IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Marion Community Hospital/Inservco Insurance Services, Inc.,	:	
Petitioners	:	
v.	:	No. 500 C.D. 2009
Workers' Compensation Appeal Board (McLaughlin and ESIS, Inc.),	:	Submitted: September 4, 2009
Respondents	:	

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: December 16, 2009**

Inservco Insurance Services, Inc. (Inservco), which was formerly responsible for the workers' compensation insurance for Marion Community Hospital (Employer), petitions for review of an order of the Workers' Compensation Appeal Board (Board), which held that the Workers' Compensation Judge (WCJ) did not err in failing to direct Comp Management, Inc. (ESIS), which is currently responsible for

Employer's workers' compensation insurance,[1] to reimburse Inservco the benefits paid to Mary McLaughlin (Claimant) from May 6, 2006, forward. The Board determined that the proper avenue for Inservco to recoup the monies paid to Claimant for periods during which Inservco was not responsible for Employer's workers' compensation insurance is through the Supersedeas Fund.

By way of background, Claimant sustained a meniscal tear to the left knee while in the course and scope of her employment for Employer on October 7, 1998. At the time of Claimant's injury, Employer was insured by Phico Insurance Company (Phico). Employer/Phico accepted liability for Claimant's injury and issued a Notice of Compensation Payable (NCP). (NCP, January 7, 1999.) Subsequently, Phico became insolvent, the Workers' Compensation Security Fund became responsible for the payment of this claim, and Inservco apparently became the third party administrator. Claimant returned to work at no loss of earnings on January 19, 1999, and Claimant's disability benefits were suspended. A prior WCJ decision found Employer/Inservco liable with respect to ongoing treatment for Claimant's left knee, including left knee replacement surgery performed in 2005. As a result of the knee replacement surgery, Claimant was out of work from July 13, 2005 through October 10, 2005, and Claimant's disability benefits were reinstated during this period.

[1] While the record is not very clear in this regard, Inservco had apparently been the third party administrator for Employer before ESIS became responsible for Employer's workers' compensation insurance. The parties in their briefs, as well as the WCJ and the Board, make no distinction between Inservco and ESIS and insurers as defined by the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1 – 1041.4, 2501 – 2708. As this distinction is not critical to our analysis in this case, we, like the others, will not distinguish in this opinion between Inservco and ESIS and insurers as defined by the Act.

Claimant returned to work on October 11, 2005, with a loss in earnings. Claimant returned to work at no loss of earnings on January 3, 2006, and Claimant's disability benefits were again suspended. In May 2006, Claimant's work hours were reduced to four hours per day due to knee pain, which entitled her to partial disability benefits. Claimant continued to work part-time until she was laid off in September 2006.

On June 2, 2006, Claimant filed a Petition for Reinstatement of Benefits (Reinstatement Petition), seeking to have her disability benefits reinstated as of May 4, 2006. On June 19, 2006, Claimant filed a Petition to Review Benefits, amended to a Claim Petition (Review/Claim Petition), alleging a left foot deformity related to her compensable knee injury. Employer/Inservco denied the allegations.

On September 22, 2006, Employer/Inservco filed a Petition to Suspend Benefits (Suspension Petition), alleging that as of May 6, 2006: Claimant had fully recovered; Claimant was able to return to unrestricted work; Claimant had returned to work; and Claimant's ongoing disability was unrelated to her work injury. Employer/Inservco requested supersedeas along with its Suspension Petition. Claimant denied the allegations in the Suspension Petition.

On September 25, 2006, Inservco filed a Petition for Joinder (Joinder Petition) seeking to join a new insurance carrier/third party administrator, ESIS, alleging that Claimant's disability was due to a new injury for which ESIS was solely responsible.

All of the petitions filed by the parties were consolidated for judicial economy. The WCJ issued a supersedeas decision to all parties requiring Inservco to continue

making payments to Claimant pending a final resolution of the matter. As to the consolidated petitions, Claimant testified in support of her petitions and also offered the deposition testimony of her treating orthopedic surgeon, William Jason, M.D., who performed Claimant's left knee replacement surgery. The WCJ credited Claimant's testimony and Dr. Jason's testimony. (WCJ Decision, Findings of Fact (FOF) ¶¶ 21-22.) Specifically, the WCJ found as fact:

> 9. *In 2005 [ESIS] became the insurance carrier/third party administrator for [Employer]*.
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> . . . .
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> 25. Claimant's left knee complaints have continued since the date of her original compensable injury. In this case, the claimant has not fully recovered from her work related left knee injury. There is no dispute that claimant was laid off by the defendant/employer through no fault of her own on September 13, 2006.
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> 26. Claimant bears the burden of proof in proceeding on the Reinstatement Petition, as well as the Review/Claim Petition. Dr. Jason, a panel physician for the defendant, relates claimant's left foot deformity to the original compensable injury. The defendant admitted to having notice of Dr. Jason's diagnosis and had received both Dr. Jason's medical notes as well as the medical slip reducing claimant's work hours to four hours per day. Following claimant's return to work full-time and at no loss in earnings on January 3, 2006, claimant's foot condition worsened to the point that Dr. Jason restricted her work hours. Dr. Jason credibly explained how *claimant's work activities aggravated her foot deformity on a daily basis.*
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> 27. *Claimant began working part-time because of her foot condition in May 2006*. At the time that she was laid off, claimant was working part-time, four (4) hours per day.
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> 28. Claimant began experiencing increased symptoms and pain with respect to her left foot following her return to work on a full time basis after she underwent left knee replacement surgery.

> Claimant's return to work on a full time basis resulted in increased pain in claimant's left foot, *which resulted in a new injury. As the result of this new injury, claimant became partially disabled in May 2006 when her work hours were reduced to four (4) hours per day, continuing until such time as she was laid off from employment by the defendant/employer on January 13, 2006, at which time she became entitled to temporary total disability benefits.*

(FOF ¶¶ 9, 25-28 (emphasis added).) Based on the factual findings, the WCJ denied Claimant's Reinstatement Petition, but granted Claimant's Review/Claim Petition because Claimant's compensable knee injury, which aggravated Claimant's preexisting foot problems, resulted in an additional injury as of May 2006, when Claimant's work hours were reduced to four hours per day. (WCJ Decision, Conclusions of Law (COL) ¶ 3; FOF ¶ 28.) "Based on the credible medical evidence of record, every day that claimant worked caused a new injury to claimant's left foot/ankle." (COL ¶ 3.) The WCJ granted Employer/Inservco's Suspension Petition because Claimant returned to full-time work without wage loss as of January 3, 2006. The WCJ also granted Inservco's Joinder Petition because "Claimant's last date of employment with the hospital . . . occurred in January 2006." (COL ¶ 3.)

Inservco and ESIS cross-appealed to the Board. Of relevance here, Inservco argued that the WCJ erred in failing to direct ESIS to reimburse it for the monies that it paid to Claimant from May 2006 forward, when Inservco paid Claimant partial disability benefits. The Board affirmed the WCJ's decision and order, but it amended it to reflect that the effective date of Claimant's entitlement to temporary total disability benefits actually began on September 13, 2006. Although the Board determined that ESIS is "the responsible carrier for the foot injury," (Board Op. at 3), the Board ultimately held that "the proper avenue for Inservco [to be reimbursed the

monies it paid to Claimant from May 6, 2006 and forward] is through the Supersedeas Fund." (Board Op. at 9.) Inservco now petitions this Court for review.[2]

Before this Court, Inservco argues only that the Board erred in refusing to award reimbursement from ESIS to Inservco for monies paid by Inservco between May 6, 2006 and June 2008.[3] Specifically, Inservco contends that, in 2006, Employer was insured through ESIS for any compensable injury that occurred. (FOF ¶ 9.) Since the new injury was sustained as of May 6, 2006 (see FOF ¶ 28), the WCJ should have ordered ESIS to reimburse Inservco for the monies that it paid to Claimant for the above-mentioned timeframe. Moreover, Inservco argues that, as the administrator for the Workers' Compensation Security Fund,[4] it does not have any right to collect Supersedeas Fund reimbursement under the Workers' Compensation Act (Act).[5]

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[2] "This Court's review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of appeal board procedures, and whether necessary findings of fact are supported by substantial evidence." Mark v. Workers' Compensation Appeal Board (McCurdy), 894 A.2d 229, 233 n.6 (Pa. Cmwlth. 2006) (en banc).

[3] ESIS has not appealed the Board's order affirming the WCJ's decision granting Inservco's Joinder Petition.

[4] Inservco states in its brief that at the time Claimant originally sustained her left knee injury in 1998, Employer was insured through Phico. (Inservco Br. at 5.) "PHICO became insolvent and the Workers' Compensation Security Fund is responsible for payment of this claim. The Administrator is [Inservco]." (Inservco Br. at 5 n.1.)

[5] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1 – 1041.4, 2501 – 2708.

ESIS argues that the Board was correct that Inservco must seek reimbursement from the Supersedeas Fund, and not from ESIS, for any benefits paid to Claimant following the appropriate date of suspension because Inservco is entitled to do so under Section 443 of the Act.[6] Specifically, ESIS focuses on the last requirement to enable Inservco to be reimbursed from the Supersedeas Fund—"[i]n the final outcome of the proceedings, it was determined such compensation was not, in fact, payable." Mark v. Workers' Compensation Appeal Board (McCurdy), 894 A.2d 229, 233 (Pa. Cmwlth. 2006) (en banc). ESIS argues that this requirement is met because

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[6] Added by the Act of February 8, 1972, P.L. 25, as amended, 77 P.S. § 999. Section 443 of the Act creates the Supersedeas Fund and permits reimbursement therefrom. The relevant provisions provide:

> (a) If, in any case in which a supersedeas has been requested and denied under the provisions of section 413 or section 430, payments of compensation are made as a result thereof and upon the final outcome of the proceedings, it is determined that such compensation was not, in fact, payable, the insurer who has made such payments shall be reimbursed therefor. . . .
>
> (b) There is hereby established a special fund in the State Treasury, separate and apart from all other public moneys or funds of this Commonwealth, to be known as the Workmen's Compensation Supersedeas Fund. The purpose of this fund shall be to provide moneys for payments pursuant to subsection (a) . . . .

77 P.S. § 999. In Mark, this Court interpreted these statutory provisions and explained that reimbursement from the Supersedeas Fund will be granted when the following requirements are satisfied:

> 1) a supersedeas was requested; 2) the request for supersedeas was denied; 3) the request was made in a proceeding under Section 413 or Section 430 of the Act; 4) payments were continued because of the order denying supersedeas; and 5) in the final outcome of the proceedings, it was determined such compensation was not, in fact, payable.

Mark, 894 A.2d at 233 (footnotes omitted).

the WCJ "ultimately concluded that benefits paid *by Inservco* were not in fact payable to Claimant." (ESIS Br. at 6 (emphasis added).)

It is important to note that the purpose of the Supersedeas Fund is "to protect an insurer who makes compensation payments *to a claimant who ultimately is determined not to be entitled*" to those payments. State Workers' Insurance Fund v. Workers' Compensation Appeal Board (Shaughnessy), 837 A.2d 697, 702 (Pa. Cmwlth. 2003) (emphasis in original). This is because the Legislature has recognized that it is not practical and would undermine the charitable purposes of the Act were insurers to recoup payments from claimants. Leslie Fay Companies v. Workers' Compensation Appeal Board (Macaluso and ITT Hartford), 853 A.2d 1155, 1162 (Pa. Cmwlth. 2004). However, in this case, Claimant was rightfully entitled to benefits for a new disabling injury occurring in May 2006. Thus, "recoupment from the claimant" is not at issue here. Rather, the issue involves whether the insurer/third party administrator responsible for paying benefits to Claimant for the new disabling injury that took place in May 2006 (ESIS) should reimburse the insurer/third party administrator that actually paid Claimant those benefits (Inservco).

This Court, in Shaughnessy, addressed a similar issue involving the proper remedy for an insurer that paid fatal claim benefits for a period during which it was not the responsible insurance carrier. In that case, an employee died when he was exposed to chemicals while in the course and scope of his employment, and the widow of the deceased filed a fatal claim petition. Shaughnessy, 837 A.2d at 698. The State Workers' Insurance Fund (SWIF) "defended against the [f]atal [c]laim [p]etition based on the fact that it was not [e]mployer's insurance carrier at the time

of [d]ecedent's death." Id. "[A] WCJ granted the [f]atal [c]laim [p]etition, and ordered [SWIF] to pay benefits to the" widow. Id. After SWIF appealed, the Board remanded the matter for a determination as to whether the employer had workers' compensation coverage. Id. Following further proceedings, the parties entered into a stipulation stating that SWIF was not the workers' compensation carrier for the employer during the last period that decedent was exposed to chemicals. Id. at 699. The parties also stipulated that the "[f]atal [c]laim [p]etition should be denied" and that SWIF would not seek reimbursement from the widow. Id. "The WCJ denied the fatal claim petition pursuant to the Stipulation." Id. Subsequently, SWIF sought reimbursement from the Supersedeas Fund, which the Bureau of Workers' Compensation opposed. Id. A WCJ denied SWIF reimbursement, and the Board affirmed. Id. SWIF petitioned this Court for review, and argued that it was entitled to Supersedeas Fund reimbursement. Id. at 700. In addressing this argument, this Court stated:

> SWIF was wrongfully told to pay Claimant benefits despite evidence that it was not the insurer. SWIF dutifully paid these benefits and now seeks to have this wrong corrected. Supersedeas Fund reimbursement is only appropriate, however, when it is "determined that such compensation was not, in fact, payable." "[T]he purpose of the supersedeas fund is to provide a means to protect an insurer who makes compensation payments to a claimant who ultimately is determined not to be entitled thereto." That is not what happened in this case. Rather, it was determined, by Stipulation, that SWIF should not have paid compensation to Claimant, not that Claimant should never have received any compensation. As such, reimbursement from the Supersedeas Fund is not appropriate. *Rather, we believe that the appropriate remedy is for SWIF to file a Review Petition, seek to have Employer joined by filing a Joinder Petition and ask a WCJ to hold Employer responsible for the payment of Claimant's compensation benefits and correct the wrong that was started with the first WCJ. Since SWIF has already paid Claimant's benefits, the WCJ could order Employer to reimburse SWIF, thus putting SWIF back*

> *into the same financial position it would have been had the first WCJ not wrongfully ordered it to pay benefits.*

Id. at 702-03 (emphasis added) (emphasis omitted) (citations omitted) (footnote omitted).

In Leslie Fay, the claimant was disabled in the course and scope of her employment on September 16, 1996, as a result of a cumulative trauma. Id., 853 A.2d at 1157-58. At that time, SWIF was the responsible carrier. Id. at 1158. The WCJ granted the claim petition filed by the claimant. The Board affirmed the WCJ's decision, but modified it by directing SWIF to reimburse the employer's former insurance carrier, ITT/Hartford (ITT), for any benefits ITT had previously paid to the claimant for that disabling injury. Id. SWIF petitioned this Court for review and argued "that even if it is held to be the responsible carrier, the Board should not have ordered it to pay benefits to ITT, but rather should have directed ITT to seek reimbursement from the supersedeas fund." Id. at 1161. This Court disagreed because the issue did not involve a situation in which the claimant should not have been granted benefits and the insurer was seeking a credit *against the claimant*, but, rather, the issue involved a former insurer seeking reimbursement from the responsible carrier. Id. at 1161-62. We held that "[t]he appropriateness of such a remedy on these narrow facts does not violate the benevolent purposes of the Act and does not appear to be precluded by Section 443(a). Thus, we conclude that such a remedy is within the Board's discretion. Therefore, we decline to alter this portion of its order." Id. at 1162.

Similar to Shaughnessy and Leslie Fay, the dispute in this case is between two insurers/third party administrators, not between an insurer/third party administrator and a claimant. Thus, Supersedeas Fund reimbursement is inappropriate. Here, the WCJ found as fact that ESIS was the responsible carrier for Employer from 2005 and forward. (FOF ¶ 9.) The WCJ also found that Claimant sustained a new compensable injury in May 2006. (FOF ¶ 28.) Although not explicitly stated, the WCJ related Claimant's loss of income from May 2006 and forward to Claimant's new injury that occurred while ESIS was the responsible carrier. This is set forth in the WCJ's conclusion that "Claimant has failed to meet her burden of proof on the Reinstatement Petition and the same should be denied. [Inservco] is entitled to a suspension of Claimant's wage loss benefits effective January 3, 2006 based upon Claimant's return to work, full time, at no loss of earnings." (COL ¶ 2.) Claimant's new injury was compensated through Inservco from May 2006 until the WCJ issued its final decision on May 29, 2008. Thus, because ESIS was joined as a party before the WCJ, the proper remedy is to remand this matter to the Board with the instruction to remand to the WCJ to determine the correct period of time for which Inservco is entitled to reimbursement from ESIS for the benefits paid to Claimant for the new compensable injury.

Accordingly, the Board's order is reversed in so far as it instructed Inservco to seek reimbursement through the Supersedeas Fund, and the matter is remanded to the

Board with the instruction to remand the matter to the WCJ for further proceedings consistent with this opinion.[7]

RENÉE COHN JUBELIRER, Judge

[7] Because of our disposition, we do not reach the issue of whether an entity that is not an insurer as defined by the Act, such as a third party administrator, can receive reimbursement from the Supersedeas Fund.

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O R D E R

NOW, December 16, 2009, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby reversed, in part, and the matter is remanded to the Board with instructions to remand the matter to the WCJ for further proceedings consistent with this opinion.

Jurisdiction relinquished

RENÉE COHN JUBELIRER, Judge