

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sara Green,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 471 C.D. 2009
	:	
Workers' Compensation Appeal	:	Submitted: July 31, 2009
Board (Dick Blick Companies),	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: October 16, 2009

Sara Green (Claimant) petitions for review of the February 24, 2009 order of the Workers' Compensation Appeal Board (Board), which reversed the decision and order of a Workers' Compensation Judge (WCJ). In his decision and order, the WCJ granted Claimant's Petition for Penalties (Penalty Petition) and Petition to Reinstate Compensation Benefits (Reinstatement Petition) (collectively, Petitions) and imposed a fifty-percent penalty against Dick Blick Companies (Employer) for violating Section 406.1(d)(5)(i) of the Workers' Compensation Act (Act).¹ Claimant asserts

¹ Act of June 2, 1915, P.L. 736, as amended, added by Section 3 of the Act of February 8, 1972, P.L. 25, 77 P.S. § 717.1(d)(5)(i).

that the Board erred by holding that: (1) the Reinstatement Petition was barred by the three-year statute of limitations set forth in Section 413(a) of the Act, 77 P.S. § 772; and (2) the Penalty Petition was precluded by the equitable doctrine of laches. We affirm, in part, on other grounds,² and we vacate, in part, and remand for additional findings of fact.

On June 28, 2000, Claimant sustained a work-related injury to her low back. Employer issued a Notice of Temporary Compensation Payable (NTCP) and paid Claimant workers' compensation benefits from June 29, 2000 to September 1, 2000. Employer filed a Notice Stopping Temporary Compensation (NSTC) with the Bureau of Workers' Compensation (Bureau) on September 18, 2000. (WCJ Decision, Findings of Fact (FOF) ¶¶ 1-2, 4.) The Employer also issued a Notice of Compensation Denial (NCD), which the Bureau received on September 18, 2000. (NCD, Ex. J-1.)

On March 28, 2007, Claimant filed her Penalty Petition, alleging that Employer violated the Act because the NSTC filed by Employer to revoke the NTCP was untimely. Claimant further alleged that, because the NTCP was not properly revoked, it converted into a notice of compensation payable (NCP) by operation of Section 406.1(d)(6). Claimant also filed the Reinstatement Petition, averring that Employer had unilaterally revoked her benefits on September 1, 2000. Employer filed timely answers, denying the allegations made in the Petitions and asserting that

² "This Court may affirm on other grounds where grounds for affirmance exist." Bonifate v. Ringgold School District, 961 A.2d 246, 253 n.2 (Pa. Cmwlth. 2008).

its revocation of the NTCP was timely and that the Reinstatement Petition was time-barred.

The Petitions were consolidated, and the matter was assigned to a WCJ for a hearing. At the hearing, Claimant described how she had been injured, and she testified that she never received the NTCP or the NSTC from Employer. (WCJ Hr'g Tr. at 5-7, May 24, 2007.) In opposition to the Petitions, Employer submitted its business records pertaining to Claimant's injury and its payment of WC benefits for that injury, which the WCJ admitted over Claimant's relevancy and hearsay objections. (WCJ Hr'g Tr. 12-13; Loss Summary, Ex. D-1.)

The WCJ concluded that Employer failed to timely issue the NSTC and that Claimant had met her burden of proving that Employer violated the Act by unilaterally stopping payment of Claimant's workers' compensation (WC) benefits on September 1, 2000. (WCJ Decision, Conclusions of Law ¶¶ 2-3.) Accordingly, the WCJ reinstated Claimant's benefits as of September 2, 2000 and ordered Employer to pay a fifty-percent penalty and statutory interest on all unpaid WC benefits.

Employer appealed to the Board, asserting that the WCJ failed to make necessary findings of fact, such as the date of the last payment of benefits made to Claimant and whether Claimant had any work-related disability. Employer further argued that the WCJ erred as a matter of law because the Reinstatement Petition was barred by the three-year statute of limitations and because Employer had timely filed the NSTC. The Board agreed with Employer's second argument, holding that,

notwithstanding Claimant's allegation that Employer improperly ceased paying benefits, Claimant had three years, or until September 2003, to file her Reinstatement Petition, and she failed to do so.³ The Board further held that, because Claimant was not receiving compensation pursuant to an agreement or award, Claimant was not entitled to the extension of the statute of limitations to 500 weeks or 9.6 years (i.e., the period for which compensation for partial disability is payable). See Section 306(b) of the Act, 77 P.S. § 512 (stating, *inter alia*, that compensation paid for partial disability "shall be paid during the period of . . . partial disability . . . but for not more than five hundred weeks"). Additionally, the Board concluded that Claimant's Penalty Petition, filed almost seven years after the injury, was barred by the equitable doctrine of laches. Accordingly, the Board reversed the WCJ's decision and order, and Claimant now petitions this Court for review.⁴

Claimant first argues that she is entitled to the reinstatement of her benefits from September 2, 2000 and ongoing because the NTCP converted, as a matter of law, into an NCP. According to Claimant, because Employer's obligation to pay WC benefits has been ongoing since September 1, 2000, there was no need for her to file any petition to reinstate those benefits and, therefore, Section 413(a) does not apply

³ A claimant seeking to review, modify or reinstate WC benefits must do so within three years of "the date of the most recent payment of compensation." 77 P.S. § 772; Romaine v. Workers' Compensation Appeal Board (Bryn Mawr Chateau Nursing Home), 587 Pa. 471, 477, 901 A.2d 477, 480 (2006).

⁴ "This Court's standard of review is limited to determining whether there has been a violation of constitutional rights, an error of law or whether necessary findings of fact are supported by substantial evidence." Channellock, Inc. v. Workers' Compensation Appeal Board (Reynolds), 965 A.2d 1239, 1241 n.2 (Pa. Cmwlth. 2008).

to her Reinstatement Petition. We disagree that Claimant is entitled to the reinstatement of her benefits.

Section 413(a) provides, in relevant part:

A [WCJ] . . . may, at any time, modify, reinstate, suspend, or terminate a **notice of compensation payable**, an original or supplemental agreement or an award of the department or its [WCJ], upon petition filed by either party with the department, upon proof that the disability of an injured employe has increased, decreased, recurred, or has temporarily or finally ceased Such modification, reinstatement, suspension, or termination shall be made as of the date upon which it is shown that the disability of the injured employe has increased, decreased, recurred, or has temporarily or finally ceased Provided, That, . . . **no notice of compensation payable**, agreement or award **shall be reviewed**, or modified, or reinstated, **unless a petition is filed** with the department **within three years after the date of the most recent payment of compensation** made prior to the filing of such petition. . . . And provided further, That **where compensation has been suspended because the employe's earnings are equal to or in excess of his wages prior to the injury that payments under the agreement or award may be resumed at any time during the period for which compensation for partial disability is payable**, unless it be shown that the loss in earnings does not result from the disability due to the injury.

77 P.S. § 772 (emphasis added). Thus, pursuant to Section 413(a), the statute of limitations period for reinstating benefits paid under an NCP is three years from the date of the most recent payment of compensation made prior to the petition to reinstate benefits. This limitations period is extended to the period during which compensation for partial disability is payable (i.e., 500 weeks, see Section 306(b)(1) of the Act, 77 P.S. § 512(1)), where the claimant's compensation was suspended based on the claimant's return to work with no loss of wages.

Assuming, *arguendo*, that Claimant is correct and the NTCP converted to an NCP pursuant to Section 406.1(d)(6), it is undisputed that Claimant returned to work

on September 1, 2000 with no loss of wages. Therefore, as of that date, Employer was entitled, as a matter of law, to a suspension of Claimant's benefits. The fact that there was no evidence of a formal termination or suspension of the claim does not change that entitlement. Bellows v. Workmen's Compensation Appeal Board (Shabloski), 663 A.2d 267, 269-70 (Pa. Cmwlth. 1995).⁵ Because Claimant's benefits were in a state of suspension based on her return to work with no loss of wages on September 1, 2000, she has 500 weeks or 9.6 years to file her Reinstatement Petition. 77 P.S. § 772; Bellows. Claimant's Reinstatement Petition was clearly filed within that time and, therefore, the Board erred in determining that the Reinstatement Petition was time-barred.

⁵ In Bellows, the claimant sustained a work-related injury in March 1977, and he returned to light-duty work in April 1979 with no loss of wages. Bellows, 663 A.2d at 267-68. The claimant "never signed a final receipt, a supplemental agreement or any other documents when he returned to work," and the claimant "did not receive indemnity or medical benefits from 1979 forward." Id. at 268. In 1991, the claimant filed a petition for the reinstatement of benefits, alleging that he never had recovered from the 1977 work injury. Id. The WCJ reinstated benefits, but the Board reversed finding that the claimant's reinstatement petition, filed twelve years after he returned to work with no loss of wages, was time-barred. Id. In affirming the Board's determination, we rejected the claimant's argument, similar to Claimant's assertions here, that the statute of limitations of Section 413(a) was inapplicable to his petition because his employer did nothing to start the running of the period of limitations (i.e., file a petition to modify the agreement). Id. at 269. This Court concluded in Bellows that, notwithstanding the lack of evidence of a formal termination or suspension, the employer was entitled to a suspension of the claimant's benefits based on the claimant's return to work with no loss of wages. Id. at 269-70. Thus, applying the statute of limitations set forth in the second part of Section 413(a) (requiring a petition for reinstatement to be filed within 500 weeks of the claimant's return to work with no loss of wages), we held that the claimant's reinstatement petition was time-barred. Id. at 270. Moreover, we rejected the claimant's argument that it is "bad policy to allow an employer to prevail when it unilaterally ceases paying benefits without a final receipt or order," stating that the Act "grants a claimant a liberal period of over nine years within which to file a petition for reinstatement. . . . Any enlargement of the 500 week limitations period is for the Legislature." Id.

However, this does not mean that the WCJ did not err in reinstating Claimant's benefits. To be entitled to the reinstatement of benefits, a claimant must establish "two things in order to show that the reasons for the suspension no longer exist." Monteson v. Workmen's Compensation Appeal Board (Trinity Industries), 545 Pa. 632, 637, 682 A.2d 776, 778 (1996). The claimant must prove that: (1) "through no fault of the claimant, his/her earning power is once again adversely affected by the injury"; and (2) the injury which gave rise to the claimant's original claim in fact continues." Id. As Employer noted in its appeal to the Board, the WCJ made **no** findings of fact regarding whether Claimant currently has any work-related disability (i.e., loss of wages).⁶ Indeed, the WCJ could not make such factual findings because the record is devoid of **any** evidence that Claimant's "earning power is once again adversely affected by the injury" or that Claimant's injury, in fact, continues. Id. The only evidence presented by Claimant was her testimony regarding how she was injured and that she did not receive the NTCP or the NSTC in September 2000. Therefore, even if the NTCP converted to an NCP, as Claimant avers, she failed to adduce sufficient evidence to show her entitlement to the reinstatement of her benefits, and the WCJ erred in reinstating those benefits absent such evidence.⁷ Accordingly, we affirm the Board's denial of Claimant's Reinstatement Petition.

⁶ Claimant asserts that Employer has waived appellate review of any issue not directly addressed by the Board because Employer did not file a Petition for Review with this Court. However, it is well settled that a party who prevails before the Board, like Employer here, is not aggrieved and, therefore, does not have standing to appeal the Board's determination. Hashagen v. Workers' Compensation Appeal Board (Air Products & Chemicals, Inc.), 758 A.2d 276, 277 n.2 (Pa. Cmwlth. 2000). Accordingly, Employer's failure to appeal the Board's determination does not result in a waiver of Employer's other allegations of error.

⁷ Furthermore, if we were to conclude that the NTCP was timely revoked by the September 18, 2000 NSTC, the outcome of this case, the denial of Claimant's benefits, would be the same and only the analysis would differ. If the NTCP was timely revoked, then Claimant would have been
(Continued...)

Claimant next argues that the Board erred in reversing the WCJ's award of penalties because: (1) Employer waived the defense of laches; and (2) the WCJ properly granted Claimant's Penalty Petition because Employer's NSTC was not timely filed. We agree with Claimant that Employer waived the defense of laches by failing to raise it before the WCJ. Roadway Express, Inc. v. Workmen's Compensation Appeal Board (Allen), 618 A.2d 1224, 1226 (Pa. Cmwlth. 1992) (stating that laches is an affirmative defense that must be raised and the failure to do so results in waiver). However, we disagree that the WCJ made the necessary findings of fact to support his conclusion that Employer's NSTC was untimely and, consequently, that Employer violated the Act.

Claimant contends that Employer's failure to file its NSTC within five days of its last payment to Claimant was a violation of the Act. Employer responds that its revocation was timely because Claimant admitted in her answer in the supersedeas proceedings that she received Employer's last payment, dated September 13, 2000, and the NSTC, received by the Bureau on September 18, 2000, was filed within the five days of that last payment as required by Section 406.1(d)(5)(i).⁸ In her reply brief, Claimant states that Employer's reference to her admission regarding the September 13, 2000 payment is outside the record in this case and, therefore, the document should not be considered by the Court.

required to file a claim petition within three years of receiving the most recent payment of compensation. Section 315 of the Act, 77 P.S. § 602. Having failed to file a claim petition by September 2003, Claimant's claim petition would be untimely.

⁸ We note that if Employer's NSTC was timely, then Employer's action of ceasing Claimant's benefits on September 1, 2000 would not constitute a violation of the Act.

Section 406.1 of the Act addresses the issuance and revocation of a notice of temporary compensation payable. This section requires employers to promptly investigate each injury reported and permits employers who are uncertain whether the reported claim is compensable, or uncertain as to the extent of its liability, to commence the payment of compensation pursuant to a notice of compensation payable without prejudice and without admitting liability. 77 P.S. §§ 717.1(a) and 717.1(d)(1). A claimant receiving benefits pursuant to a notice of temporary compensation payable is entitled to a maximum of ninety days of compensation. Section 406.1(d)(2)(ii) of the Act. Section 406.1(d) addresses the requirements and timing of ending payments made pursuant to a notice of temporary compensation payable and provides, in relevant part:

(5)(i) If the employer ceases making payments pursuant to a notice of temporary compensation payable, a notice in the form prescribed by the department shall be sent to the claimant and a copy filed with the department, but in **no event shall this notice be sent or filed later than five (5) days after the last payment.**

....

(6) If the employer does not file a notice under paragraph (5) **within the ninety-day period during which temporary compensation is paid or payable**, the employer shall be deemed to have admitted liability and the notice of temporary compensation payable shall be converted to a notice of compensation payable.

77 P.S. § 717.1(d)(5)(i), (d)(6) (emphasis added). Thus, pursuant to Section 406.1, an employer's NSTC not only must be filed with the Bureau within the ninety-day period during which temporary benefits are paid, it also must be sent to the claimant and filed with the Department **no later than five days after the last payment.** Hurst v. Workers' Compensation Appeal Board (Preston Trucking Company), 823 A.2d

1052, 1058 (Pa. Cmwlth. 2003). If an employer fails to satisfy either one of these provisions, the notice of temporary compensation payable converts to an NCP. Id. Accordingly, here, the operative date for determining whether Employer's conduct violated Section 406.1(d)(5)(i) of the Act is when the last payment of benefits under the NTCP occurred.

In Romaine v. Workers' Compensation Appeal Board (Bryn Mawr Chateau Nursing Home), 587 Pa. 471, 901 A.2d 477 (2006), our Supreme Court addressed the issue of when the three-year limitations period under Section 413(a) begins to run where a claimant's WC benefit payments, like the benefits here, are made by check. In that case, the claimant filed a petition to reinstate benefits on December 16, 1997, asserting that the last payment of benefits occurred on December 19, 1994. Id. at 475, 901 A.2d at 478-79. The employer had issued a check on December 14, 1994, which covered the payment period of December 6, 1994 through December 19, 1994. Id. at 475, 901 A.2d at 479. Relying on dicta from this Court's decision in Urick Foundry Co. v. Workmen's Compensation Appeal Board (Aarnio), 496 A.2d 883 (Pa. Cmwlth. 1985), the WCJ used the date the check was issued to dismiss the claimant's petition as untimely. Romaine, 587 Pa. at 475-76, 901 A.2d at 479. Both the Board and this Court affirmed the WCJ's decision, and the claimant appealed to the Supreme Court, maintaining that the relevant date was not the date on the check, but the date she negotiated (i.e., cashed, the check). Id. at 476-77, 901 A.2d at 479-80. The Supreme Court granted allowance of appeal to address the "sole issue as to when, for purposes of the Act, a payment has been made." Id. at 476, 901 A.2d at 479-80.

After discussing the history of the legal implications of the varying dates associated with check payments (i.e., date issued, date received, date cashed), our Supreme Court rejected the dicta from Urick and concluded that, “[f]or purposes of the statute of limitations contained in Section 413(a), the only date of import is the **date upon which the check is received,**” and that the WCJ erred in relying on the date the benefits check was issued to calculate the limitations. Romaine, 587 Pa. at 488, 901 A.2d at 486 (emphasis added).

The Supreme Court’s analysis on this issue in Romaine is instructive on when to determine “the last payment” for the purposes of Section 406.1(d)(5)(i). We note that Claimant is correct that the specific evidence of the last payment cited by Employer in its Supplemental Reproduced Record is not a part of the original record and, therefore, cannot be considered on appeal. Pryor v. Workers’ Compensation Appeal Board (Colin Service Systems), 923 A.2d 1197, 1201 (Pa. Cmwlth. 2006) (stating that “the court is confined to the record before it”). However, the original record does contain evidence of the September 13, 2000 payment to Claimant. The business records admitted into evidence by the WCJ lists the WC benefit checks issued to Claimant, including the September 13, 2000 check. (Loss Summary, Ex. D-1 at 4.) However, as Employer pointed out in its appeal to the Board, in concluding that Employer’s NSTC was untimely, the WCJ made no findings regarding when Claimant **received** the September 13, 2000 check from Employer. Because this is the operative date for determining whether Employer’s conduct violated the Act, the

absence of this necessary finding impedes this Court's ability to perform appellate review.⁹

Accordingly, we affirm that portion of the Board's order denying Claimant's Reinstatement Petition. Additionally, we vacate that portion of the Board's order reversing the grant of the Penalty Petition, and we remand this matter to the Board for further remand to the WCJ for the issuance of findings of fact and conclusions of law based on the existing record regarding: (1) when the last payment of WC benefits pursuant to the NTCP occurred (i.e., when Claimant received the last payment); (2) whether Employer's NSTC, filed on September 18, 2000, was within five days of the last payment; and (3) whether, based on these findings, Employer's conduct violated the Act.

RENÉE COHN JUBELIRER, Judge

⁹ Alternatively, Claimant contends that, because the September 13th payment was for the period ending September 1, 2000, Employer still had to file its NSTC within five days of that date in order to timely revoke the NTCP. However, our Supreme Court rejected a similar argument in Romaine, stating that, because Section 413(a) states that the reinstatement petition must be filed within three years after "the date of the most recent payment of compensation," 77 P.S. § 772, it speaks to the date of the last payment, and not the period for which benefits were paid. Romaine, 587 Pa. at 483, 901 A.2d at 483.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sara Green, :
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 : Petitioner :
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 : v. : No. 471 C.D. 2009
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 : Workers' Compensation Appeal :
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 :
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ORDER

NOW, October 16, 2009, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED IN PART, VACATED IN PART**, and **REMANDED** for further findings of fact and conclusions of law to be made, based on the existing record, with regard to (1) when the last payment of WC benefits pursuant to the NTCP occurred (i.e., when Claimant received the last payment); (2) whether Employer's NSTC, filed on September 18, 2000, was within five days of the last payment; and (3) whether, based on these findings, Employer's conduct violated the Act.

Jurisdiction relinquished.

RENÉE COHN JUBELIRER, Judge