IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Judith Viscidi, Petitioner	:	
v.	:	No. 643 C.D. 2007
	:	SUBMITTED: August 10, 2007
Workers' Compensation Appeal Board (Lagoon, Inc.), Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** January 30, 2008

Claimant Judith Viscidi petitions for review of the March 12, 2007 order of the Workers' Compensation Appeal Board (Board) that affirmed the order of Workers' Compensation Judge (WCJ) Lorine granting in part claimant's petition for penalty, which the WCJ also treated as a petition to reinstate workers' compensation benefits. In this case, the Pennsylvania Workers' Compensation Security Fund (the Security Fund) became responsible for administering claimant's workers' compensation claim when employer Lagoon, Inc.'s original workers'

compensation carrier became insolvent.[1] The sole issue before us is whether the Board erred in determining that employer could not be subject to penalties under the Workers' Compensation Act (Act)[2] once the Security Fund assumed administration of claimant's workers' compensation claim. We affirm.[3]

In 1999, claimant sustained a work-related right knee injury while employed as a bartender for employer. In her claim petition, she alleged an average weekly wage of $650.00. Subsequently, employer issued a temporary Notice of Compensation Payable (NCP) acknowledging the injury, but asserting a weekly compensation rate of $25.50. In a February 2001 decision, WCJ Stokes concluded that although claimant remained entitled to receive compensation under the outstanding temporary NCP, she failed to prove that her average weekly wage was in excess of $28.33. The Board affirmed the decision of WCJ Stokes.

In June 2004, employer filed a petition for termination/suspension, alleging that claimant had fully recovered from her 1999 work injury and that she was able to return to work without restriction as of January 5, 2000. Claimant denied the material allegations in employer's petition. In August 2004, claimant filed a penalty petition therein alleging that employer violated the Act by failing to pay her benefits pursuant to WCJ Stokes's order. In addition, she filed a review petition, maintaining that her average weekly wage as set forth in the temporary NCP was incorrect. Employer denied the material allegations of both petitions.

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[1] Workers' Compensation Security Fund Act, Act of July 1, 1937, P.L. 2532, *as amended*, 77 P.S. §§ 1051-1066.

[2] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§ 1-1041.4, 2501-2626.

[3] In light of the purely legal issue presented, our appellate review over the Board's order is limited to determining whether it committed an error of law. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704.

WCJ Lorine consolidated the three petitions for hearing and decision. The only petition at issue in the present case is claimant's penalty petition.[4]

WCJ Lorine found that claimant met her burden of proof regarding the penalty petition in that, absent an order permitting it to cease payment, Inservco Insurance Services, Inc. (Inservco), the third-party administrator responsible for administering claimant's workers' compensation claim on behalf of the Security Fund, illegally failed to make indemnity payments to claimant after assuming the handling of her file in July 2004. Thus, the WCJ determined that claimant was entitled to weekly compensation benefits as of July 1, 2004, subject to a credit against such compensation for any monies claimant earned on or after that date. The WCJ did not, however, assess penalties against either employer or the Security Fund, concluding that he was precluded from doing so.

The Board affirmed the WCJ's determination that no penalties could be assessed against either the Security Fund or employer, citing *Luvine v. Workers' Comp. Appeal Bd. (Erisco Indus.)*, 881 A.2d 72 (Pa. Cmwlth. 2005) and *Constructo Temps, Inc. v. Workers' Comp. Appeal Bd. (Tennant)*, 907 A.2d 52 (Pa. Cmwlth. 2006), *appeal granted*, ___ Pa. ___, 930 A.2d 1250 (2007). In *Luvine*, this court noted that although the Act's penalty provision provides that "[e]mployers and insurers may be penalized a sum not exceeding ten per centum of the amount awarded and interest accrued and payable,"[5] the Security Fund cannot

[4] WCJ Lorine denied employer's petition for termination/suspension, accepting medical evidence to the contrary that claimant had not fully recovered from the work injury. WCJ Lorine also denied claimant's review petition, pointing out that because WCJ Stokes had previously resolved the issue of claimant's average weekly wage in employer's favor, he was precluded from revisiting that issue.

[5] *Id*. at 73 n.3 (quoting Section 435(d)(i) of the Act, 77 P.S. § 991(d)(i)).

be penalized for a failure to pay benefits because the legislature in Section 401 of the Act did not expressly include it within the definition of "insurer."[6]

In *Constructo Temps*, this court reiterated that the Security Fund could not be subject to penalties and additionally held that "just as the actual employer is not liable for payment of compensation, it is also not liable for payment of penalties *due to the conduct of the Security Fund* in handling or processing the claim."[7] *Constructo Temps*, 907 A.2d at 62-63 (first emphasis in original) (second emphasis added) (footnote omitted). Claimant's timely petition for review to this court followed.

Claimant concedes that the Board correctly held that the Security Fund could not be subject to penalties due to the fact that it was not an insurer under Section 401. She contends, however, that the Board's interpretation of Section 435, the penalty provision, is erroneous in that it provides that penalties may be imposed against both employers and insurers who are in violation of the

[6] That section provides that "[t]he terms '**insurer**' and '**carrier**,' when used in this article, shall mean the State Workmen's Insurance Fund or other insurance carrier which has insured the employer's liability under this act, or the employer in cases of self-insurance." 77 P.S. § 701.

[7] In its order granting the petition for allowance of appeal, the Supreme Court set forth the following two issues to be considered on appeal:

> (1) Whether an order prohibiting the assessment of penalties against the Workers' Compensation Security Fund for its failure to pay reasonable and necessary medical expenses incurred by the claimant violated the humanitarian purposes of the Workers' Compensation Act?
>
> (2) Whether an employer may be assessed a penalty for its failure to pay reasonable and necessary medical expenses incurred by the claimant where the penalties imposed resulted from the conduct of the Workers' Compensation Security Fund?

930 A.2d at 1250.

Act. She notes further that the provision does not bar penalties from being assessed against an employer, as opposed to the Security Fund.

Moreover, claimant maintains that there is nothing in the Act which prevents employers who no longer have insurers from being assessed penalties. Specifically, claimant asserts that because the Security Fund technically is not an insurer, the Fund cannot have assumed employer's liability for penalties. Accordingly, she argues that the Board erred in determining that a penalty could not be assessed against employer.

Finally, claimant maintains that, absent negative consequences, the decision below rewards employer and the Security Fund for their illegal conduct and does not act as a deterrent for future illegality. She asserts that the law as presently interpreted is contrary to the humanitarian purposes of the Act in that it results in the punishment of an innocent claimant and in the insulation of the Security Fund and employer. She maintains that a superior alternative would be to hold employer responsible for violations of the Act attributable to the Security Fund, but to provide employer with redress in the form of a contractual action against the Fund.

In response, employer notes that pursuant to Section 305 of the Act, an insurer assumes an employer's liability to pay compensation.[8] If an insurer becomes insolvent, the Security Fund then becomes the successor-in-interest to the insolvent insurance carrier. Employer points out that although Section 11(3) of the

[8] Specifically, that section provides that "[e]very employer liable under this act to pay compensation shall insure the payment of compensation in the State Workmen's Insurance Fund, or in any insurance company, or mutual association or company, authorized to insure such liability in this Commonwealth. . . ." 77 P.S. § 501(a)(1). Further, "[s]uch insurer shall assume the employer's liability hereunder and shall be entitled to all of the employer's immunities and protection hereunder. . . ." *Id.*

Workers' Compensation Security Fund Act provides that "[a]n employer may pay an award or a part thereof in advance of payment from the fund," subject to subrogation, an employer is not required to do so. 77 P.S. § 1061(3).

Pertinent to the present case, employer asserts that the record is devoid of evidence that it was not properly insured at the time of injury or that it was in any way responsible for Inservco's stoppage of payments to claimant. Thus, employer maintains that an imposition of penalties on it would improperly amount "to an attempt to penalize into compliance an already compliant employer." *Constructo Temps*, 907 A.2d at 61.

As an initial matter and for purposes of clarification, we note our agreement with claimant that employers can be liable for penalties even in situations where the Security Fund has had to assume responsibility for the obligations of insolvent insurers. Although claimant discusses *Constructo Temps* in her brief, she appears to have missed and/or misunderstood that portion of our decision wherein we concluded that employers were not protected from the imposition of penalties merely because the Security Fund was not an insurer and, therefore, not subject to penalties by operation of law. In that case, we emphasized that "[t]his opinion does not hold that an employer cannot, under any circumstances, be required to pay penalties once it has obtained insurance. . . ." *Id*. at 63. "We hold only that . . . an employer, which may be penalized for its own 'discernible and avoidable wrongful conduct,' cannot be penalized *vicariously* for conduct properly attributable to the Security Fund." *Id*. (emphasis added). In other words, employer's vulnerability to the possibility of the imposition of penalties is independent of the Security Fund's status as a non-insurer.

Also in *Constructo Temps*, we rejected the claimant's argument that an employer's liability would be appropriate based on the alleged control that it could maintain over an insurer's processing and payment of workers' compensation claims. We pointed out that "there is nothing to suggest that an employer is able to exercise any control over the Security Fund's payment of claims, an entity with which [e]mployer has *no* contractual relationship." *Id.* at 61 n.17 (emphasis in original). Accordingly, although the imposition of penalties on employers whose workers' compensation claims have come within the administration of the Security Fund seems somewhat unlikely, it certainly is not precluded.

Notwithstanding the aforementioned observation about the possibility of the imposition of penalties on employers, we note that WCJ Lorine in the present case made a specific finding regarding Inservco's mishandling of claimant's file for the Security Fund. To wit, WCJ Lorine found that "Inservco, on behalf of the Security Fund, illegally stopped the payment of compensation to the [c]laimant on or about July 1, 2004." Finding of Fact No. 20(d). Significantly, he made no findings regarding any misconduct on the part of employer and nor does the record indicate that a remand is warranted for any findings in that regard.[9]

Moreover, although we acknowledge the possibility that protecting the Security Fund from the imposition of penalties at the expense of innocent claimants very well may not serve the humanitarian purposes of the Act, any perceived deficiency in that regard must be addressed by the legislature. Clearly, there is no support for claimant's proffered solution of holding hapless employers

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[9] In order for penalties to be imposed, any violation must appear in the record. *DeVault Packing Co. v. Workmen's Comp. Appeal Bd. (Jones)*, 670 A.2d 741 (Pa. Cmwlth. 1996).

liable for the Security Fund's mishandling of claims, even subject to the redress of subrogation.

Accordingly, given the fact that employer has no vicarious liability for the Security Fund's wrongful conduct and there is no indication of record that employer independently committed any impropriety, we conclude that the Board did not err in determining that employer should not be subject to penalties. We wish to eradicate, however, any possible belief on the Board's part that the Security Fund's exemption from penalties provides employers with a similar blanket protection. As always, whether an employer violated "provisions of this act or such rules and regulations or rules of procedure"[10] is a factual determination. *Dworek v. Workmen's Comp. Appeal Bd. (Ragnar Benson, Inc.)*, 646 A.2d 713 (Pa. Cmwlth. 1994). In addition, the imposition of penalties against an employer or an insurer is at the discretion of the WCJ. *Fearon v. Workers' Comp. Appeal Bd. (Borough of Ashland)*, 827 A.2d 539 (Pa. Cmwlth. 2003).

For the aforementioned reasons, we affirm.

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BONNIE BRIGANCE LEADBETTER,
President Judge

[10] 77 P.S. § 991(d).

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Respondent	:	

<u>O R D E R</u>

AND NOW, this 30th day of January, 2008, the order of the Workers' Compensation Appeal Board in the above captioned matter is hereby AFFIRMED.

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BONNIE BRIGANCE LEADBETTER,
President Judge