IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Samuel Gockley, Petitioner	:	
v.	:	No. 570 C.D. 2008
	:	Submitted: June 27, 2008
Workers' Compensation Appeal Board (City of Scranton), Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER FILED: September 10, 2008

Samuel Gockley seeks review of the Workers' Compensation Appeal Board's (Board) order upholding a decision by the Workers' Compensation Judge (WCJ) to dismiss Gockley's petition to modify and reinstate workers' compensation benefits because it was untimely under the second paragraph of Section 413(a) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §772.[1] Gockley questions whether the statute of limitations did not run because the employer continued to pay medical bills; whether the 500-week and

[1]The second paragraph of Section 413(a) provides in part that a WCJ may, at any time, modify, reinstate, suspend or terminate a notice of compensation payable, an original or supplemental agreement or an award upon petition filed by either party and proof that the disability has increased, decreased, recurred or temporarily or finally ceased, with the change "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," and with the proviso 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."

three-year periods should have begun to run from the first WCJ's July 10, 1996 order; whether Gockley's being unaware of the statute of limitations should have tolled it; and whether the Board erred in determining that he waived some issues.

Gockley was employed by the City of Scranton (Employer) as a fire fighter when, on or about October 10, 1992, he sustained an acute sprain of the lumbar back for which a notice of compensation payable was issued showing an average weekly wage of $675.42 and a compensation rate of $450.28 per week. By decision of July 10, 1996, WCJ J. Joseph Grady modified Gockley's benefits to partial disability at a rate of $219.51 per week, effective December 6, 1993, based on a referral to a job that Gockley could perform and his failure to apply for it. On or about August 2, 2006, Gockley filed a petition to modify and reinstate benefits, alleging a worsening of his condition. At a hearing before WCJ Howard M. Spizer on April 3, 2007, Gockley acknowledged Employer's records showing that the last payment of benefits to Gockley was on July 2, 2003, although Employer continued to pay for his medical treatment. Gockley testified that pain in his low back, left buttock and left leg seemed to be worsening in November 2005 and to have spread to his right leg. He did not consult counsel until August 2, 2006. On December 6, 2006, Dr. Alan P. Gillick advised Gockley that he was disabled from his original job and from the job recognized by WCJ Grady as the basis for the modification.

Employer cited authority including *Stewart v. Workers' Compensation Appeal Board (Pa. Glass Sand/US Silica)*, 562 Pa. 401, 756 A.2d 655 (2000), *Romaine v. Workers' Compensation Appeal Board (Bryn Mawr Chateau Nursing Home)*, 856 A.2d 308 (Pa. Cmwlth. 2004), *aff'd on other grounds*, 587 Pa. 471, 901 A.2d 477 (2006), and *Hashagen v. Workers' Compensation Appeal Board (Air Prods. & Chems., Inc.)*, 758 A.2d 276 (Pa. Cmwlth. 2000), for the proposition that

petitions for reinstatement of total disability benefits must be brought within three years of the final payment after exhaustion of 500 weeks of partial disability benefits. The WCJ concluded that Gockley's petition had to be filed by July 2, 2006 to be timely; because it was not, his petition was barred.

On Gockley's appeal, the Board noted that he raised new contentions that the three-year period should run from November 11, 2005, the last day that Gockley was treated by Dr. Gillick, or from October 6, 2006 when Gockley again saw Dr. Gillick. At the initial hearing before WCJ Spizer the parties agreed that the question was what was the date of the last payment of compensation and whether the petition was filed within three years of that payment. Although it was established that Employer continued to pay medical bills after that date, there was no suggestion made that such payments or any other factor tolled the running of the three-year period. The Board stated that a party waives an issue for appeal if it does not raise the issue before the WCJ, citing *Rox Coal Co. v. Workers' Compensation Appeal Board (Snizaski)*, 570 Pa. 60, 807 A.2d 906 (2002), and *USX Corp. v. Workers' Compensation Appeal Board (Labash)*, 788 A.2d 1101 (Pa. Cmwlth. 2001). The Board agreed with the WCJ that a reinstatement petition must be filed within three years of the last payment of compensation, and it affirmed.[2]

On the question of waiver Gockley argues that *Rox Coal Co.* does not apply because that case involved an employer's waived defense to the applicability of a statutory provision, whereas here the issue is one of a defense to an affirmative defense. Gockley indicated that he was contesting the statute of limitations

[2]The Court's review of the Board's order is limited to determining whether there was a constitutional violation or an error of law, whether any practice or procedure of the Board was not followed and whether the necessary findings are supported by substantial evidence. *Helvetia Coal Co. v. Workers' Compensation Appeal Board (Learn)*, 913 A.2d 326 (Pa. Cmwlth. 2006).

defense, but he states that he did not have an obligation under *Rox Coal Co.* or any other case to outline every specific argument that he intended to make regarding the statute of limitations issue. In *USX Corp.*, he asserts, there was a failure to question a doctor regarding specific opinions, resulting in failure to develop facts regarding an argument raised on appeal, and case law requires objections to be raised at the time of deposition. He states that sufficient facts were developed here regarding his statute of limitations arguments. Employer does not rely upon the waiver rationale articulated by the Board but instead addresses the merits.

The Court observes that in *Rox Coal Co.* the employer contested a fatal claim petition resulting from an employee's death in a one-vehicle crash when he was on his way to his supervisory job in his company-supplied vehicle. Before the WCJ the employer first denied alleged bases for an exception to the general rule against compensation for injuries while an employee is going to or coming from work, and it claimed based on a police accident investigation report that the decedent was violating traffic laws and company policy at the time of death. On a request for reconsideration to the Board on appeal, the employer raised for the first time a contention that the generally acknowledged exception to the going and coming rule that the contract of employment includes transportation had been eliminated by 1993 amendments to Section 301(c)(1) of the Act, 77 P.S. §411(1). The Board held that the issue was waived because it was not raised before the WCJ and was not cross or protectively appealed to the Board.

This Court declined to consider the waiver issue and addressed the merits, but the Supreme Court affirmed the ruling that the issue was waived even though the court granted allowance of appeal in part to determine the effect of the 1993 amendments. The court quoted *Wing v. Unemployment Compensation Board*

of Review, 496 Pa. 113, 117, 436 A.2d 179, 181 (1981), stating that "diligent preparation and effective advocacy before the [administrative law] tribunal must be encouraged by requiring the parties to develop complete records and advance all legal theories[.]" The court also cited *Smith v. Workmen's Compensation Appeal Board (Concept Planners & Designers)*, 543 Pa. 295, 670 A.2d 1146 (1996), stating that the purpose of the waiver rule is to ensure that the tribunal with initial jurisdiction is presented with all cognizable issues so that the integrity, efficiency and orderly administration of the workers' compensation scheme of redress is preserved. Gockley failed to raise for the WCJ to consider and decide his theories that Employer's payment of medical bills tolled the running of the statute of limitations or that the 500 weeks should run from July 1996 or that the three-year limitations period should not be applied where Gockley asserts that he was unaware of it. Under *Rox Coal Co.*, *Wing* and *Smith*, the Board correctly held that Gockley's arguments on these issues were waived.

Should the merits of Gockley's contentions be considered, he would not prevail. He first argues that the statute of limitations did not run because Employer continued to pay medical bills. He quotes Section 315 of the Act, 77 P.S. §602, as amended by Section 13 of the Act of December 5, 1974, P.L. 782, which is the statute of repose provision specifying the period of three years from the injury after which original claims for compensation are forever barred and which includes an exception as follows: "Where, however, payments of compensation have been made in any case, said limitations shall not take effect until the expiration of three years from the time of the making of the most recent payment prior to date of filing such petition…." He quotes *Harley Davidson, Inc. v. Workers' Compensation Appeal Board (Emig)*, 829 A.2d 1247 (Pa. Cmwlth.

2003), where the Court noted that Section 315 protects unwary employees who may not have filed formal claim petitions because they were receiving ongoing payments of medical expenses, who could be lulled into a false sense of security if the statute was not tolled. Gockley asserts that his case is similar to *Harley Davidson* because Employer continued to pay his medical bills and it was aware that they were the result of the work-related injury.

As Employer emphasizes in response, Gockley's petition to reinstate benefits was filed pursuant to Section 413(a) of the Act, not pursuant to Section 315. Cases cited by Gockley applying Section 315 are irrelevant. The issue is whether payment of medical bills is payment of "compensation" within the meaning of Section 413. The Court has held that a crucial distinction exists between a statute of repose, where an employer's liability has not been established, and a statute of limitations where its liability already has been determined. *See O'Brien v. Workers' Compensation Appeal Board (Montefiore Hosp.)*, 690 A.2d 1262 (Pa. Cmwlth. 1997). In the latter cases, medical expenses and compensation are considered to be separate. *Id.* Further, it is settled law "that while payments of medical expenses in cases governed by Section 315 of the Act do toll that section's three year limitation, payments of medical expenses in cases governed by Section 413 of the Act do not toll that section's three year statute of limitations." *Riggle v. Workers' Compensation Appeal Board (Precision Marshall Steel Co.)*, 890 A.2d 50, 56 (Pa. Cmwlth. 2006). Thus Gockley's argument already has been advanced and has been rejected by this Court. In his reply brief, he concedes that *O'Brien* and *Riggle* are directly contrary to his position. Without offering argument as to why, he requests that the Court now overrule those decisions, but the Court declines to abandon the clear holdings of *O'Brien* and *Riggle*.

Gockley next asserts that the 500-week limit and the three-year statute should run from the date of WCJ Grady's order, *i.e.*, July 10, 1996. On this point, Gockley emphasizes that between December of 1993 and June of 1996 Employer paid him temporary total, not partial, disability benefits and for that reason his view should be adopted. WCJ Grady's decision ends, however, by stating that Employer and/or its insurance carrier is not entitled to credit against overpayments of compensation made to Gockley after December 6, 1993, but Employer and/or its insurance carrier "may make [application for] reimbursement to the Supersedeas Reimbursement Fund for any reimbursement due and owing to it." WCJ Grady's Decision, p. 8; Reproduced Record 108a. As quoted in n1 above, Section 413(a) requires that a modification be made as of the date the disability of the claimant decreased, which in this case was December 1993 and not July 1996.

Finally, Gockley states that there is uncontradicted testimony in the record that his former counsel never informed him of the statute of limitations. (Employer notes that Gockley blocked its efforts to secure evidence from prior counsel based on attorney-client privilege.) Gockley cites no case law whatsoever to support his contention that ignorance of the applicable statute of limitations somehow tolls or extends the period but refers instead to *Maple Creek Mining Co. v. Workers' Compensation Appeal Board (Bakos)*, 833 A.2d 1198 (Pa. Cmwlth. 2003), for the general principles that the Act's purpose is to make whole an injured employee and that the Act must be liberally construed to effect its humanitarian purposes with borderline interpretations resolved in favor of the employee. He has not raised "borderline" issues to be resolved. The order of the Board is affirmed.

DORIS A. SMITH-RIBNER, Judge

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O R D E R

AND NOW, this 10th day of September, 2008, the order of the Workers' Compensation Appeal Board is affirmed.

DORIS A. SMITH-RIBNER, Judge