IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Mathews, Petitioner	:	
v.	:	No. 41 C.D. 2008
	:	Submitted: May 9, 2008
Workers' Compensation Appeal Board (Ferrante Upholstering & Carpeting), Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN FILED: July 3, 2008

William Mathews (Claimant) petitions for review of the December 11, 2007, order of the Workers' Compensation Appeal Board (Board) affirming the decision of a workers' compensation judge (WCJ) that granted Claimant total disability benefits for the period from November 17, 2004, through April 5, 2006, with benefits suspended thereafter. We affirm as modified.

Claimant filed two claim petitions,[1] each alleging that: (1) on January 10, 2004, Claimant sustained bilateral carpal tunnel syndrome as a result of his employment at Ferrante Upholstering & Carpeting (Employer); (2) Claimant notified Employer of this injury on January 10, 2004; and (3) Claimant's last day of work was November 17, 2004. The petitions identified Providence Washington

[1] The record provides no explanation for the duplicate filing of the claim petitions.

(Providence) as Employer's insurer;[2] however, at the time of Claimant's alleged injury, Employer's insurer was the State Workers' Insurance Fund (SWIF). The Bureau of Workers' Compensation (Bureau) circulated each of the claim petitions to Employer/Providence, the first on February 3, 2005, and the other on March 1, 2005; thus, to be timely, answers to the petitions were due no later than February 23, 2005, and March 21, 2005, respectively. However, Employer/Providence filed answers denying the allegations on March 9, 2005, and March 28, 2005, and, after receiving notice from Employer, SWIF filed an answer denying the allegations on April 8, 2005.

Subsequently, the petitions were consolidated for hearings before the WCJ. Because Employer's and SWIF's answers were untimely,[3] Claimant filed a motion, pursuant to *Yellow Freight System, Inc. v. Workmen's Compensation Appeal Board*, 423 A.2d 1125 (Pa. Cmwlth. 1981),[4] requesting that the WCJ decide the matter based on the allegations in the petitions, along with the records

[2] Claimant had been injured in a work-related car accident in 2002, and Providence was Employer's insurer at that time. (WCJ's Findings of Fact, No. 7.)

[3] By interlocutory order dated June 21, 2005, the WCJ dismissed Providence from the litigation. (WCJ's Findings of Fact, No. 1.)

[4] Pursuant to *Yellow Freight* and section 416 of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §821, an employer's failure to file a timely answer without an adequate excuse constitutes an admission of the factual allegations in the claim petition and bars the employer from asserting any affirmative defenses to the claim petition. In these instances, the WCJ shall decide the matter on the basis of the petition and evidence presented by the claimant. *Yellow Freight.* The claimant still bears the burden of establishing a right to compensation and of proving all the necessary elements to support an award, and an employer's failure to file a timely answer does not automatically satisfy the claimant's burden of proof. *Rite Aid Corporation v. Workers' Compensation Appeal Board (Bennett)*, 709 A.2d 447 (Pa. Cmwlth. 1998), *appeal denied*, 568 Pa. 710, 796 A.2d 988 (1999).

and the testimony of Robert S. Vandrak, D.O., Claimant's treating physiatrist, who diagnosed Claimant with work-related bilateral carpal tunnel syndrome. The WCJ agreed that *Yellow Freight* applied and granted Claimant's motion, (R.R. at 30); however, the WCJ held additional hearings, and allowed Employer to present evidence explaining why its answer was untimely and alleging that Claimant's disability had changed.

Employer offered the testimony of Louis J. Ferrante and James L. Ferrante (J. Ferrante), owners and operators of Employer, both of whom described ongoing confusion regarding the identity of Employer's insurer at the time of Claimant's January 10, 2004, injury. J. Ferrante explained that, after first receiving a copy of one of the claim petitions, Employer began communicating with Providence, the named insurer, regarding Claimant's injury. J. Ferrante testified that Providence issued a Notice of Compensation Denial (NCD) without giving "lack of coverage" as a reason for denying the claim, and, in fact, prior to March 3, 2005, Providence never indicated that it did not insure Employer at the time of the alleged injury. J. Ferrante further testified that, as soon as he learned that Providence was not the responsible carrier, he contacted SWIF immediately to notify them of the claim. (WCJ's Findings of Fact, No. 3; S.R.R. at 57b-58b, 76b-77b, 81b, 84b-85b.)

J. Ferrante acknowledged knowing that his insurance carrier changed around the time of Claimant's injury and that Providence was not his current insurer; however, J. Ferrante explained that he assumed that Providence was the correct insurer because Claimant listed Providence on the petitions. J. Ferrante

also acknowledged that he never personally checked Employer's insurance files to determine who insured Employer on January 10, 2004. (WCJ's Findings of Fact, No. 3; S.R.R. at 85b, 93b, 97b.)

Employer also presented the testimony of Amy Watts, a workers' compensation supervisor for Providence, who testified that there was communication between Providence and Employer regarding the petitions, that Providence issued the NCD before informing Employer that it was not the responsible carrier and that the NCD did not indicate "lack of coverage" as a reason for the denial. Watts stated that she sent a letter by fax and by regular mail to Employer on February 22, 2005, informing Employer that Providence was not the responsible carrier for this claim; however, she did not recall receiving a confirmation that the fax had been successfully transmitted or whether the mailed letter had been returned as undeliverable by the post office.[5] (WCJ's Findings of Fact, No. 4; S.R.R. at 119b-20b, 123b-24b, 145b-46b, 157b, 164b.)

Finally, Employer offered the testimony of Mark E. Baratz, M.D., who examined Claimant on April 5, 2006. Dr. Baratz disagreed with Dr. Vandrak that Claimant sustained work-related bilateral carpal tunnel syndrome, indicating that Claimant was subject to non-work-related tendonitis and arthritis in both wrists. Dr. Baratz also stated that, even based on the claimed carpal tunnel syndrome, Claimant was capable of returning his full duties as an upholsterer as of April 5, 2006. (O.R., Dr. Baratz's Deposition at 24-25; WCJ's Findings of Fact, Nos. 6-7.)

[5] J. Ferrante denied receiving either copy of the February 22, 2005, letter. (S.R.R. at 80b-81b.)

Crediting the testimony of the Ferrantes and Watts, and noting that the petitions themselves identified the wrong insurer, the WCJ concluded that Employer established a reasonable and adequate excuse for its untimely answer, and, therefore, the *Yellow Freight* doctrine was inapplicable. (WCJ's Conclusions of Law, Nos. 2-3.) The WCJ then credited Dr. Vandrak in part[6] and Dr. Baratz in part, finding that Claimant sustained work-related right-sided carpal tunnel syndrome but that Claimant was capable of returning to work as of April 5, 2006. Accordingly, the WCJ held that Claimant was entitled to total disability benefits for his right-sided carpal tunnel syndrome until April 5, 2006, with benefits suspended thereafter. (WCJ's Conclusions of Law, No. 1.) Based on this determination, the WCJ noted that the *Yellow Freight* issue was moot for all practical purposes. Claimant appealed to the WCAB, which affirmed.

On appeal,[7] Claimant argues that Employer's excuses for its untimely answer were inadequate, and, therefore, the WCJ erred by failing to apply the *Yellow Freight* doctrine and recognize Employer's admissions that Claimant: sustained work-related bilateral carpal tunnel syndrome; promptly notified

[6] Claimant offered Dr. Vandrak's testimony in support of the petitions. After reviewing Claimant's medical history and records, the results of diagnostic testimony and Claimant's work duties, Dr. Vandrak opined that Claimant's left-sided carpal tunnel syndrome was the result of the 2002 work-related car accident and that Claimant developed the right-sided carpal tunnel syndrome as a result of his work activities. However, the WCJ rejected Dr. Vandrak's opinion that the left-sided carpal tunnel syndrome was work-related, citing inconsistencies in Dr. Vandrak's testimony. (WCJ's Findings of Fact, Nos. 5, 7.)

[7] Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law or whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

Employer of this injury; and left work as a result of this injury on November 17, 2004. We agree.

Whether an employer's excuse for an untimely filing is adequate is evaluated on a case by case basis. *City of Philadelphia v. Workers' Compensation Appeal Board (Candito)*, 734 A.2d 73 (Pa. Cmwlth.), *appeal denied*, 561 Pa. 661, 747 A.2d 902 (1999). The employer is the entity in the best position to identify the proper insurance carrier and is responsible for providing actual notice to its own carrier so that an answer may be timely filed. *Heraeus Electro Nite Company v. Workmen's Compensation Appeal Board (Ulrich)*, 697 A.2d 603 (Pa. Cmwlth. 1997), *appeal dismissed*, 554 Pa. 512, 721 A.2d 1095 (1999).[8] The failure of the Bureau to notify the correct insurer or the claimant's failure to designate the insurer on the claim petition does not serve as an act or omission that interferes with an employer's or insurer's ability to effectuate a timely filing. *Id.* Moreover, where the excuse accounting for the delay is attributable to, and within the control of, the party failing to file the timely answer, the excuse is inadequate. *City of Philadelphia*.

Here, Employer seeks to attribute its delay in filing its answer on: (1) Claimant, for failing to know who Employer's insurance carrier was at the time of his injury; (2) the Bureau, for failing to notice that Claimant incorrectly designated Providence as Employer's insurer; and (3) Providence, for beginning to investigate the alleged injury. However, the answer to the question of who insured Employer on January 10, 2004, lay in Employer's files. Despite knowing that Employer

[8] Thus, when an employer is properly served with notice from the Bureau, the insurance carrier cannot claim that it did not receive actual notice of the claim. *Heraeus*.

changed carriers around the time of Claimant's January 2004 injury, J. Ferrante admitted that he never checked those files and simply assumed that Claimant named the proper insurer. However, Employer cannot point to Claimant's or the Bureau's ignorance of Employer's insurance contracts to shield itself from liability for failing to file a timely answer when the answer lay in Employer's control. *City of Philadelphia*. Accordingly, we conclude that Employer's excuse for its untimely answer is inadequate, and Employer is deemed to have admitted all of the allegations contained in the claim petition, including that Claimant sustained **bilateral** carpal tunnel syndrome as a result of his employment.[9] Thus, the WCJ's award for right-sided carpal tunnel syndrome is modified to include Claimant's left-sided carpal tunnel syndrome as well.

However, an employer's admissions pursuant to *Yellow Freight* of the facts alleged in the claim petition speak **as of the day that the petition is filed**, and, therefore, an employer still is entitled the opportunity to prove events, such as a change in the claimant's disability, which may have occurred **after the last day** when the answer should have been filed. *Rite Aid Corporation v. Workers' Compensation Appeal Board (Bennett)*, 709 A.2d 447 (Pa. Cmwlth. 1998), *appeal denied*, 568 Pa. 710, 796 A.2d 988 (1999); *Heraeus*. Here, the WCJ concluded

[9] In concluding that Claimant suffered only from right-sided carpal tunnel syndrome, the WCJ rejected Dr. Vandrak's testimony regarding the left-sided injury as not credible. However, where, as here, an employer has admitted the factual allegations of a claim petition, and the petition's allegations satisfy the claimant's burden of proving a compensable work injury, a WCJ's credibility determination does **not** constitute **evidence** which can be weighed **against** the **admitted allegations** in the claim petition. *Greeley v. Workmen's Compensation Appeal Board (Matson Lumber Company)*, 647 A.2d 683 (Pa. Cmwlth. 1994), *appeal granted*, 540 Pa. 607, 665 A.2d 994 (1995). A claimant is not required to prove the underlying validity of any admitted allegation; these allegations stand on their own as competent evidence. *Rite Aid Corporation.*

that Employer rebutted Claimant's allegations of ongoing disability through its expert's testimony that Claimant could return to work as of April 5, 2006, a date more than one year after the last day Employer should have filed its answer. (WCJ's Conclusions of Law, No. 1.) Claimant failed to challenge this conclusion in his appeal to the WCAB, and, therefore, the issue was waived.[10] Section 703(a) of the Administrative Agency Law, 2 Pa. C.S. §703(a) (stating that "[a] party who proceeded before a Commonwealth agency under the terms of a particular statute … may not raise upon appeal any … question [other than the validity of the statute] not raised before the agency….") Thus, notwithstanding Employer's admission that Claimant sustained a disabling work-related injury in the nature of bilateral carpal tunnel syndrome, Employer was entitled to a suspension of Claimant's benefits as of April 5, 2006, and the WCJ did not err in awarding Claimant benefits for a closed period.

Accordingly, we affirm as modified.

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ROCHELLE S. FRIEDMAN, Judge

[10] Moreover, Claimant: (1) failed to challenge the WCJ's Findings of Fact, No. 6, which summarized Dr. Baratz's testimony, to the WCAB; and (2) did not object to or otherwise challenge Dr. Baratz's testimony regarding the nature of Claimant's injury or his conclusion that Claimant could return to work on April 5, 2006. Finally, as previously stated, Dr. Baratz credibly testified that, even assuming Claimant had carpal tunnel syndrome, Claimant could return to full duty work as of April 5, 2006. (O.R., Dr. Baratz's deposition at 24-25.)

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O R D E R

AND NOW, this 3rd day of July, 2008, the order of the Workers' Compensation Appeal Board (WCAB), dated December 11, 2007, is hereby modified to include William Mathews' left-sided carpal tunnel syndrome in the description of his work injury and is affirmed as modified.

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ROCHELLE S. FRIEDMAN, Judge