and heel." Id. at 6a. This time, Claimant sought total disability benefits for a cumulative trauma injury caused by the "physical activity of his job through his last day of employment," which he alleged to be 10/00/2005. Id. Employer contends Claimant's claim petition is a sloppy reincarnation of his failed review petition.

"Technical res judicata applies when the following four factors all are present: (1) identity of the thing sued upon or for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality or capacity of the parties suing or being sued." Henion v. Workers' Comp. Appeal Bd. (Firpo & Sons, Inc.), 776 A.2d 362, 365-66 (Pa. Cmwlth. 2001). "This doctrine applies to claims that were actually litigated as well as those matters that should have been litigated." Id. at 366. "Generally, causes of action are identical

when the subject matter and the ultimate issues are the same in both the old and new proceedings." Id.

Here, Claimant's 2006 review petition sought to expand the 1984 NCP to include an additional injury caused by the 1984 work incident where a 400-pound steel beam struck Claimant and amputated three toes. Claimant asserted he suffered from reflex sympathetic dystrophy, or chronic regional pain syndrome, as a result of the 1984 trauma. In his March, 2007 decision denying the review petition, the WCJ did find Claimant still suffers some symptoms associated with the amputation of his toes; however, he did not find any additional injuries related to the 1984 trauma. See R.R. at 5a.

Claimant's April, 2007 claim petition now alleges his pain, which renders him totally disabled, resulted from a cumulative trauma injury caused by his every day work activities through his last day of employment, albeit "10/00/2005." Consequently, the claim petition sufficiently alleges a new, different type of injury (repetitive trauma) and a different date of injury. As a result, res judicata does not apply. Henion.

For the above reasons, we reverse the Board's order affirming the WCJ and remand for hearing.[6]

ROBERT SIMPSON, Judge

[6] Also before the Court for disposition is Employer's Motion to Strike Respondent's Supplemental Exhibits. These exhibits, R-1(s) through R-10(s), include notices of the May 17, 2007 and June 14, 2007 WCJ hearings and eight pages of Employer's brief to the Board. Employer contends these items were not attached to the certified record and should not be included in the reproduced record. See Pa. R.A.P. 2152-53 (contents of reproduced record). Claimant responds that these documents were attached solely for the purpose of showing what issues Employer raised below. Claimant argues Employer did not raise res judicata or Claimant's entitlement to ongoing benefits before the WCJ or Board. Having determined res judicata does not apply and the WCJ erred in granting Claimant's Yellow Freight motion without a hearing on Employer's proffered excuse, we dismiss Employer's Motion to Strike Respondent's Supplemental Exhibits as moot.

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v.	:	No. 389 C.D. 2009
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O R D E R

AND NOW, this 16th day of December, 2009, the order of the Workers' Compensation Appeal Board is **REVERSED** and this case is **REMANDED** for further proceedings consistent with the foregoing opinion. Petitioners Motion to Strike Respondent's Supplemental Exhibits is **DISMISSED as MOOT**.

Jurisdiction is relinquished.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Cos-Win, Inc. and Gallagher Bassett Services, Inc., Petitioners	:	
v.	:	No. 389 C.D. 2009
	:	Submitted: August 28, 2009
Workers' Compensation Appeal Board (Robinson), Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY SENIOR JUDGE McCLOSKEY FILED: December 16, 2009

I respectfully dissent as I disagree with the majority's conclusion that the answer filed by Erie Insurance Group (Erie) in the present matter was sufficient to satisfy the obligation of Cos-Win, Inc. (Employer) under Section 416 of the Pennsylvania Workers' Compensation Act (the Act)[1] and to overcome the Yellow Freight motion filed by Mark Robinson (Claimant).[2]

[1] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §821.

[2] See Yellow Freight System, Inc. v. Workmen's Compensation Appeal Board (Madara), 423 A.2d 1125, 1128 (Pa. Cmwlth. 1981) (holding that, pursuant to Section 416 of the Act, the failure to file a timely answer without an adequate excuse precludes the presentation of evidence by an adverse party and allows a claim petition to be decided based on the allegations in the petition and the claimant's evidence).

As the majority notes, Claimant originally sustained a work-related injury in June of 1984, after being struck in the left shoulder by a 400-pound steel beam, which then fell onto his left foot, severing three of Claimant's toes and a portion of a fourth. Nevertheless, Claimant continued working for Employer until October of 2005. Claimant unsuccessfully filed a review petition in 2006 seeking to expand the description of his work injury to include a crush injury to his left foot. In April of 2007, Claimant filed the present claim petition. Admittedly, this claim petition alleged a date of injury of "10/00/2005." (R.R. at 6a). As Erie had previously represented Employer as its workers' compensation insurance carrier, Claimant again named Erie in this petition. In May of 2007, the Bureau of Workers' Compensation mailed a notice of assignment of this petition to Erie, **Employer** and **Gallagher Bassett Services** (GBS), Employer's third-party claims administrator.

GBS responded to this notice by remitting a letter to the WCJ dated May 11, 2007, indicating that it appeared from the claim petition and the notice of assignment that Employer "may be" a client of GBS, but that it had "searched" their client base and did not find a client by the name of "Cos-Win" or one doing business under that name and that it did not administer workers' compensation claims for Erie. (R.R. at 19a).

Erie responded to this notice by filing an answer. While the majority stresses Erie's reference to itself as "Defendant" throughout this answer, the majority does not stress the final paragraph thereof, which states as follows:

> Our appearance is being entered only on behalf of Erie Insurance Group. Erie Insurance Group did not carry Workers' Compensation coverage for this Employer on the alleged date of injury.

(R.R. at 9a). The WCJ subsequently dismissed Erie from any liability in this matter following a hearing on May 17, 2007. The WCJ held a second hearing on June 14, 2007. Neither Employer nor GBS appeared through counsel at this hearing or filed an answer. By letter dated June 15, 2007, Westport Insurance Corporation (Westport) and GBS notified the WCJ that they were the proper workers' compensation insurance carrier and third-party administrator.

Contrary to the majority, I do not believe that the answer filed by Erie herein satisfied the requirement under Section 416 of the Act that an employer file an answer within twenty days. As the majority states, some insurers routinely file precautionary answers so as to avoid any potential future harm, such as the Yellow Freight motion filed by Claimant in this case. However, the answer filed by Erie contained express language indicating that it was **not** filing the answer on behalf of Employer and that it did **not** provide workers' compensation coverage for Employer at the time of the alleged injury. We cannot contemplate any more precise language by Erie. Indeed, the Workers' Compensation Appeal Board noted the "significance of this language" in rejecting Employer's arguments following a rehearing. (Board Opinion at 4).

Additionally, I disagree with the majority insofar as it concluded that confusion as to the correct insurer and reliance on Erie's timely answer combined to raise an adequate excuse for Employer's delay in responding to the claim petition. I again defer to the specific language Erie used in its answer, i.e., it was **not** Employer's workers' compensation insurance carrier at the time of the alleged injury. Moreover, any confusion in this case appears to rest solely with Employer and GBS. GBS itself was not even sure that it acted as a third-party administrator for Employer until nearly two months after the filing of said claim petition.

However, both Employer and GBS were mailed a notice of assignment of Claimant's claim petition. Employer should know which carrier provides its workers' compensation coverage and GBS should know for which entities it acts as a third-party administrator.

Further, we cannot disagree with the majority that Claimant's claim petition alleged a non-existent date of injury, i.e., "10/00/2005." However, we do not agree with the majority that such an error on the part of Claimant necessitates a reversal of the Board's decision and order. At most, said error warrants a remand to the Workers' Compensation Judge for a finding of the exact date of injury.

For these reasons, I would affirm the Board's order insofar as it affirmed the WCJ's grant of Claimant's Yellow Freight motion and claim petition and remand solely for a specific finding regarding the date of Claimant's injury.

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JOSEPH F. McCLOSKEY, Senior Judge