IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Crompton Corporation, Petitioner	:	
v.	:	No. 654 C.D. 2008
Workers' Compensation Appeal Board (Barger), Respondent	:	Submitted: August 29, 2008

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: October 24, 2008**

The only issue in this workers' compensation appeal is whether Terry Barger (Claimant) provided timely notice of his occupationally induced hearing loss to Crompton Corporation (Employer). Claimant, Employer contends, filed his petition for benefits at least five years after he knew or should have known that exposure to hazardous work noise caused his hearing loss. Because we recently rejected the same argument in Crompton Corp. v. Workers' Compensation Appeal Board (King), 954 A.2d 751 (Pa. Cmwlth. 2008), we affirm.

On May 24, 2005, Claimant filed a claim petition alleging a 100% binaural sensorineural hearing loss resulting from exposure to hazardous work noise. Claimant, who continues to work for Employer, sought payment of medical bills and counsel fees. In a responsive pleading, Employer averred Claimant failed

to provide timely notice of his injury and the statute of limitations bars the claim petition. Litigation followed.

Claimant testified he began working for Employer in 1971. Over the years, Claimant worked in various positions. With the exception of his first and current jobs, Claimant's work activities exposed him to constant loud noises in the various departments from coke grinding mills, blowers, furnaces, welding, hammering, and diesel engines. The loud noises consisted of rumbling, high-pitched whining, and metal on metal impact noises. Employer conducted hearing tests on three occasions, but the persons who conducted the examinations only told Claimant he had a hearing loss and should see a doctor. In 2000 or 2002, Claimant began wearing earmuffs for protection.[1]

Claimant first sought treatment for his hearing loss in April 2005. Notably, Claimant informed Employer of his injury and its possible work-relatedness on May 9, 2005. Dr. Barry E. Hirsch (Claimant's doctor) informed Claimant in July 2005 that his exposure to work noise caused his hearing loss.

Claimant's doctor, a board-certified otolaryngologist, first examined Claimant in April 2005. Based on an audiogram, the doctor found Claimant has a 25.3% hearing impairment under the AMA Guides to the Evaluation of Permanent

[1] Claimant's exposure to other loud noises includes his prior employment, hobbies, and lawn care activities. Particularly, Claimant testified he worked a total of nine months over a three-year period as a masonry laborer; he always wore ear protection while at work. In addition, Claimant enjoyed motorcycle riding for a few years in the 1970s and then again in the 1980s. He also hunted deer between the ages of 12 and 44. At home, Claimant uses a diesel tractor, a chain saw, a weed eater and a power saw.

Impairment. Claimant's doctor credibly testified Claimant's exposure to hazardous work noise caused the hearing loss.

Employer presented the deposition testimony of its expert, Dr. Douglas Chen, also a board-certified otolaryngologist (Employer's expert). He opined Claimant suffers a 21.56% hearing impairment under the AMA Guides. Employer's expert attributed Claimant's hearing loss to cumulative occupational and non-occupational noise. Both medical experts agreed the differences in impairment ratings could be test-to-test variations.

The WCJ concluded Claimant met his burden of proving an occupationally induced hearing loss with a 21.56% hearing impairment rating.[2] For present purposes, the WCJ made three relevant findings of fact:

> 7. [Claimant] first noticed a loss of hearing about 2000.
>
> …
>
> 10. [Claimant's doctor's testimony] considered entirely, is credible and persuasive evidence in support of [Claimant's] Petition. [Claimant's] Petition apparently is based upon the medical opinion of [his doctor]. In his letter to [Claimant's] primary care physician dated April 18, 2005, [doctor] implied a work related loss but he did not state such an opinion. He certainly knew of the [Claimant's] workers' compensation claim since he recited [Claimant's] work history, referred to the minimum 10% impairment, and provided a copy of his letter to [Claimant's] attorney. <u>The first documentation of his opinion that [Claimant's] hearing loss is work</u>

[2] Employer's expert credibly testified that the best evaluation represents the patient's ability to hear. WCJ Op., 3/16/07, at Finding of Fact (F.F.) No. 12.

> related is his letter dated July 11, 2005, 1½ months after the Petition was filed ([Claimant] Exhibit 4)….
>
> …
>
> 13. [Claimant's] 21.56% binaural hearing impairment is a work related injury, caused by his exposure to hazardous noise during the course of his employment [with] … Employer. The date of this injury is May 24, 2005.
>
> 14. [Claimant] notified … Employer of his claimed hearing loss injury by a letter dated May 9, 2005 and received by … Employer no later than May 17, 2005.

WCJ Op., 3/16/07, at Findings of Fact (F.F.) Nos. 7, 10, 13, 14 (Emphasis added).

Significantly, the date of injury is the same date Claimant filed his petition for benefits. The WCJ awarded Claimant 56.06 weeks of workers' compensation benefits for his compensable hearing loss and medical expenses. On appeal, the Board affirmed.[3]

Employer contends Claimant knew or should have known of his work-related hearing impairment in 2000 so as to trigger the 120-day notice of injury requirement of the Workers' Compensation Act (Act).[4] In particular,

[3] In a cross-appeal, Claimant asserted error in the WCJ's determination Employer presented a reasonable contest to the claim petition. The Board disagreed and cited Employer's expert's testimony that Claimant's loss of hearing resulted from his exposure to previous occupational and other non-occupational noise sources. Claimant did not appeal the Board's order.

[4] See Section 311 of the Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §631. Under Section 311, unless an employer has knowledge of the occurrence of an injury, a claimant is required to give notice of the injury to the employer within 120 days of the injury's occurrence.

Claimant suspected in 2000 that work noise caused his hearing loss but did not notify Employer of the injury until May 2005. Urging a departure from this Court's decision in Socha v. Workers' Compensation Appeal Board (Bell Atlantic PA), 725 A.2d 1276 (Pa. Cmwlth. 1999) (Socha I), aff'd, 566 Pa. 602, 783 A.2d 288 (2001) (Socha II), Employer asserts the Court's application of the discovery rule to employees who continue to work, yet know or reasonably should know of a hearing loss, allows an injured worker additional time beyond the usual period to provide notice.[5]

We recently rejected Employer's argument in King. There, the claimant began wearing a hearing aid in 1999. In 2002, he submitted a new patient information sheet to his doctor indicating a work-related hearing loss. Two years later, and after receiving a medical report indicating work noise caused the hearing loss, the claimant filed a claim petition against this Employer. A WCJ determined the claimant satisfied Section 311's notice requirement because he filed his claim petition within 120 days after receiving his doctor's medical report. On appeal, Employer argued the claimant failed to notify it of the injury within 120 days of when the claimant knew or should have known that exposure to work noise caused his hearing loss; that is, 1999 or 2002. Rejecting Employer's arguments, we reviewed the Socha decisions and concluded the claimant timely notified Employer of his work-related hearing loss. A brief review of the Socha decisions is appropriate because the same result is warranted here.

[5] Our review is limited to determining whether the record supported the findings of fact, whether errors of law were made, or whether constitutional rights were violated. Pryor v. Workers' Comp. Appeal Bd. (Colin Serv. Sys.), 923 A.2d 1197 (Pa. Cmwlth. 2006).

In Socha I, the claimant filed a petition for benefits in 1995, although he knew in 1990 that he suffered an occupational hearing loss. On these facts, a WCJ determined the claimant failed to notify the employer of his injury within 120 days of the injury's occurrence. Before this Court, the claimant argued the 1995 amendments[6] to Section 306(c)(8) of the Act, 77 P.S. §513(8), established the date of injury for occupational hearing loss as the earlier of the date of the claim petition or the claimant's last date of long term exposure to hazardous occupational noise while in the employ of the employer against whom the claim is filed. We rejected the claimant's position and concluded the General Assembly included Section 306(c)(8)(ix) solely to identify the date of injury for purposes of calculating compensation.

Notwithstanding, we then considered whether the claimant provided the employer timely notice of his hearing loss injury under Section 311. Noting

[6] Act of February 22, 1995, P.L. 1, as amended. The 1995 amendments rewrote subsection 8 of Section 306(c). Relevant here, subsections (viii) and (ix) respectively address the applicable statute of limitations and date of injury:

> (viii) Whenever an occupational hearing loss caused by long-term exposure to hazardous occupational noise is the basis for compensation or additional compensation, the claim shall be barred unless a petition is filed within three years after the date of last exposure to hazardous occupational noise in the employ of the employer against whom benefits are sought.
>
> (ix) The date of injury for occupational hearing loss under subclause (i) [relating to calculation of benefits] shall be the earlier of the date on which the claim is filed or the last date of long-term exposure to hazardous occupational noise while in the employ of the employer against whom the claim is filed.

the issue of whether a claimant complied with Section 311 is a question of fact, we reiterated the long-standing principle that

> [a] claimant's belief, without more, that the hearing loss is work-related does not rise to the level necessary to begin the running of the statute of limitations under the Act. Indeed, the "mere knowledge or suspicion of significant hearing loss and a possible causal relationship with employment … is not sufficient evidence of a compensable hearing loss."

Socha I, 725 A.2d at 1280-81 (quoting Anastasio v. Workmen's Comp. Appeal Bd. (NGK Metals Corp.), 713 A.2d 116, 120 (Pa. Cmwlth. 1997)). We applied the same principle to partial hearing loss claims, and we further observed a claimant cannot be charged with the knowledge he suffered a hearing loss until a physician or other medical care provider informs him his permanent binaural hearing loss impairment may meet or exceeds the statutory threshold.[7] Id.

Thus, in Socha I we held that Section 306(c)(8)(ix) is intended for calculation of benefits, not for determining notice under Section 311. Indeed, our decision in Socha I did not change the time period for notice under Section 311. Rather, it reaffirmed the established principle that a claimant cannot be charged with knowledge of an occupationally-induced hearing loss until notified of such loss by a health care provider. E.g., Anastasio; Boeing Helicopter Co. v. Workmens' Comp. Appeal Bd. (McCanney), 629 A.2d 184 (Pa. Cmwlth. 1993); Cyclops Corp. v. Workmen's Comp. Appeal Bd. (Sray), 541 A.2d 851 (Pa. Cmwlth. 1988). In Socha I, the claimant filed a claim petition two weeks after a

[7] See Section 306(c)(8)(iii) of the Act, 77 P.S. §513(c)(8)(iii).

medical doctor advised him his hearing loss resulted from exposure to work hazardous noise. This was well within Section 311's 120-day notice provision.

On further appeal, the Supreme Court affirmed in a plurality opinion. Socha II. In particular, the Court determined Section 306(c)(8)(ix) of the Act aligns the date of injury for occupational hearing loss with the filing of a claim petition or, alternatively, the date upon which the claimant's long-term exposure to hazardous work noise ceased. Id. at 610-11, 783 A.2d at 293. Because the claimant continued to work, the majority determined the claimant satisfied the notice requirement of Section 311 concurrent with the filing of the claim petition.

In King, we noted Socha II, as a plurality decision, has limited precedential value. See Interest of O.A., 552 Pa. 622, 676, 717 A.2d 490, 496 n.4 (1998) (legal conclusions and reasoning of a plurality decision are not binding precedent). Consequently, this Court's holding in Socha I that Section 306(c)(8)(ix) is intended to be utilized for calculation benefits but not for determining whether Section 311 is satisfied, remains a correct enunciation of the law. King. In other words, a claimant is still required to notify an employer of a work-induced hearing loss within 120 days of receiving medical confirmation the loss of hearing resulted from exposure to hazardous work noise. Id.

Here, Claimant's doctor informed Claimant in May 2005 that his hearing loss might be work-related. R.R. at 77a. Claimant promptly notified Employer of his hearing loss by letter of May 9, and he filed a petition for benefits on May 24, 2005. Id. at 2a; 77a. In July 2005, Claimant's doctor affirmatively

opined Claimant's exposure to hazardous work noise caused his hearing loss. Id. at 90a. Claimant's notice of injury to Employer preceded Claimant's doctor's report of occupationally-induced hearing loss.

In accord with Socha I, Claimant timely notified Employer of his work-related hearing loss. The WCJ acted within his authority in finding Claimant met the 120-day notice requirement of Section 311. See F.F. Nos. 13; 14. Supported by substantial evidence, the finding is conclusive on appeal. O'Donnell v. Workers' Comp. Appeal Bd. (United Parcel Serv.), 831 A.2d 784 (Pa. Cmwlth. 2003).[8]

Order affirmed.

ROBERT SIMPSON, Judge

[8] Even if we applied Socha II, the same result occurs. The WCJ here found Claimant's date of injury as May 24, 2005, the day upon which Claimant filed the claim petition. F.F. No. 13. This is consistent with the plurality decision in Socha II.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Crompton Corporation, Petitioner	:	
v.	:	No. 654 C.D. 2008
Workers' Compensation Appeal Board (Barger), Respondent	:	

O R D E R

AND NOW, this 24th day of October, 2008, the order of the Workers' Compensation Appeal Board is **AFFIRMED**.

ROBERT SIMPSON, Judge