IN THE COMMONWEALTH COURT OF PENNSYLVANIA

St. Lawrence Church and Risk Enterprise Management, Petitioners	:	
v.	:	No. 597 C.D. 2008
	:	Submitted: July 3, 2008
Workers' Compensation Appeal Board (Sulligan), Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN FILED: August 14, 2008

St. Lawrence Church and Risk Enterprise Management (together, Employer) petition for review of the March 6, 2008, order of the Workers' Compensation Appeal Board (WCAB), which affirmed the decision of a workers' compensation judge (WCJ) granting the penalty petition filed by Frank Sulligan (Claimant). We vacate and remand.

Claimant suffered work-related injuries in January 2000 and January 2001 in the nature of a left knee strain, bilateral carpal tunnel syndrome and bilateral cubital. (R.R. at 209a-10a, 220a.) In January 2003, a WCJ approved a stipulation between the parties addressing a closed period of total disability and resolving Claimant's petitions for reinstatement/review/modification and penalties. Pursuant to the stipulation, Employer agreed to pay benefits owing, and Claimant

acknowledged that the descriptions of the injuries, as stated above, were correct. In addition, it was agreed that Claimant's counsel would receive a lump sum payment of twenty percent of the compensation payable to Claimant pursuant to the stipulation, deductible from Claimant's share, and that no further counsel fees were to be paid. (R.R. at 214a-20a.) Thereafter, Claimant continued to receive total disability benefits at the weekly rate of $586.22, in bi-weekly installments.[1]

On November 15, 2006, Claimant filed a penalty petition alleging that: (1) Employer improperly deducted attorney's fees from Claimant's checks when no fee agreement had been approved; (2) Claimant's attorney returned the checks and Employer disregarded counsel's instructions to forward those sums to Claimant; (3) beginning January 17, 2006, Employer's combined payments to Claimant and his counsel were less than the total awarded; (4) Employer did not make payments in a timely fashion; and (5) Employer regularly refused to pay for reasonable and necessary medical treatment and medications. Claimant requested penalties in the amount of fifty per cent of compensation payable from November 2005 and ongoing. (R.R. at 3a-4a.) Employer filed an answer specifically denying that it failed to make payments in a timely fashion, (R.R. at 5a), and the matter was assigned to a WCJ.

At the first hearing, Claimant testified that, in September 2005, Employer took an offset for Social Security benefits. Claimant acknowledged that

[1] As reflected in the stipulation, Employer had reinstated Claimant's total disability benefits on April 15, 2002. (R.R. at 218a.)

he had submitted an Employee's Report of Benefits Form to Employer, which indicated that he was receiving Social Security old age benefits. Claimant explained that he actually was receiving disability benefits, but mistakenly reported them as old age benefits and that Employer thereafter took an offset. He stated that once Employer learned of the error, Employer sent a makeup check but improperly deducted attorney's fees from the amount owed when no fee agreement was in place. The record reflects that an order approving a twenty per cent attorney's fee subsequently was issued on November 8, 2005. (R.R. at 147a, 155a-57a, 238a.) According to Claimant, Employer deducted the correct amount of attorney's fees from a few checks and then began taking out more than the fee agreement provided. He also stated that his attorney returned the checks that had been incorrectly issued and asked that the monies be sent directly to Claimant, but Employer did not reimburse Claimant for these short pays. (R.R. at 147a-49a.)

Claimant further testified that he initially received his workers' compensation checks on Tuesdays, which had been his regular payday, but, subsequently, he received checks on Wednesdays, Thursdays and Fridays, until the checks started coming on Wednesdays again. Claimant stated that he paid bills trusting that his workers' compensation checks would arrive on a particular day, and, as a result of the late payments, he bounced checks and incurred seven or eight thirty-dollar overdraft fees.[2] (R.R. at 149a-50a.)

[2] Claimant offered into evidence a copy of one page of his October 2006 bank statement showing that the compensation payment dated September 26, 2006, was deposited on October 3, 2006, after Claimant had been charged two overdraft fees following an overdrawn check and a cash withdrawal. (R.R. at 207a.)

Claimant submitted into evidence copies of payment vouchers for checks issued by Employer, which reflect that: (1) Employer issued bi-weekly checks for the correct amount of $1,172.44 until September 12, 2005, when Employer paid only $601.96 after taking the offset for Social Security; (2) Employer issued a replacement check on September 19th for the underpayment, but deducted attorney fees from the amount due; (3) from September 26, 2005, through January 3, 2006, Employer issued bi-weekly payments in the amount of $937.95, indicating it had taken a deduction for attorney's fees; and (4) from January 17, 2006, through December 5, 2006, Employer issued bi-weekly checks in the reduced amount of $905.56, again indicating deductions for attorney's fees. (Claimant's Ex. C-1, R.R. at 160a–99a.)

Claimant introduced into evidence two bills, one for an MRI of his left elbow and one for a myelogram and CT scan of his lower back. (R.R. at 200a-201a.) He testified that Employer would not authorize the MRI of his elbow, that he had to reschedule the appointment and that, eventually, Blue Cross paid the charges. Claimant acknowledged that he was receiving benefits only for injuries to his upper extremity and knee, but he stated that he had injured his back at work three times and had back surgery.[3] Claimant believed that Employer had rejected payment for his back surgery and that Blue Cross had paid that bill. Claimant did not believe that the bill for the MRI of his elbow was submitted to Employer's insurance carrier, and he did not know if either of the bills had been accompanied by form LIBC 9. (R.R. at 152a-55a.)

[3] In the penalty petition, Claimant described the work injuries as including a back injury. (R.R. at 3a.)

Claimant also offered into evidence a January 10, 2007, report from John Pandolfo, D.C., which the WCJ admitted into evidence over Employer's hearsay objection. (R.R. at 5b.) In the report, Dr. Pandolfo states that Claimant injured his back at work on April 16, 1999, began treatment with Dr. Pandolfo in October 2001 and was unable to continue working as of November 1, 2001. The report reflects Dr. Pandolfo's opinion that Claimant's total disability, including current injuries to his back, directly resulted from work injuries sustained in 1999, 2000 and 2001 and that the diagnostic testing reflected on the bills submitted by Claimant was necessitated by Claimant's 2000 and 2001 work injuries. (R.R. at 205a.)

Employer did not offer any witness testimony but introduced into evidence a packet of documents including: (1) the January 17, 2003, decision adopting the parties' stipulation; (2) a June 2, 2005, Notice of Workers' Compensation Benefits Offset; (3) a June 2, 2005, letter to Claimant explaining Employer's proposed offset for Social Security benefits; (4) a September 16, 2005, letter from Claimant's counsel informing Employer that Claimant reported the receipt of old age benefits by mistake and asking that full compensation payments be reinstated and a check issued for the offsets taken; (5) Claimant's November 26, 2005, affidavit in response to Employer's request for supersedeas;[4] and (6) a report

[4] In the affidavit, Claimant states that he suffered injuries to his left knee and to his hands and elbow from which he continues to be totally disabled. However, the affidavit does not mention any injury to Claimant's back. (R.R. at 231a-35a.)

detailing payments issued to Claimant from February 27, 2001, through December 5, 2006. (R.R. at 224a-61a.)

The WCJ granted Claimant's penalty petition, based in part on the following finding:

> This [WCJ] has carefully reviewed the testimony of the Claimant and finds his testimony to be credible and persuasive that Employer, through its insurer, failed to pay compensation benefits in a timely manner although Claimant's memory was not crystal clear as to when all payments were made. After filing numerous Petitions, Claimant went before Judge Lorine in order to be paid the correct amount of compensation. Employer also violated the Act by trying to take a Social Security offset for which it was not entitled. The Employer also deducted attorney fees before a fee agreement was in place. While the Employer eventually paid Claimant what was due, the indemnity checks did not always reach Claimant on a regular basis which caused Claimant financial hardship. Moreover, without filing for Utilization Review, Employer refused to pay Claimant's medical bills, and Claimant continues to be in need of medical care. The documentary evidence submitted by both Claimant and Employer really supports Claimant's position. This Judge accepts Claimant's testimony as the facts of this case.

(WCJ's Finding of Fact, No. 14.) The WCJ found that Claimant met his burden of establishing that Employer repeatedly violated the Act and awarded Claimant penalties in the amount of fifty per cent of all benefits paid to Claimant from September 12, 2005, "the date of the illegal credit/offset," through March 28, 2007, the date of the WCJ's decision. The WCJ also found that Employer's contest was not reasonable because Employer provided no evidence to refute Claimant's

allegations that Employer failed to pay compensation in a timely manner and refused to pay Claimant's reasonable and necessary medical bills. Accordingly, the WCJ also awarded Claimant counsel fees.[5] (WCJ's Findings of Fact, Nos. 15, 19.) Employer appealed the grant of penalties and attorney's fees to the WCAB, which affirmed the WCJ's decision.

On appeal to this court,[6] Employer first argues that the WCJ erred in finding that the manner in which compensation was paid constituted a violation of the Workers' Compensation Act (Act).[7] In relevant part, section 308 of the Act provides that "all compensation payable under this article shall be payable in periodical installments, as the wages of the employe were payable before the injury." 77 P.S. §601. Employer asserts that section 308 does not require payments to be made on the same day of the week on which the employee was paid his wages, and Employer contends that it did not violate the Act because it paid compensation on a bi-weekly basis, the same basis on which Claimant's wages were paid.

[5] Counsel fees assessed against an employer are payable on the basis of quantum meruit, and the WCJ must make definite factual findings concerning the skill required, the duration of the proceedings and the time and effort required and actually expended. Section 440(b) of the Workers' Compensation Act, 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. §996(b). Here, the WCJ detailed the time and work involved in prosecuting this matter and approved a $300 hourly fee, observing that Claimant's counsel "is an experienced workers' compensation attorney and enjoys a distinguished reputation among the bar." (WCJ's Findings of Fact, No. 19.)

[6] Our scope of review is limited to determining whether an error of law was committed, whether constitutional rights were violated or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

[7] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§1-1041.4, 2502-2708.

We agree that section 308 does not require an Employer to pay compensation on the same day of the week as the employee received wages. However, in the present case, it is undisputed that Employer was required to pay compensation bi-weekly, and Claimant credibly testified that he did not always receive compensation payments when they were due, i.e., every two weeks. Although Claimant's testimony in this regard was somewhat vague, Claimant specifically testified that he did not receive the check dated September 26, 2005, until October 2, 2005, five days beyond the two-week period. Employer argues that it had no control over when the checks were *delivered* to Claimant, but Employer offered no evidence establishing that Claimant's compensation checks were timely *mailed*.[8] Accordingly, we conclude that the record supports the WCJ's finding that Employer failed to pay compensation in a timely manner.

Employer next argues that the WCJ erred in finding that Employer "violated the Act by trying to take a Social Security offset for which it was not entitled." (WCJ's Findings of Fact, No. 14.) We agree. Employees are required to report receipt of benefits commonly known as Social Security "old age" benefits. Section 204(c) of the Act, 77 P.S. §71(c); 34 Pa. Code §123.3. Employers are entitled to an offset against workers' compensation for an employee's receipt of these benefits and are required to provide the employee twenty days notice prior to making an adjustment in payments. 34 Pa. Code §§123.4, 123.5. An employee may challenge the employer's action by filing a

[8] In response to Employer's argument that Claimant is responsible for the overdraft fees he incurred, we note that the Act does not require that an employee suffer economic harm before penalties are imposed. *Palmer v. Workers' Compensation Appeal Board (City of Philadelphia)*, 850 A.2d 72 (Pa. Cmwlth. 2004).

petition to review. 34 Pa. Code §123.4. Here, Claimant reported the receipt of old age benefits on Form LIBC-756, dated April 14, 2005. (R.R. at 226a.) Employer responded by notifying Claimant, by form dated June 2, 2005, that it would take an offset effective August 1, 2005, and the offset actually was taken in the bi-weekly period from September 1 to September 14, 2005. By letter dated September 16, 2005, Claimant informed Employer of the mistake and advised that Claimant was receiving disability, not old age, benefits. (R.R. at 230a.) Thereafter, Employer stopped taking the offset and issued a reimbursement check. We agree with Employer that these facts do not establish a violation of the Act and that the WCJ erred in concluding otherwise.

Employer also argues that the record does not support the WCJ's finding that it violated the Act by failing to pay medical bills for the MRI of Claimant's elbow or the CT scan of his lumbar spine. Again, we agree. First, we note that an employer may deny payment of medical expenses based on a lack of causal relationship to the work injury without first filing a petition with the WCJ. *Cittrich v. Workmen's Compensation Appeal Board (Laurel Living Center)*, 688 A.2d 1258 (Pa. Cmwtlh. 1997); *DeJesus v. Workmen's Compensation Appeal Board (Friends Hospital)*, 623 A.2d 397 (Pa. Cmwlth. 1993). With respect to the CT scan of Claimant's back, Claimant has stipulated that the descriptions of his 2000 and 2001 injuries as including "left knee strain, wrist, bilateral carpal tunnel syndrome and bilateral cubital" are correct. (R.R. at 209a-10a, 220a.) In finding that Employer wrongfully refused payment for this service, the WCJ relied entirely on the report of Dr. Pandolfo. However, Employer objected to the admission of this report, and there is *no* other evidence of record corroborating Dr. Pandolfo's

opinion that Claimant suffered a work-related back injury in 1999. To the extent that Dr. Pandolfo relates Claimant's back problems to the injuries of 2000 and 2001, Claimant is estopped by his 2003 stipulation from changing the descriptions of those injuries. Moreover, an employer is not obligated to pay medical bills that are not submitted in accordance with the Act and Bureau regulations. *AT&T v. Workers' Compensation Appeal Board (DiNapoli)*, 728 A.2d 381 (Pa. Cmwlth. 1999).[9] Here, Claimant failed to establish that the two invoices were properly submitted; in fact, he did not believe that the bill for the MRI of his elbow had been submitted at all. Therefore, the WCJ erred in finding that Employer's failure to pay these medical bills constituted a violation of the Act.

Employer also contends that the fifty per cent penalty imposed by the WCJ was disproportionate to any violation. Section 435(d)(i)[10] of the Act provides that employers may be penalized a sum not exceeding ten per cent of the amount awarded and interest accrued and payable; however, the penalty may be increased to fifty per cent "in cases of unreasonable or excessive delays." 77 P.S. §991(d)(i). The assessment of penalties, as well as the amount of penalties imposed, is discretionary, and, absent an abuse of discretion by the WCJ, we will not overturn

[9] Section 306(f.1)(2) of the Act, 77 P.S. §531(2), requires providers to file periodic reports that include, where pertinent, the employee's history, diagnosis, treatment, prognosis and physical findings. Reports must be filed within ten days of commencing treatment and at least once a month thereafter as long as treatment continues. *Id.* An employer is not liable to pay for such treatment until a report has been filed. *Id.; see also* 34 Pa. Code §127.202(a) (insurers are not required to pay for treatment billed until the provider submits bills on one of the forms specified); 34 Pa. Code §127.203 (providers must submit periodic medical reports to the employer on a prescribed form before the employer is obligated to pay for treatment).

[10] Section 435(d)(i) was added by section 3 of the Act of February 8, 1972, P.L. 25.

a penalty on appeal. *Essroc Materials v. Workers' Compensation Appeal Board (Braho)*, 741 A.2d 820 (Pa. Cmwlth. 1999).

Employer argues that the WCJ abused her discretion in imposing the fifty per cent penalty on compensation due from September 12, 2005, because Employer properly took an offset on that date, promptly reimbursed Claimant when it learned of Claimant's mistake, paid Claimant bi-weekly as required by section 308, and denied payment for bills that were not properly submitted. Employer concedes that it erred by beginning to deduct attorney's fees from Claimant's compensation payments in September 2005. However, Employer points out that its deduction of attorney's fees was entirely proper after November 30, 2005, the date of the WCJ's order approving the fee agreement, and that the deductions for the prior three-month period were neither egregious nor in bad faith.

Without specifically finding that there was an unreasonable or excessive delay, the WCJ imposed a fifty per cent penalty from September 12, 2005, the date of the "illegal offset," based in part on her findings that the offset taken for Social Security benefits and the denial of medical bills were violations of the Act. The WCJ relied in part on the same findings to conclude that Employer's contest of this matter was not reasonable. Because we hold that *these* findings are in error, and because the imposition of penalties and the amount awarded are committed to the discretion of the WCJ, we vacate and remand this matter for the

WCJ to reconsider Claimant's penalty petition in light of the foregoing discussion.[11]

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ROCHELLE S. FRIEDMAN, Judge

[11] We have addressed only the issues raised by Employer on appeal. However, on remand, we recommend a review by the WCJ of all of the relevant findings, having noted some discrepancies between the findings and the record. (For example, in WCJ's Findings of Fact, No. 10, the WCJ states that Claimant's Ex. C-4 represents Claimant's earnings, whereas the record reflects that this exhibit is a listing of allegedly improper reductions taken by Employer. (R.R. at 4(b))). We further recommend that the WCJ explain the significance, if any, of the payment history as detailed at length in her various findings.

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O R D E R

AND NOW, this 14th day of August, 2008, the order of the Workers' Compensation Appeal Board (WCAB), dated March 6, 2008, is hereby vacated, and the matter is remanded to the WCAB with instructions to remand to the workers' compensation judge to issue findings and conclusions consistent with the foregoing opinion.

Jurisdiction relinquished.

ROCHELLE S. FRIEDMAN, Judge