

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Philadelphia, :
Petitioner :
 :
v. : No. 565 C.D. 2009
 : Submitted: September 11, 2009
Workers' Compensation Appeal :
Board (Hairston), :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: January 15, 2010

The City of Philadelphia (Employer) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) that denied Employer's termination petition and granted Sandra Hairston's (Claimant) review petition. In doing so, the Board affirmed the decision of the Workers' Compensation Judge (WCJ) that Claimant had recovered from the work injury identified in the Notice of Compensation Payable (NCP) but not from the work injuries mistakenly omitted from the NCP when first issued. Employer contends that the WCJ and Board erred because Claimant's review petition was untimely filed, making the amendment to the NCP unlawful.

In August 1992, Claimant, a library assistant, was injured while lifting a box at work. Claimant has received total disability benefits since June 1994

pursuant to an NCP describing her work injury as a “strained left shoulder.”¹ Reproduced Record at 1a (R.R.____). Employer has filed three unsuccessful termination petitions.

Employer’s first termination petition was denied in March 1998 because the WCJ found that Claimant’s shoulder injury continued to be symptomatic. In that decision, the WCJ found that Claimant’s work injuries included lumbar, dorsal and cervical strains, but he did not amend the NCP to include these additional injuries. Employer appealed to the Board, which affirmed. It held that the WCJ’s discussion of work injuries not included in the NCP amounted to “harmless error” because Claimant had not fully recovered from her acknowledged work injury. The Board instructed Claimant to file a review petition to determine the “work relatedness” of the additional conditions. Board’s Opinion, 12/20/99, at 4-5; R.R. 14a-15a. Claimant did not do so.

Employer’s second termination petition was denied in May 2002. Again, the WCJ found that Claimant’s left shoulder, back and neck remained symptomatic. Again, the WCJ did not amend the NCP to include the lumbar, dorsal and cervical strains. Employer appealed to the Board, which held that the WCJ erred in treating Claimant’s work injuries to include her neck and back conditions. The Board affirmed the WCJ, however, because Claimant continued to suffer from the acknowledged work injury to her left shoulder. This Court affirmed the Board’s order.

¹ Claimant received “Injured on Duty” payments in the interim between her date of injury and the date that total disability benefit payments began.

In May 2006, Employer filed a third termination petition, which is the one considered in this appeal. In September 2006, Claimant filed a review petition, seeking to have lumbar, dorsal and cervical strains added to the NCP as work injuries. In June 2007, the WCJ held a hearing on Employer's termination petition and on Claimant's review petition.

In support of its termination petition, Employer presented the deposition testimony of Anthony Salem, M.D., who is board certified in orthopedic surgery. On January 5, 2006, Dr. Salem performed an independent medical examination (IME), at which Claimant reported pain in the left side of her neck, in her left shoulder and in her right lower back. Based on his examination, Dr. Salem opined that Claimant had fully recovered from her left shoulder injury. He further testified that even if Claimant had suffered lumbar, dorsal and cervical strains at the time of her 1992 injury, there was no objective evidence of any "residual abnormalities that [could be] related to any of those injuries." Salem deposition, 11/21/06, at 15. Dr. Salem signed a Physician's Affidavit of Recovery that Claimant had fully recovered from back, neck and shoulder injuries. By this affidavit, he did not concede that those injuries actually occurred. Rather, he explained that if those injuries occurred, such strains would not continue to cause Claimant pain after so many years.

Claimant testified that she injured her left shoulder, the mid-section of her back, and her neck in the August 1992 work incident. She stated that she sees her treating physician three to four times a year and takes Advil as needed for the pain and swelling. When asked if she could return to her former position as a library assistant, Claimant stated that she was unsure if she could handle the lifting

and bending involved in the position. She explained that she must change positions after sitting for less than an hour. Claimant further testified that all life activities have become more difficult in light of her current physical limitations.

Claimant then presented the deposition testimony of Maxwell Stepanuk, M.D., who is board certified in orthopedic surgery. Dr. Stepanuk testified that he evaluated Claimant twice after her family physician referred Claimant to him. At the evaluations, Claimant complained of lumbar and dorsal pain. Dr. Stepanuk first saw Claimant on March 15, 2006, when he took Claimant's medical history, performed a physical examination, and ordered diagnostic imaging testing. He saw her again on April 5, 2006. Dr. Stepanuk diagnosed Claimant with dorsal and lumbar chronic strains and sprains and opined that these injuries had resulted from the August 1992 work incident.

Dr. Stepanuk testified that Claimant has not fully recovered from her August 1992 work injuries. He stated that Claimant continues to complain of dorsal and lumbar pain that is "periodic in nature," causing her to have good days and bad days. Dr. Stepanuk explained that an orthopedic patient's symptoms can vary greatly depending on, *inter alia*, the weather, how the patient slept, or what she did the previous day. Dr. Stepanuk further testified that Claimant is unable to return to her pre-injury job; however, he opined that she could perform a sedentary job with lifting and mobility restrictions.

The WCJ found that Claimant had fully recovered from her left shoulder and cervical strain but continued to suffer from lumbar and dorsal strain. The WCJ further found that Claimant's evidence established that the NCP was materially incorrect at the time it was issued. Accordingly, the WCJ denied

Employer's termination petition and granted Claimant's review petition, amending the NCP to include lumbar and dorsal strain as work injuries. In doing so, the WCJ rejected Employer's legal argument that Claimant's review petition, filed twelve years after the incident, should have been dismissed as untimely. Employer appealed to the Board.

The Board affirmed the decision of the WCJ that Claimant established that the NCP was materially incorrect when issued. Moreover, the Board held that the statute of limitations in Section 413(a) of the Workers' Compensation Act² (Act) did not apply in this case because Claimant was still receiving disability benefits for the work injury when she filed her review petition. Employer now appeals the Board's adjudication to this Court.

On appeal,³ Employer contends that Claimant's review petition and the WCJ's resulting expansion of Claimant's work injury description were barred by the three-year statute of limitations in Section 413(a) of the Act. Therefore, Employer argues that its termination petition should have been granted when the WCJ found that Claimant had fully recovered from the acknowledged left shoulder work injury. In response, Claimant contends that there is no time limit for amending an NCP that is determined to have been materially incorrect when it was issued.

² Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §772.

³ This Court's scope and standard of review of an order of the Board 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. *City of Philadelphia v. Workers' Compensation Appeal Board (Brown)*, 830 A.2d 649, 653 n.2 (Pa. Cmwlth. 2003).

We begin with a review of Section 413(a) of the Act. The second paragraph of Section 413(a), which Employer relies on in its appeal, states, in relevant part, as follows:

A [WCJ] designated by the department may, at any time, modify ... a notice of compensation payable ... upon petition filed by either party with the department, upon proof that the disability of an injured employee has increased, decreased, recurred, or has temporarily or finally ceased, or that the status of any dependent has changed.... Provided, That, except in the case of eye injuries, *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.*

77 P.S. §772 (emphasis added). Employer contends that the three-year statute of limitations in the second sentence modifies the statement in the first sentence that a WCJ “at any time” can modify an incorrect NCP. Accordingly, Claimant was barred from filing a review petition more than twelve years after the NCP was issued and more than five years after she was told by the Board that she should file a review petition to clarify the extent of her work injuries.

In support of its construction of Section 413(a), Employer relies on *Jeanes Hospital v. Workers’ Compensation Appeal Board (Hass)*, 582 Pa. 405, 872 A.2d 159 (2005). Employer contends that *Jeanes Hospital* established that a review petition is treated like a claim petition for all purposes, including the statute of limitations. We conclude, however, that *Jeanes Hospital* is inapposite. It addresses injuries that develop after the NCP was issued. It did not address the situation here, which is an NCP that was alleged to be incorrect when it was issued.

Claimant proved that the lumbar and dorsal strains were sustained in 1992, not at a later date.⁴

Employer also directs our attention to *Westinghouse Electric Corporation/CBS v. Workers' Compensation Appeal Board (Korach)*, 584 Pa. 411, 883 A.2d 579 (2005). In *Korach*, the Supreme Court held that a review petition was barred by the three-year statute of limitations where the claimant sought to add psychological injuries to the description of a work injury fourteen years after the injury had occurred. In that case, however, the claimant's petition was time barred because he had not received disability compensation within the three years immediately preceding the filing of the petition.⁵ By contrast, here Claimant was still receiving disability compensation when the WCJ ordered the NCP corrected.

In sum, the three-year statute of limitations for filing a review petition begins to run after benefits cease. Employer misapprehends the Court's holdings

⁴ Employer relies on the second paragraph of Section 413(a), 77 P.S. §772, in support of its argument that Claimant's review petition is subject to the three-year statute of limitations, which applies to amendments to an NCP where the claimant's physical condition changes over time as a result of the original work injury.

However, the first paragraph of Section 413(a) applies to amendments of the NCP to correct mistakes or omissions in the original work injury description. *Cinram Manufacturing, Inc. v. Workers' Compensation Appeal Board (Hill)*, ___ Pa. ___, ___, 975 A.2d 577, 580-581 (2009). That paragraph states:

A [WCJ] may, at any time, review and modify . . . a notice of compensation payable . . . if it be proved that such notice of compensation payable . . . was in any material respect incorrect.

77 P.S. §771. Notably, this first paragraph in Section 413(a) does not contain a statute of limitations. Here, Claimant proved that her NCP was materially incorrect.

⁵ The claimant had received a lump sum settlement in commutation of his partial disability compensation. As part of the commutation proceeding, Employer agreed to pay ongoing medical benefits for Claimant's work injuries. When Employer ceased to pay compensation benefits for wage loss, however, the statute of limitations began to run.

in *Jeanes Hospital* and *Korach*; the three-year statute of limitations does not begin to run from the date of injury. Rather, the statute of limitations is triggered when a claimant ceases to receive wage loss compensation benefits. Here, Claimant's disability benefits were still being received when she filed her review petition. Accordingly, the WCJ did not err in granting Claimant's review petition.

Employer next contends that Claimant should not be allowed to file a review petition to make corrective amendments to her NCP because she filed the petition more than twelve years after the date of injury. Employer asserts that the NCP is the operative document that Employer relies on when it seeks to establish that a claimant fully recovered from the accepted work injury and that it was prejudiced by Claimant's failure to file her review petition after the Board directed her to do so in 1999. Employer makes a good point that it must be able to rely on the NCP when it requests an IME. There can be prejudice if the employer learns afterwards that the claimant believes the list of injuries in the NCP is incorrect. Here, Employer had actual notice, as a result of the first termination petition proceeding, that Claimant claimed to have suffered neck and back strains. Further, Dr. Salem examined Claimant for those strains during her IME, and he concluded that she had fully recovered from those injuries. The WCJ chose not to accept Dr. Salem's opinion, which is the prerogative of the factfinder. In any case, the potential for prejudice identified by Employer appears to be one created by the language of Section 413(a).

Finally, we consider Employer's contention that its termination petition should have been granted because the WCJ found that Claimant had fully recovered from the acknowledged left shoulder work injury. This argument

depends entirely on our first holding that Claimant's review petition was untimely filed, making her sole work injury the shoulder injury. However, the NCP was amended by the WCJ to include a lumbar and dorsal strain, and this is permissible under Section 413(a) of the Act. Employer's evidence did not persuade the WCJ that Claimant had fully recovered from her lumbar and dorsal strains. Accordingly, Employer did not meet its burden of proving full recovery from all of her work injuries.

For the foregoing reasons, we affirm the Board's adjudication.

MARY HANNAH LEAVITT, Judge

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ORDER

AND NOW, this 15th day of January, 2010, the order of the Workers' Compensation Appeal Board, dated March 12, 2009, is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge