

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Lower Burrell,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 449 C.D. 2008
	:	SUBMITTED: August 15, 2008
Workers' Compensation Appeal	:	
Board (Switala),	:	
	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: October 31, 2008

Employer, City of Lower Burrell, petitions for review of the February 19, 2008 order of the Workers' Compensation Appeal Board (Board) that affirmed the order of the Workers' Compensation Judge (WCJ) granting the fatal claim and penalty petitions of claimant Aimee Switala, widow of decedent Michael Switala. For the reasons set forth below, we affirm.

A life member of employer's volunteer fire department, decedent was also a member of its dive and rescue team prior to his August 28, 2005 drowning death at age fifty following scuba diving training. Although decedent was resuscitated at the scene, he had suffered irreversible brain damage and later died at a hospital after removal of life support.

When employer notified Inservco Insurance Services of decedent's death, claims adjuster Mr. John Maher conducted a preliminary investigation which resulted in the issuance of a September 9, 2005 notice of workers' compensation denial, stating that the preliminary information was insufficient to confirm compensability and that an additional investigation was pending. Subsequent to that denial, Mr. Maher had several discussions with claimant regarding the claim and the need for certain documentation. She provided the requested information, which, *inter alia*, included proof of past earnings and an authorization allowing Inservco to procure decedent's medical records.

After securing the services of an attorney, claimant filed a fatal claim petition on January 31, 2006, seeking compensation benefits as a result of her husband's death. She then filed a penalty petition on February 2, 2006, requesting that penalties be assessed against employer for denying her claim without any legal basis. On February 9, 2006, Maher issued claimant a check in the amount of \$11,387.81, but made no further payments and issued no further documents.

Claimant testified in support of her petitions, and, relevant to this proceeding, presented the deposition testimony of Dr. Bennet I. Omalu and claims adjuster Maher. Claimant testified that she and decedent married in 1977 and had three children together. She stated that decedent had been self-employed as a mortgage closing agent. She described the drowning accident and her subsequent contact with Mr. Maher. Dr. Omalu, board-certified in anatomic pathology, clinical pathology, forensic pathology and neuropathology, opined that decedent's death was due to drowning.

Claims adjuster Maher testified as to his investigation of the claim, conversations that he had with claimant and his characterization of the check. The

WCJ rejected as completely incredible and non-persuasive Mr. Maher's explanation that he advised claimant that the check represented some type of settlement that he hoped would result in withdrawal of the petitions, instead accepting claimant's explanation that they had no such conversations. Ultimately, the WCJ concluded that the check constituted compensation and, therefore, an acceptance of the claim.

In opposition to the petitions, employer presented the testimony of Dr. Eric L. Vey, board-certified in anatomic pathology and forensic pathology. He disagreed that decedent's death was due to drowning, and testified in extensive detail as to why he concluded that claimant's decedent had not drowned. Although he opined that cardiac conditions were potentially plausible causes of death, he could not render an opinion within a reasonable degree of medical certainty that they were, in fact, the cause of death.

The WCJ determined that employer's initial payment of benefits constituted an acceptance of the claim and that employer had violated the Act by failing to make further payments following that acceptance. In addition, he concluded that employer had violated Section 407 of the Workers' Compensation Act (Act),¹ which provides in pertinent part that "[w]here payment of compensation is commenced without an agreement, the employer or insurer shall simultaneously give notice of compensation payable [NCP] to the employe or his dependent . . . identifying such payments as compensation under this act. . . ." Accordingly, the WCJ assessed penalties against employer in the amount of twenty percent along with ten percent statutory interest.

¹ Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 731.

Moreover, the WCJ found that employer did not have a reasonable basis to contest this matter on either the premise that the initial payment of benefits was an attempt to resolve the claim or on the basis of its medical evidence. The WCJ noted that, once employer accepted the claim via that initial payment of benefits, it would have been more appropriate for it to have challenged the description of the injury by filing a review petition, rather than to have contested the matter. Thus, he also awarded counsel fees. The Board affirmed and employer's timely petition for review to this court followed.

The issues are as follows: 1) whether the WCJ erred in determining that the issuance of the check constituted a payment of compensation such that employer violated Section 407 by not issuing a NCP; 2) whether the WCJ abused his discretion in awarding penalties; 3) whether the WCJ issued a reasoned decision; and 4) whether the WCJ erred in determining that employer did not have a reasonable basis to contest the claim petition.²

Employer argues that the WCJ erred in determining that the check constituted compensation because the relevant fact-findings are not supported by substantial evidence and his legal conclusion is contrary to applicable law. It emphasizes Maher's testimony regarding the purpose of the check, the timeliness of the notice of compensation denial and the fact that it continued to deny liability in its answers and at the hearing. In addition, it asserts that although the WCJ appears to have relied upon estoppel principles to justify his decision, there were

² Employer raises the additional issue of whether the WCJ's award must be vacated because claimant failed to satisfy her burden of establishing that decedent's death was in the course and scope of his employment and that she was living with decedent and dependent upon him at the time of his death. Because we conclude that the WCJ did not err in determining that employer accepted the claim via the issuance of the check, we need not address this issue.

no grounds to invoke that doctrine. Claimant, on the other hand, maintains that there is substantial evidence to support the pertinent fact-findings and that, as a matter of law, the evidence adduced and deemed credible supports the conclusion that the check constituted compensation.

In determining that the check constituted compensation, the WCJ noted that the check and attached statement indicated thereon that Inservco was making payment for “23 6/7 wks ttd” for the period of August 27, 2005, the date of death, to February 9, 2006, the date the check was issued. Maher Dep., Exh. 2; R.R. 251a. He also found Maher’s notes to be significant:

2/10/2006 . . . I have been working on doing a lump sum resolution but clmt has consulted with an attorney and wants payment now. So, *approved initial payment today* and will be working with clmt’s atty to resolve any other issue.

. . . .
2/14/06. . . Clmt has filed petition for benefits. I have referred all legal papers to our atty. *I instituted benefits* last week. Our atty is going to see about withdrawal of petition *in light of benefits being paid*.

Id., Exh. 1; R.R. 246a (emphasis added).

Moreover, the WCJ specifically rejected as incredible and non-persuasive Maher’s testimony that the check was a settlement payment and that he relayed that information to claimant, instead accepting claimant’s testimony that there were no such discussions. Indeed, Maher admitted that he “could not make a formal settlement offer without approval of the insurer.” *Id.* at 45; R.R. 232a. *Joy Global, Inc. v. Workers’ Comp. Appeal Bd. (Hogue)*, 876 A.2d 1098, 1103 (Pa. Cmwlth. 2005) (“determinations as to witness credibility and evidentiary weight are within the exclusive province of the WCJ and are not subject to appellate review.”) In light of the documentary evidence and the WCJ’s credibility

determinations, we conclude that the WCJ did not err in determining that the check constituted compensation such that employer was deemed to have accepted the claim by virtue of its payment to claimant.

The additional significance of the finding that the check constituted compensation, of course, is that employer's disbursement of the check without the issuance of a NCP caused it to be in violation of Section 407 of the Act.³ Even where there is a violation of the Act, however, the imposition of penalties is discretionary. *Jordan v. Workers' Comp. Appeal Bd. (Phila. Newspapers, Inc.)*, 921 A.2d 27 (Pa. Cmwlth. 2007). We turn, therefore, to a determination as to whether the WCJ abused his discretion in imposing penalties.

Section 435(d) of the Act provides that "[t]he department, the board, or any court which may hear any proceedings brought under this act shall have the power to impose penalties as provided herein for violations of the provisions of this act. . . ." 77 P.S. § 991(d). Where a claimant is seeking penalties for an employer's purported violation of the Act, she has the burden of producing such evidence and persuading the fact-finder of the credibility of such evidence. *Sanders v. Workers' Comp. Appeal Bd. (Marriott Corp.)*, 756 A.2d 129 (Pa. Cmwlth. 2000). There is no requirement that an employer even have *knowingly* violated the Act before penalties may be imposed. *Graphic Packaging, Inc. v.*

³ As noted above, in the absence of an agreement, Section 407 requires issuance of a NCP when payments are commenced. Thus, we reject any suggestion in the present case that Maher had to have misled claimant or that she must have detrimentally relied upon his statements or actions in order to establish a violation of the Act warranting the imposition of penalties. *Futura Agency, Inc. v. Workers' Comp. Appeal Bd. (Marquez)*, 878 A.2d 167 (Pa. Cmwlth. 2005) (substantial competent evidence must support finding that an employer violated, *inter alia*, Section 407 of the Act.)

Workers' Comp. Appeal Bd. (Zink), 929 A.2d 695 (Pa. Cmwlth.), *appeal denied*, ___ Pa. ___, 938 A.2d 987 (2007). In addition, there is the possibility that penalties may be assessed even for technical violations of the Act. *Galizia v. Workers' Comp. Appeal Bd. (Woodloch Pines, Inc.)*, 933 A.2d 146 (Pa. Cmwlth. 2007). Finally, we note that, absent an abuse of discretion by the WCJ, this Court will not overturn a WCJ's assessment of penalties. *Jordan*. We find no such abuse in the present case.

Employer next argues that the WCJ failed to issue a reasoned decision,⁴ asserting that the WCJ failed to cite the law he was relying upon in concluding that the single check constituted compensation and, thus, an acceptance of claimant's fatal claim petition. We disagree. The WCJ made the fact-findings necessary for a legal conclusion that the check constituted compensation and that employer, therefore, had violated the Act by failing to carry out the mandates of Section 407. Specifically, the WCJ relied upon the check and its attached statement, the claims adjuster's notes and claimant's testimony that they had no settlement discussions in determining that the check constituted compensation. We

⁴ The reasoned decision requirement mandates, in pertinent part, as follows:

The workers' compensation judge shall specify the evidence upon which the workers' compensation judge relies and state the reasons for accepting it in conformity with this section. When faced with conflicting evidence, the workers' compensation judge must adequately explain the reasons for rejecting or discrediting competent evidence. Uncontroverted evidence may not be rejected for no reason or for an irrational reason: the workers' compensation judge must identify that evidence and explain adequately the reasons for its rejection. The adjudication shall provide the basis for meaningful appellate review.

77 P.S. § 834.

find his failure to discuss caselaw, or his rejection of employer's estoppel theory to be of no moment.

Finally, employer challenges the finding that it did not have a reasonable basis to contest the petition.⁵ Pursuant to Section 440(a) of the Act,⁶ counsel fees may be awarded in the form of costs for an unreasonable contest. "A reasonable contest is one brought to resolve a genuinely disputed issue and not merely for the purpose of harassment." *Kelly v. Workmen's Comp. Appeal Bd. (DePalma Roofing)*, 669 A.2d 1023, 1026 (Pa. Cmwlth. 1995). "A reasonable contest is established when conflicting or susceptible to contrary inferences in medical evidence exists and no evidence exists that an employer's contest was frivolous or filed to harass the claimant." *Dworek v. Workmen's Comp. Appeal Bd. (Ragnar Benson, Inc.)*, 646 A.2d 713, 716 (Pa. Cmwlth. 1994). A determination as to whether employer's contest of liability had a reasonable basis is a question of law, which must be based on fact-findings supported by the record. *Id.*

Here, the WCJ found that employer did not have a reasonable basis to contest the petition, since it had already accepted the claim by making an initial payment of benefits and was, therefore, obligated to file a review petition (at which time employer would have had the burden of proof) rather than contesting the claim. We disagree with this analysis. Genuine factual issues existed as to whether Inservco's check constituted a settlement payment or compensation. If the fact-finder had believed Maher, then claimant would have been obligated to prove definitively the elements necessary to establish her fatal claim petition. The WCJ

⁵ "[A] determination that a violation of the Act occurred does not mean that a contest was per se unreasonable." *Galizia*, 933 A.2d at 154. *See also Jordan*, 921 A.2d 27.

⁶ 77 P.S. § 996(a). This section was added by the Act of February 8, 1972, P.L. 25.

also found, however, that Dr. Vey's testimony was insufficient to support a reasonable contest, and with this we agree, even in the context of a claim petition. While employer's medical evidence validly contested the conclusion that decedent's death was caused by drowning, and raised the possibility that his cardiac problems were the cause of death, it remained undisputed that whatever event—cardiac or otherwise—led to his demise, it occurred during decedent's work-related scuba dive. Even if Dr. Vey's testimony were accepted, there would have been no basis to conclude that the dive did not precipitate or complicate the unknown underwater event, nor that the occurrence of such event while decedent was scuba diving did not cause or hasten his ultimate death. In other words, Dr. Vey's testimony was simply insufficient to cast doubt on the apparent causal connection between the dive and the fatality.

Accordingly, we affirm the order of the Board.

BONNIE BRIGANCE LEADBETTER,
President Judge

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ORDER

AND NOW, this 31st day of October 2008, the order of the Workers' Compensation Appeal Board in the above captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge