

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Zurich North America, :
Petitioner :
v. : No. 894 C.D. 2007
Workers' Compensation Appeal : Argued: December 10, 2007
Board (Allen), :
Respondent :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: January 23, 2008

Zurich North America, insurer for Venezia Transport Services, appeals from the order of the Workers' Compensation Appeal Board (Board) that affirmed the reimbursement award of a part of Zurich's claim against the Supersedeas Fund. Zurich challenges the date used in determining the reimbursable payments, asserting that all of the payments it made to the claimant should be reimbursed from the Fund.

Claimant, Harold Allen sustained injuries in a 1989-accident while driving a truck for Venezia in West Virginia. He received temporary total disability benefits pursuant to an award in Ohio, where Allen resides and where Venezia was self-insured, and in January 1993, settled the Ohio claim for a lump sum payment

of \$50,000.00. In May 1995, Allen filed a claim in Pennsylvania for the 1989 injuries. The parties agreed to bifurcate the litigation of Pennsylvania jurisdiction from the question of compensable disability. In 1998, a Workers' Compensation Judge (WCJ) found Venezia's business principally localized in Pennsylvania. Zurich, as Venezia's Pennsylvania insurer, appealed this decision and the Board quashed the appeal as interlocutory. In 2001, the WCJ awarded total disability benefits of \$353.00 per week as of the accident date in 1989. On April 19, 2001, Zurich appealed and requested supersedeas. Without waiting for a decision on the supersedeas request, Zurich paid a lump sum of \$363,387.55 on March 8, 2001. Three days later, on May 11, the Board granted supersedeas pending argument but on June 15 revoked this grant. On February 1, 2002, the Board reversed the award of benefits, concluding that Pennsylvania lacked jurisdiction over the claim.

Thereafter, in January of 2003, Zurich applied for reimbursement from the Fund seeking payment for all of the benefits it paid to Allen, totaling \$381,341.32. In answer to the application, the Bureau of Workers' Compensation agreed to reimburse but only for the benefits paid from June 15, 2001, through January 25, 2002, totaling \$11,346.43. Following litigation of the supersedeas claim, a WCJ concluded that because the Board denied supersedeas on June 15, 2001, a right to reimbursement arose under Section 443 of the Workers' Compensation Act,¹ added by the Act of February 8, 1972, P.L. 25, *as amended*, 77

¹ The Workers' Compensation Act is the Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§ 1 – 1041.4, 2501 – 2626. In pertinent part, Section 443(a) establishes the criteria for reimbursement, as follows:

If, in any case in which a supersedeas has been requested and denied under the provisions of section 413 or section 430, payments of compensation are made as a result thereof and upon the final outcome of the proceedings, it is determined that such compensation was not, in fact,

(Footnote continued on next page...)

P.S. § 999, only as to benefit payments tendered after that date. Zurich appealed to the Board, which remanded to the WCJ with directions to apply our court’s decision in *Mark v. Workers’ Compensation Appeal Board (McCurdy)*, 894 A.2d 229 (Pa. Cmwlth. 2006).² On remand, the WCJ readopted his earlier findings and again entered the same award of partial reimbursement. Zurich appealed to the Board, which affirmed.

The Board explained that pursuant to the prescribed times for petition and answer under 34 Pa. Code § 111.23(a) and the time for decision under 34 Pa. Code § 111.24(b),³ the Board had until May 19, 2001, to rule on the supersedeas request and, therefore, the Board timely granted a temporary supersedeas on May

(continued...)

payable, the insurer who has made such payments shall be reimbursed therefore.

Hence, as our cases consistently state, in order to obtain reimbursement from the supersedeas fund, (1) a supersedeas must have been requested; (2) the request for supersedeas must have been denied; (3) the request must have been made in a proceeding under Sections 413 or 430 of the Act; (4) payments were continued because of the order denying the supersedeas; and (5) in the final outcome of the proceedings, it was determined that such compensation was not, in fact, payable. *ConocoPhillips v. Workers’ Compensation Appeal Board (Logan)*, 890 A.2d 1160, 1161 n.1 (Pa. Cmwlth. 2006).

² In *Mark*, our court announced, in overruling *Wausau Insurance Co. v. Workers’ Compensation Appeal Board (Commonwealth)*, 826 A.2d 21 (Pa. Cmwlth. 2003), that, where the criteria of Section 443(a) have been met, reimbursement could be had for a lump sum payment to cover periods of disability occurring prior to the supersedeas request. As recognized by the WCJ on remand, the ruling in *Mark* does not impact the issue to be resolved in the present case, i.e., whether payments made before supersedeas denial can be reimbursed.

³ Pursuant to the applicable Board regulations at the time Zurich requested supersedeas, 34 Pa. Code § 111.22 provided that a “request for supersedeas shall be filed with the Board within the time allowed by law for appeal from the referee’s decision or Board order from which the supersedeas is requested.” 34 Pa. Code § 111.23 stated that “an answer to a request for supersedeas may be filed with the Board within 10 days of service of the request for supersedeas.” 34 Pa. Code § 111.24 provided that “the Board will rule on requests for supersedeas within 20 days of the date when the answer is due or the answer is received, whichever occurs first, or the request shall be deemed denied.”

11, 2001. The Board reasoned that, inasmuch as Section 443 permits reimbursement from the Fund only for benefit payments tendered after the explicit or deemed denial of a request for supersedeas, no right to reimbursement arose until the denial entered on June 15, 2001, and, therefore, since Zurich tendered payment on May 8, 2001, it was not entitled to reimbursement. The Board rejected Zurich's contention that a deemed denial of supersedeas should be found to have occurred as of April 30, thirty days after grant of the benefit award, because failure to make payment within 30 days would expose it to penalties under the Act. The Board opined:

This argument is identical to the one raised by the defendant in *ConocoPhillips [v. Workers' Compensation Appeal Board (Logan)]*, 890 A.2d 1160 (Pa. Cmwlth. 2006)]. The Commonwealth Court, however, dismissed this contention relying on *Snizaski v. WCAB (Rox Coal Co.)*, [847 A.2d 139 (Pa. Cmwlth. 2004), *aff'd*, 586 Pa. 146, 891 A.2d 1267 (2006)]. In *Snizaski*, the Supreme court held that when a defendant does not make payment within thirty days of the date its obligation arose, it is not liable for penalties when it is simply following the Board's regulations and awaiting a ruling on its supersedeas request. [586 Pa. at 163-64, 891 A.2d at 1278]. The Court, in *ConocoPhillips*, reasoned that in light of *Snizaski*, the quandary facing defendants requiring them to chose between not paying on an award and being subject to a penalty or paying the award before the request was acted upon and foregoing supersedeas fund reimbursement was resolved. *ConocoPhillips*, 890 A.2d at 1163-64. Therefore, it rejected the defendant's argument that if the Board does not act on a supersedeas request within thirty days of a WCJ's order, the request for supersedeas should be deemed denied as a matter of law for purposes of Section 443(a) of the Act. *Id.* at 1163. Based on the Court's holding in *ConocoPhillips*, we reject [Zurich's] argument.

Commonwealth v. Zurich North America, (No. A06-1171, filed April 10, 2007) Board op. at 5-6.

Following the Board's decision, Zurich filed the present appeal, in which it asserts, as it did before the Board, that the failure to decide the supersedeas petition within the thirty day period following the March 30-award of benefits should be considered a deemed denial as of April 30, thus entitling it to reimbursement of all amounts it paid on May 8 and thereafter.⁴ Because we are bound to follow *ConocoPhillips*, this argument must be rejected. *ConocoPhillips* involved a claim award entered March 7, 2001, that included a retroactive period of benefit liability, on which employer mistakenly tendered a lump sum payment on April 19, after the grant of supersedeas issued on the very same day. As Zurich points out, this factual scenario varies somewhat from that in the present case; nevertheless, *ConocoPhillips* remains dispositive.

The court, in *ConocoPhillips* addressed the identical argument Zurich raises here, to wit, "whether Employer is entitled to reimbursement from the Fund where it made payment of compensation before the Board formally denied its request for supersedeas." 890 A.2d at 1163. Just as Zurich argues here, the employer in *ConocoPhillips* argued that, "because it is required to make payment within 30 days of the award or be subject to penalties under Section 431(b) of the Act, 77 P.S. § 971(b), if the Board does not act on the supersedeas request within

⁴ Zurich makes additional arguments that do not merit discussion. Specifically, there are simply no grounds to treat as a supersedeas petition Zurich's 1998 appeal from the WCJ's interlocutory order adjudging that Pennsylvania had jurisdiction over the claim. Zurich's additional assertion that Allen filed his claim beyond the time afforded under the Act was not raised before the Board and, therefore, has not been preserved. In any event, we note that such an assertion constitutes a challenge to the claim award and is not cognizable in this supersedeas reimbursement litigation.

that 30 days, the request for supersedeas should be ‘deemed denied’ as a matter of law for purposes of Section 443(a) of the Act, and it is entitled to reimbursement from the Fund.” *Id.* In rejecting this argument, the *ConocoPhillips* court noted: “the Board issued the Special Rule in 1989 that stated there was a deemed denial if the Board did not act on the request within 50 days from the date of the award.” *Id.* The court opined that, given the clear regulatory provision, to judicially impose a 30-day period for decision or deemed denial would be an abuse of discretion. *Id.*

Zurich attempts to distinguish *ConocoPhillips* on the ground that in the latter case supersedeas was eventually *granted* rather than denied, as here. However, nothing in the *ConocoPhillips* opinion suggests that it placed any weight on that circumstance. Rather, it focused solely on the fact that payment was made before the supersedeas request was acted upon, and rejected the claim that it had earlier been “deemed denied.” We are not unmindful of, nor unsympathetic to, employer’s quandary, but in the end we are without authority to craft an equitable remedy in derogation of the clear statutory language that provides for reimbursement only where “supersedeas *has been requested and denied* ... [and] payments of compensation are made *as a result thereof*...” and in light of our prior clear holding that a “deemed denial” does not occur when there has been no action on a supersedeas request within thirty days of an award.

For the reasons stated, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

