

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Warren Varner, Jr., :  
Petitioner :  
 :  
v. : No. 891 C.D. 2011  
 : Submitted: August 26, 2011  
Workers' Compensation Appeal :  
Board (Cerro Fabricated Products :  
and PMA Group), :  
Respondents :

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE PELLEGRINI

FILED: September 15, 2011

Warren Varner, Jr. (Claimant) petitions for review of the order of the Workers' Compensation Appeal Board (Board) affirming the decision of the Workers' Compensation Judge (WCJ) granting his claim petition for workers' compensation benefits but modifying the award of his medical benefits. For the reasons that follow, we affirm the Board's decision.

The facts of this case are not in dispute. Claimant began working for Accurate Forging Corporation/Delta American Inc. (Accurate) in its plant in 1966. He continued working for the company when Accurate's assets were acquired by Cerro Fabricated Products (Cerro) on July 28, 2000. Claimant continued to work

for Cerro in the plant and as a forklift operator for the same wages under the same collective bargaining agreement until 2004. Audiometric testing was performed on Claimant in 1997 indicating that he had a binaural hearing loss of 18.1%. Subsequent testing in July 2004 indicated a binaural hearing loss of 24.69%.

On September 2, 2004, Claimant filed a claim petition alleging that as of August 4, 2004, he sustained a hearing loss during the course and scope of his employment with Accurate. On January 6, 2006, the WCJ issued an interlocutory order stating that Accurate would be dismissed as a party to the litigation when the final decision and order was issued in the case because Cerro was the successor-in-interest of Accurate and bore all responsibility for payment of benefits if Claimant prevailed on his claim petition. As to the merits of the claim, the WCJ found that Claimant had established a binaural hearing loss of 18.75% as the result of his total and cumulative exposure to hazardous noise while working for Accurate and Cerro and granted Claimant's petition. She ordered Cerro to pay Claimant all reasonable and necessary medical expenses.

Cerro appealed to the Board arguing that the WCJ erred as a matter of law in determining that it was the successor-in-interest of Accurate and responsible for all medical benefits. The Board agreed, vacating and remanding the matter to the WCJ to include Accurate as a party. On remand, the WCJ found that Claimant's claim petition against Accurate was time barred because his employment with Accurate ended on July 27, 2000, and his claim petition was not filed until August 31, 2004, more than three years after Claimant could have had

occupational noise exposure during the course of his employment with Accurate.<sup>1</sup> The WCJ further found that Claimant had a 9.69% binaural hearing impairment due to occupational noise exposure on July 22, 2004. The WCJ stated in her findings that all parties reported that Cerro had already paid Claimant for the 18.75% hearing loss that she had previously ordered and ordered a credit for benefits paid. The WCJ ordered Cerro to pay all reasonable and necessary medical expenses related to Claimant's work-related hearing loss. Cerro and Claimant both appealed.

Cerro argued that the WCJ's calculation of its proportionate share of responsibility for Claimant's hearing loss was erroneous because she determined that his pre-existing hearing loss based on an audiogram from 1999 instead of one conducted in 2000 when Claimant became its employee. The Board remanded the matter so that the WCJ could make a credibility decision utilizing the 2000

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<sup>1</sup> Pursuant to Section 306(c)(viii) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §513, "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." In *McInay v. Workers' Compensation Appeal Board (Standard Steel)*, 870 A.2d 395 (Pa. Cmwlth. 2005), we stated that in hearing loss cases, the date of injury was the last date of exposure to the hazardous noise. We specifically held that the "discovery rule" did not apply to hearing loss cases. Therefore, in this case, the statute of limitations began to run when Claimant left the employ of Accurate in July 2000 because the company was sold to Cerro. Consequently, the WCJ properly determined that the statute of limitations had run based on Claimant's last date of exposure to hazardous noise at Accurate in July 2000 because his claim petition against Accurate was filed in January 2005, well outside the three-year statute of limitations.

audiogram rather than the 1999 audiogram for which there was a hearsay objection that was sustained.

On the second remand, the WCJ found the medical testimony of Lee Rowe, M.D. (Dr. Rowe) credible when he stated that the 2000 audiogram tested Claimant's binaural hearing loss at 13.75%. The WCJ stated that because she found that Claimant's overall binaural hearing loss was 18.75%, she subtracted the 13.75% loss Claimant suffered when he started working for Cerro in 2000, and came up with a 5% hearing loss for which Cerro was responsible. She then ordered that Cerro was responsible for all of Claimant's reasonable and necessary medical bills related to his hearing loss. The WCJ dismissed the hearing loss claim filed against Accurate.

Both Claimant and Cerro appealed to the Board. Claimant alleged that Cerro was a successor-in-interest to Accurate and should be required to compensate him for the 18.75% cumulative hearing loss, which the Board rejected. Cerro argued that the WCJ erred by holding it responsible for 100% of Claimant's reasonable and necessary medical expenses based upon a 5% hearing loss, only a percentage apportioned of the overall loss itself. The Board agreed with Cerro, citing Section 306(c)(8)(vi) of the Act, which only requires an employer to provide payment for reasonable surgical and medical services and supports Cerro's contention that it is responsible for compensation only for its share of Claimant's hearing loss attributable to his time in Cerro's employ. The Board then affirmed

the WCJ's decision and modified it to require Cerro to pay only its prorated share of Claimant's medical expenses. This appeal by Claimant followed.<sup>2</sup>

Claimant raises two issues on appeal: 1) whether the Board erred by vacating and remanding the WCJ's decision which determined that Cerro was a successor-in-interest and, therefore, responsible for 100% of the binaural hearing loss incurred by him while the plant was run by any predecessors of Cerro and 2) whether the Board erred in modifying the WCJ's finding that Cerro was responsible for all reasonable and necessary medical expenses and instead finding Cerro only responsible for 26.67% of Claimant's related medical expenses.

For the identical reasons we have set forth in the companion case of *McClure v. Workers' Compensation Appeal Board (Cerro Fabricated Products)*, (No 388 C.D. 2011, filed September 15, 2011), Cerro is not a successor-in-interest to Accurate but is responsible for its pro rata share of Claimant's medical bills.

Accordingly, the order of the Board is affirmed.

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DAN PELLEGRINI, JUDGE

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<sup>2</sup> Our scope of review of a Board decision is limited to determining whether an error of law was committed, constitutional rights were violated or a necessary finding of fact was not supported by substantial evidence of record. *Griffiths v. Workers' Compensation Appeal Board (Seven Stars Farm, Inc.)*, 596 Pa. 317, 943 A.2d 242 (2008).

