IN THE COMMONWEALTH COURT OF PENNSYLVANIA

UGI Amerigas HVAC, Petitioner	:	
v.	:	No. 464 C.D. 2011
	:	Submitted: July 22, 2011
Workers' Compensation Appeal Board (Haught), Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: October 19, 2011

UGI Amerigas HVAC (Employer) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) denying its petition to modify the compensation benefits of Timothy Haught (Claimant). In doing so, the Board affirmed the decision of the Workers' Compensation Judge (WCJ) that because Employer did not offer its Notice of Ability to Return to Work (Notice) into evidence, it did not make out a *prima facie* case for modification. Discerning no error, we affirm.

Claimant worked for Employer as an installer and repairman. On December 20, 2007, Claimant fell nine feet to the ground when a ladder he was using slid out from under him. Employer accepted liability for Claimant's work injury by issuing a notice of compensation payable (NCP), which described the injury as a comminuted fracture of the left tibial plateau.

On July 21, 2008, Claimant filed a review petition seeking to amend the NCP's description of the injury.[1] While Claimant's review petition was proceeding, Employer filed a modification petition alleging that Claimant was medically cleared to return to work after an independent medical examination (IME) by Dr. John Perry and was offered a job within his medical restrictions as of February 23, 2009, but refused to return to work. In addition, Employer requested a supersedeas.

At the April 30, 2009, supersedeas hearing, Employer submitted various documents in support of its position including, *inter alia*, the NCP, and a Notice dated December 4, 2008. The WCJ advised Employer that the documents were admitted only for the supersedeas request and that to have documents "admitted on the merits" Employer needed to "re-offer them either by way of stipulation, cross examination or . . . through [its] own witness[es]" during the modification hearing. Notes of Testimony, April 30, 2009, at 5-6 (N.T. ___).[2]

A hearing on the merits of Employer's modification petition followed on November 23, 2009. Employer, now represented by different counsel, attempted to offer the deposition testimony of Phoebe Heal, Employer's Human Resource Manager, and Dr. Perry into the record. However, Employer did not have a copy of Dr. Perry's deposition, believing that it had already been entered into the record. N.T., November 23, 2009, at 5. The parties stipulated that the deposition testimony of Dr. Perry would be submitted into evidence, and the WCJ

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[1] Claimant's review petition was a separate proceeding which is not at issue in the case *sub judice.*

[2] The WCJ is correct. Evidence offered for supersedeas can only be considered for that purpose and must be re-offered for the case-in-chief. *Kimberly Clark Corp. v. Workers' Compensation Appeal Board (Bullard),* 790 A.2d 1072, 1075-1076 (Pa. Cmwlth. 2001).

agreed to retrieve the original copy of Dr. Perry's deposition from the closed review petition file for that purpose. *See id.* at 5-6, 30-32.

After reviewing the record, the WCJ found that Employer had not offered the Notice at the hearing on the merits, nor did it offer the Notice through the deposition testimony of Dr. Perry, Ms. Heal, or Claimant's medical expert, Dr. Stempler. WCJ Decision, April 6, 2010, at 2-3.[3] Accordingly, the WCJ dismissed Employer's petition. The WCJ also concluded that because Employer did not present a *prima facie* case, its contest was unreasonable. Accordingly, the WCJ awarded Claimant a *quantum meruit* fee of $1,500, even though Claimant's attorney had presented no evidence on his fees.

Employer appealed to the Board, asserting that the WCJ erred in several respects. It argued that the Notice was entered into the record on the merits because it was attached as an exhibit to Dr. Perry's deposition. It also argued that the WCJ erred in awarding unreasonable contest fees when Claimant did not request them. The Board affirmed the WCJ. Specifically, the Board found the Notice was not offered as an exhibit in Employer's case-in-chief, but only at the supersedeas hearing. The Board held the *quantum meruit* award to be proper because Section 440 of the Workers' Compensation Act (Act)[4] requires such an

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[3] Claimant did not raise the issue of Employer's failure to offer the Notice into evidence on the merits. The WCJ raised the issue *sua sponte*.

[4] Section 440 of the Act of June 2, 1915, P.L. 736, added by Section 3 of the Act of February 8, 1972, *as amended*, 77 P.S. §996. Section 440(a) provides, in relevant part, that

> [i]n any contested case . . . 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 . . . 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.

77 P.S. §996(a).

(Footnote continued on the next page . . .)

award when an Employer's contest is unreasonable. Employer now petitions this Court for review.[5]

On appeal, Employer sets forth two arguments for our consideration. First, Employer argues that the WCJ erred in finding the Notice was not offered as part of its case-in-chief, when Dr. Perry's deposition testimony, to which the Notice was attached, was offered into evidence at the modification hearing without objection from Claimant.[6] Second, Employer contends the WCJ erred in awarding *quantum meruit* fees because the Notice was in evidence and, thus, it made out a *prima facie* case. Essentially, Employer's two issues turn on the single question of whether the Notice was made part of the record at the November 23, 2009, hearing.

We begin with a review of the law applicable to modification petitions. Section 306(b)(3) of the Act requires an employer to provide a claimant with a notice of ability to return to work as its threshold burden. *See* Section

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(continued . . .)

See also Ramich v. Worker's Compensation Appeal Board (Schatz Electric, Inc.), 564 Pa. 656, 663, 770 A.2d 318, 322 (2001) (noting that a WCJ *must* award fees to a claimant if an employer presented an unreasonable contest "whether the claimant asked for such fees or not.").

[5] Our scope and standard of review is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether Board procedures were violated, whether constitutional rights were violated or an error of law was committed. *Hershgordon v. Workers' Compensation Appeal Board (Pepboys, Manny, Moe and Jack and Zurich American Insurance Co.)* 14 A.3d 922, 924 n.4 (Pa. Cmwlth. 2011).

[6] Employer also argues that its due process rights were violated by the WCJ's findings that the witnesses were not questioned regarding the Notice. It alleges that these findings are tantamount to the WCJ making an "objection after [the] clos[ing] of the record that Claimant's counsel should have made when the record was open, and, therefore, . . . deprives [Employer of] the right to adequately respond." Employer's Brief at 11. Employer's argument is misplaced. The WCJ's findings do not act as "objections" to the sufficiency of Employer's evidence. Rather they are intended to show that the Notice was not discussed at the deposition of any of the witnesses, and support the WCJ's findings that the Notice was not offered on the merits.

306(b)(3) of the Act, 77 P.S. §512.[7] If the employer does not provide this notice, it cannot prevail. *See Allegis Group (Onsite) v. Workers' Compensation Appeal Board (Henry)*, 882 A.2d 1, 4 (Pa. Cmwlth. 2005). We conclude that the Board did not err in holding that Employer did not submit the Notice into evidence in its case-in-chief.

The record of the modification hearing shows that Employer did not have a copy of Dr. Perry's testimony, or its associated exhibits, to offer into evidence. N.T., November 23, 2009, at 5. The parties agreed that the WCJ would pull the original copy of Dr. Perry's deposition from the closed review petition file and admit it into evidence for the modification petition. *See id.* at 5-6, 30-32. However, no mention was made of any other additional exhibits from the supersedeas hearing or review petition file that Employer also wished to have admitted into evidence.

Dr. Perry's deposition testimony does not discuss the Notice. *See* Deposition of Dr. John Perry, February 2, 2009. There are only two exhibits marked and attached to Dr. Perry's testimony: his curriculum vitae, labeled "D Perry 1," and the IME report he authored after his examination of Claimant, labeled "D Perry 2."

Employer asserts the Notice is attached to Dr. Perry's IME report and included in "D Perry 2," but it is mistaken. "D Perry 2" consists solely of a four-page report of Dr. Perry's evaluation of Claimant and a one-page chart of

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[7] In relevant part, it states "[if a] claimant is able to return to work in any capacity, then the insurer must provide prompt written notice, on a form prescribed by the department, to the claimant.…" 77 P.S. §512. *See also Allegis Group (Onsite) v. Workers' Compensation Appeal Board (Henry)*, 882 A.2d 1, 4 (Pa. Cmwlth. 2005) (noting the "prescribed form" is the notice of ability to return to work form).

Claimant's estimated physical abilities. *Id.* The deposition testimony confirms that the only items in "D Perry 2" were the IME report and the attached physical capacities evaluation form.[8] *See* Deposition of Dr. John Perry, February 2, 2009.

The Notice was an exhibit separate from Dr. Perry's deposition, which was admitted at the supersedeas hearing, along with the items included in "D Perry 2". Claimant did not contend in his answer to the petition, at the supersedeas hearing, at the hearing on the merits or in his post-hearing brief, that he did not receive the Notice. Rather than address the extensive evidence presented by both sides on the question of whether Claimant was able to work, the WCJ decided the case on an issue not raised by the parties. *Sua sponte*, the WCJ held that Employer's evidence was incomplete because it did not include the Notice and thus, did not make a *prima facie* case. Arguably, Claimant waived the issue because he never raised it. However, Employer's sole argument before this Court is that Employer did, in fact, offer the Notice in evidence its case-in-chief, and it did not. It was not proper for the WCJ to dismiss Employer's case on grounds not raised by the parties. However, we will not compound the WCJ's error by

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[8] Specifically, the testimony provides:

> [Dr. Perry:] I filled out a Physical Capacity Evaluation Sheet to give you my estimate of his limits.
>
> [Employer's Attorney:] And that's attached to your IME report?
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> [Dr. Perry:] Yes.

Deposition of Dr. John Perry, February 2, 2009, at 18. Furthermore, Employer's attorney later stated:

> [Employer's Attorney:] I would just like to mark Dr. Perry's IME report as D Perry 2 and have it admitted into the record and attached to the transcript.

Id. at 22. No mention was made as to any other document included in, or attached to, the IME report.

repeating it ourselves. Rather, we will confine our decision to the issues raised by Employer to this Court.

Because Employer did not offer the Notice into evidence in its case-in-chief, the Board did not err in denying Employer's modification petition. [9]

MARY HANNAH LEAVITT, Judge

[9] Finding Employer did not introduce the Notice into the record, we need not address Employer's argument that its contest was not unreasonable.

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O R D E R

AND NOW, this 19th day of October, 2011, the order of the Workers' Compensation Appeal Board, dated February 15, 2011, in the above-captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge