IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Philadelphia, Petitioner	:	
v.	:	No. 792 C.D. 2007
	:	SUBMITTED: October 12, 2007
Workers' Compensation Appeal Board (Myers), Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** February 7, 2008

The City of Philadelphia (City) appeals from the order of the Workers' Compensation Appeal Board (Board) that affirmed the grant of Kevin P. Myers' (Claimant) claim petition seeking payment of workers' compensation benefits from January 21, 1996 through August 1, 2005, and the payment of medical bills associated with treatment of Claimant's hepatitis C. The City primarily contends on appeal that the Board erred in affirming the grant of the claim petition because: (1) the Board did not review the Workers' Compensation Judge's (WCJ) findings regarding the City's entitlement to a pension offset; (2) Claimant did not become disabled within 300 weeks of his last possible exposure as a City employee and the WCJ should not have awarded benefits back to 1996;

(3) Claimant failed to give proper timely notice and he voluntarily retired prior to his injury; and (4) Claimant's claim is barred by the statute of limitations. We affirm the decision of the Board.

On January 16, 2003, Claimant filed a claim petition alleging he contracted hepatitis C during the course and scope of his employment with the City as a firefighter/EMT. Claimant later amended the claim petition to include an occupational disease. Claimant worked for the Philadelphia Fire Department from 1972 through 1996 as a firefighter. Claimant also rode with the rescue squad, where he was exposed to blood and body fluids while responding to victims of motor vehicle accidents, stabbings and shootings, as well as baby deliveries. Claimant wore his blue uniform while administering medical care on the street. He testified that for many years universal precautions were not taken and gloves were not worn.

Claimant's last assignment prior to retirement was at the Philadelphia Airport where he was routinely assigned to ride with the rescue squad. Claimant was a trained EMT. He specifically remembered assisting in a baby delivery where the mother's blood and body products were splashed on his hands, face and body. Claimant also recalled administering medical care to a victim with 20 stab wounds where there was blood "all over the place." Throughout Claimant's career, he recalls contact with victims' blood on his face and arms. Claimant sustained cuts both on and off the job.

Claimant's personal history is negative for blood transfusions prior to 1996, negative for acupuncture, prostitutes, homosexual sex, intravenous drug use and snorting cocaine. Claimant has one tattoo which he received in 1969 or 1970 and he received treatment for alcoholism in 1981. In August 1995, Claimant began

having trouble with his foot and complained of tiredness, weakness and significant weight loss. While receiving treatment for his foot, Claimant was diagnosed with alcoholic liver disease. Claimant retired from the fire department in January 1996. In 1998, medical records show that Claimant was diagnosed with end stage liver disease, secondary to hepatitis C and alcohol abuse. Despite this hepatitis C diagnosis, Claimant's testimony was credited that in 1998 he was unaware that he had contracted the disease believing that his end stage liver disease was caused by cirrhosis.[1] In December 1999, Claimant participated in a union sponsored screening for hepatitis C and was scheduled to be examined by a liver specialist, but the night before the appointment he was hospitalized for spitting up blood. During his hospitalization in January 2000, Claimant again tested positive for hepatitis C and was informed of this diagnosis. Claimant received a liver transplant in March 2000.

On January 21, 2000, Claimant gave notice to the Fire Commissioner that he believed his hepatitis C was causally related to his years as a Philadelphia firefighter. Claimant received a pension benefit from January 1996 until his death in August 2005 pursuant to the City's defined benefit plan, to which he had contributed.

The WCJ found the testimony of Claimant and his physician, Dr. Gillian Zeldin, M.D., a board certified internal medicine specialist, to be credible and persuasive. The WCJ found that the testimony of the City's expert, Dr. Stephen Gluckman, M.D., a board certified infectious disease specialist, who

[1] It is unclear whether the physician who diagnosed Claimant with hepatitis C ever informed him that he had contracted the disease. In any event, Claimant testified, and the WCJ accepted as credible, that he was not aware that he had contracted hepatitis C until January 2000.

indicated during his deposition that he did not know how Claimant acquired the disease, was not sufficient to rebut the presumption that the hepatitis C arose out of and in the course of Claimant's employment. Further, the WCJ found that Claimant gave the City timely notice of his diagnosis of hepatitis C pursuant to the January 21, 2000 letter to the Fire Commissioner. The WCJ also held that the City was not entitled to a pension offset. The WCJ concluded that Claimant demonstrated his entitlement to occupational disease benefits pursuant to Section 108(m) of the Workers' Compensation Act[2] (Act), 77 P.S. § 27.1(m), that the City had failed to rebut the statutory presumption pursuant to Section 301(e), 77 P.S. § 411, and that Claimant had established that he suffered an injury pursuant to Section 301(c), 77 P.S. § 411. The WCJ awarded temporary total disability benefits from January 21, 1996 through and including August 1, 2005.

I. The City Is Not Entitled to a Pension Offset.

The City raises two matters related to the statutory pension offset. First, the City contends that the WCJ erred in finding that it was not entitled to pension offset pursuant to Section 204 of the Act, 77 P.S. § 71(a). In addition, the City asserts that the Board erred when it did not review the WCJ's findings regarding its right to pension offset.

Section 204 of the Act, 77 P.S. § 71(a), states that benefits of a pension plan received by an employee shall be credited against a worker's compensation award to the extent funded by the employer directly liable for

[2] Act of June 2, 1915, P.L. 736. Section 108 was added by the Act of October 17, 1972, P.L. 930.

payment of compensation. In order for an employer to be entitled to a credit offset, the employer is required to produce evidence establishing such an entitlement. *See Toy v. Workmen's Comp. Appeal Bd. (Alltel PA*), 651 A.2d 701, 703 (Pa. Cmwlth. 1994).

First, we note that the City is not entitled to a pension offset because Section 204(a) of the Act, 77 P.S. § 71(a), is not applicable to this case. The Act did not provide for a pension offset until 1996 when it was amended by Act 57.[3] Section 32.1(a) of Act 57 provides that the amendments to Section 204(a) shall apply only to claims for injuries which are suffered on or after the effective date of the amendment, June 24, 1996. *See The Alpine Group v. Workers' Comp. Appeal Bd. (DePellegrini)*, 858 A.2d 673, 678 (Pa. Cmwlth. 2004). As discussed *infra*, Claimant was exposed to hepatitis C sometime prior to his retirement on January 21, 1996, more than six months before the effective date of the amendment to Section 204. Accordingly, Section 204(a) of the Act, 77 P.S. § 71(a), which provides a pension offset credit to Claimant's employer, is not applicable to this claim.[4]

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[3] Act of June 24, 1996, P.L. 350.

[4] We note that the WCJ did not base her decision on this ground, but upon a rejection of the City's evidence concerning its funding of Claimant's pension. However, it is well-settled that this Court may affirm for any reason and is not limited to grounds raised by the parties**.** *McAdoo Borough v. Pennsylvania Labor Relations Board***,** 506 Pa. 422, 485 A.2d 761 (1984), (citing *Commonwealth v. Meyer*, 488 Pa. 297, 412 A.2d 517 (1980); *Commonwealth v. Dancer*, 460 Pa. 95, 331 A.2d 435 (1975); *Gilbert v. Korvette, Inc.*, 457 Pa. 602, 327 A.2d 94 (1974); *Prynn Estate*, 455 Pa. 192, 315 A.2d 265 (1974); *Concord Township Appeal*, 439 Pa. 466, 268 A.2d 765 (1970)).

In light of this determination, we need not address the City's claim that its evidence was sufficient to establish its funding of Claimant's pension.

II. Claimant's Claim Is Not Time Barred.

The City alleges that Claimant's claim is barred as untimely for several reasons. First, the City contends that Claimant is not eligible for benefits because his disease did not manifest itself with 300 weeks of his last possible exposure. Second, the City alleges that Claimant's claim is time barred because he failed to notify the City within 120 days of his diagnosis as required by the Act. Next, the City alleges that Claimant's original claim petition and amended claim petition were filed outside the three year statute of limitation and thus are barred as untimely. Finally, the City contends that Claimant is not entitled to benefits because he was not an employee of the City at the time of his diagnosis as he had voluntarily retired. We will address the City's contentions *ad seriatim.*

A. Claimant's Hepatitis C Became Disabling within 300 Weeks.

The City challenges the grant of the claim petition asserting that Claimant did not become disabled with hepatitis C within 300 weeks of his last exposure and thus, he should not have been awarded benefits back to 1996. Section 301(c)(2), 77 P.S. § 411(2), renders compensable only those qualified diseases that result in disability within 300 weeks, *i.e.* five years, nine months and one week, of the last date of exposure in the occupation or industry where exposure to the hazard of disease occurred. *Farr v. Workers' Comp. Appeal Bd. (TRW, Inc.)*, 823 A.2d 1043, 1046 (Pa. Cmwlth. 2003).

Claimant's last date of employment as a City firefighter was January 21, 1996. His last date of possible exposure was sometime prior to August 1995, when Claimant became disabled as a result of his liver disease. While at the time his disability from liver disease first manifested his most acute problem appeared to be alcoholic liver disease, the diagnosis of hepatitis C followed in 2000, and

thus, came well within the 300 weeks following exposure. Therefore, we discern no error in the WCJ's finding that hepatitis C contributed to disability within 300 weeks of Claimant's last exposure.

B. Claimant Timely Notified the City of the Diagnosis of Hepatitis C.

In an occupational disease case, the claimant is required to give notice when he has actual or constructive knowledge of a disability, that such disability is the result of an occupational disease and the relationship of the disease to his employment is established. *Republic Steel Corp. v. Workers' Comp. Appeal Bd. (Zacek)*, 407 A.2d 117 (Pa. Cmwlth. 1979). Section 311 of the Act, 77 P.S. § 631, requires such notice within 120 days.

Claimant tested positive for the hepatitis C antibody in December 1999 and was hospitalized on January 6, 2000. During Claimant's hospitalization, the diagnosis of hepatitis C was confirmed. On January 20, 2000, Claimant and his physician, Dr. Zeldin, first discussed whether his work as firefighter could have been the cause of the hepatitis C.[5] Claimant notified the City on January 21, 2000 of his hepatitis C diagnosis and his belief that he contracted the disease during the course of his employment as a firefighter. Claimant clearly notified the City of his injury within days of his diagnosis and determination that the hepatitis C was related to his work as a firefighter. Accordingly, Claimant provided timely notice to the City.

[5] After meeting with and examining Claimant on January 20, 2000, Dr. Zeldin generated a report which indicated that Claimant may have acquired the hepatitis C through his work as a firefighter. Dr. Zeldin testified that she diagnosed Claimant with end stage liver disease and hepatitis C based on a review of thousands of pages of medical records, complaints from Claimant, and her treatment of him. She opined that he contracted hepatitis C in the course of his work as a firefighter and first responder. The WCJ accepted Dr. Zeldin's testimony as credible and persuasive.

C. Claimant Filed His Claim Petition Within the Statute of Limitations.

Section 315 of the Act, 77 P.S. § 602, establishes a three year period in which to file a claim petition. The statute of limitations begins to run in claims for total disability when the claimant knows or should know he suffers from total disability due to an occupational disease. *Price v. Workers' Comp. Appeal Bd.*, 553 Pa. 500, 503, 626 A.2d 114, 115 (1993). Knowledge most often occurs when the medical diagnosis of the total disability due to occupational disease is made known to the claimant. *Id.*

Although the doctor confirmed Claimant's hepatitis C diagnosis during the first week of January 2000, Claimant did not discuss the causation of his hepatitis C with Dr. Zeldin until January 20, 2000. Thus, Claimant did not know that the disability he suffered resulted from an occupational disease until this date. Claimant filed his claim petition alleging disability on January 16, 2003. Thus, Claimant filed his petition within the statutory three year statute period.

The City also asserts that Claimant untimely amended his claim petition to allege occupational disease benefits at his deposition on June 24, 2003, and again before Judge Callahan on April 7, 2004. The City contends that these amendments were untimely because the three year statute of limitations had expired. Claimant's initial claim petition filed on January 16, 2003 did not allege that he suffered from an occupational disease, but did allege that he suffered from hepatitis C due to repeated blood exposures during the course of his employment. Claimant later amended his petition to include an occupational disease. Although Claimant amended his petition to assert disability due to an occupational disease outside the three year statutory period, the late amendment is not fatal to his claim.

Amendment of a claim petition outside the three year statute of limitations is not *per se* impermissible. *Shaffer v. Workmen's Comp. Appeal Bd. (Hollenback Twp.)*, 621 A.2d 1125, 1129 (Pa. Cmwlth. 1993). The party opposing the amendment must show some kind of prejudice. *Id.* The City cannot claim prejudice because it was aware that Claimant suffered from hepatitis C, a known occupational disease, and that Claimant believed he contracted the disease in the course of his employment as a firefighter when Claimant notified the City via letter on January 21, 2000. In addition, the City was not prejudiced by Claimant's amendment because it had the opportunity to redepose him following the amendment of his claim. The City has failed to show any prejudice that it suffered as a result of Claimant's amendment.

Further, we note that in the context of workers' compensation claim petitions, the form of the petition is not controlling where the facts warrant relief, and if a claimant is entitled to relief under any section of the Act, his petition will be considered filed under that section. *National Mines Corp. v. Workmen's Comp. Appeal Bd. (Geisel)*, 496 A.2d 105, 107 (Pa. Cmwlth. 1985). This Court has found no error where a WCJ awards benefits under a provision of the Act different from that under which the petition was filed or the case tried. *City of Philadelphia v. Workers' Comp. Appeal Bd. (Cospelich)*, 893 A.2d 171, 179-80 (Pa. Cmwlth. 2006). Although Claimant initially did not specifically claim an injury due to occupational disease, it does not matter which section of the Act under which Claimant first asserted injury. The City's arguments on this issue are without merit.[6]

[6] In its petition for review the City avers over several pages that the WCJ and the Board erred in granting Claimant benefits pursuant to § 108(m), 77 P.S. § 27.1(m), of the Act. Perhaps **(Footnote continued on next page…)**

D. Claimant Was Forced to Retire Due to a Disabling Occupational Disease.

A disability which forces a claimant out of the work force and into retirement is compensable under the Act. *Republic Steel Corp. v. Workmen's Comp. Appeal Bd. (Petrisek)*, 537 Pa. 32, 37, 640 A.2d 1266, 1269 (1994); *Hepler v. Workers' Comp. Appeal Bd. (Penn Champ/Bissel, Inc.)*, 890 A.2d 1126, 1129 (Pa. Cmwlth. 2006). After retirement, it is a claimant's burden to demonstrate that his absence from the labor market is involuntary. *Capasso v. Workers' Comp. Appeal Bd. (RACS Assocs., Inc.)*, 851 A.2d 997, 1001 (Pa. Cmwlth. 2004). A claimant may establish through his own testimony his motivation to retire. *The Alpine Group*, 858 A.2d at 677-78 (upholding WCJ's finding of forced retirement where claimant exhibited symptoms of the occupational disease prior to retirement and where claimant testified that he retired because of breathing problems).

Claimant testified that in 1995 he was suffering from tiredness, weakness, significant weight loss and open skin sores, all symptoms that he thought at the time were cause by alcoholic liver disease with which he had been diagnosed. Following his diagnosis, Claimant was unable to resume his duties and

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(continued…)

realizing that its contentions were without merit, the City did not develop the arguments regarding this issue in its brief. Nevertheless, we state once again that hepatitis C contracted by firefighters in the course of their duties as first responders is a recognized occupational disease under both the 1972 and 2001 versions of the Act. In *City of Philadelphia v. Workers' Comp. Appeal Bd. (Sites)*, 889 A.2d 129, 139-140 (Pa. Cmwlth. 2005) and again in *City of Philadelphia v. Workers' Comp. Appeal Bd. (Cospelich)*, 893 A.2d 171 (Pa. Cmwlth. 2006), this Court found that Philadelphia firefighters, who contracted hepatitis C before the amendment to the Act, which added hepatitis C as a specifically enumerated occupational disease, and filed their claims after the amendment to the Act became effective were entitled to benefits pursuant to Section 108(m) of the Act, 77 P.S. § 27.1(m). The instant case is nearly identical to *Sites* and *Cospelich* and we hold that the WCJ did not err in granting Claimant's claim petition.

retired. While not yet diagnosed with hepatitis C at the time of retirement, it later became apparent that the symptoms of liver disease that prevented him from working resulted, at least in part, from the hepatitis C which Claimant had contracted in the course of his employment. The evidence sufficiently established that Claimant suffered from its debilitating effects long before his confirmed diagnosis. We conclude that the record contains substantial evidence demonstrating that Claimant did not voluntarily retire, but rather was forced to retire due to a disabling occupational disease.

Accordingly, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 7th day of February, 2008, the order of the Workers' Compensation Appeal Board in the above captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge