

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Suvad Muslic, :
Petitioner :
v. : No. 1861 C.D. 2007
Workers' Compensation Appeal Board : Submitted: January 4, 2008
(EMSCO), :
Respondent :

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: March 17, 2008

Suvad Muslic (Claimant) petitions for review from an Order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of a Workers' Compensation Judge (WCJ) denying his Claim Petition. We affirm.

On November 3, 2005, Claimant filed a Claim Petition alleging that on January 24, 2005 he sustained an injury to his back with accompanying leg pain in the course and scope of his employment with EMSCO (Employer). In a decision dated January 25, 2007, the WCJ denied Claimant's Petition noting that Claimant did not provide timely notice of his injury. This fact notwithstanding, the WCJ further found that Claimant failed to establish a causal connection between his L4-5 disc herniation and his employment by unequivocal medical

evidence. Claimant appealed the WCJ's Decision to the Board which affirmed in an Order dated September 21, 2007. This appeal followed.¹

Claimant argues on appeal that the WCJ erred in concluding he failed to give timely notice of his work injury. We disagree.

Section 311 of the Pennsylvania Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, 77 P.S. §631, indicates that a claimant must provide an employer with timely notice of a work-related injury. Such notice is a prerequisite to receiving workers' compensation benefits. C. Hannah & Sons Constr. v. Workers' Compensation Appeal Board (Days), 784 A.2d 860 (Pa. Cmwlth. 2001). Generally, notice must be given within 120 days of the date of the injury. Bolitch v. Workmen's Compensation Appeal Board (Volkswagon of Am., Inc.), 572 A.2d 39 (Pa. Cmwlth. 1990). The claimant has the burden to show notice was actually given. Days, 784 A.2d at 864. An employee is not required to give an exact diagnosis, but rather a reasonable description of the injury and a statement that it is work-related. State Workmen's Ins. Fund v. Workmen's Compensation Appeal Board (Wagner), 677 A.2d 892 (Pa. Cmwlth. 1996). Whether the claimant has complied with the notice requirement is a question of fact. Galayda v. Workmen's Compensation Appeal Board (Corning, Inc.), 671 A.2d 1190 (Pa. Cmwlth. 1996).

Claimant, who is from Bosnia, testified that he was injured during a conflict in that country in 1995 as a civilian. As a result of this injury, he has grenade shrapnel in his thigh and back. Claimant moved to the United States in

¹ Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated. Stehr v. Workers' Compensation Appeal Board (Alcoa), 936 A.2d 570 (Pa. Cmwlth. 2007).

2001. Claimant stated that he began to work for Employer in August of 2001 where he assembled shovels, snowboards, and slides. Claimant stated that on January 24, 2005 he was assembling shovels and he got pain in his back upon standing up that radiated into his leg. According to Claimant, he told his supervisor "Rodney" that he had pain in his leg and back. Claimant added that in telling his supervisor about the pain he was in, he told him about being injured in the conflict in Bosnia. Claimant testified that on January 24, 2005, he believed his leg pain was due to his injury in Bosnia.

On cross-examination, Claimant testified as follows regarding the January 25, 2005 incident:

Q. Did you report this to anybody?

A. Yes, I told my supervisor.

...

Q. What did you tell Rodney? What did you tell him had happened?

A. I told him that my left leg hurt so bad and that my back, that I hurt my back in '95, that I had sharp pain in my leg.

Q. Did you tell him anything about hurting your back at work with the shovels?

A. No.

Q. Did you fill out any type of an incident report for workers' compensation?

A. No, because at that time I thought my leg hurt because from the accident I had before.

Q. That accident would be the accident with the shrapnel?

A. Yes.

(R.R. 67a-69a).

Claimant reiterated the contents of his conversation with his supervisor following the January 25, 2005 work incident on redirect and re-cross examination as well in response to questioning from the WCJ. Claimant agreed that the first time Employer received notification that he believed his condition was work-related was when he filed his Claim Petition. Claimant acknowledged that he experienced pain in and/or injured his back at work on October 9, 2003, June 8, 2004, and August 23, 2004. Claimant stated he hurt his arm at work on December 17, 2004.

Employer presented the testimony of Rodney Rea who was working in a supervisory capacity for Employer in January of 2005. Mr. Rea acknowledged that Claimant had made complaints having work-related back pain prior to January 24, 2005. He agreed that he filled out incident reports for Claimant during those times and that these reports are completed when an injury occurs on the job. Mr. Rea stated, however, that Claimant never informed him that he hurt himself at work on January 24, 2005. According to Mr. Rea, Claimant did complain that day that his hip was bothering him and that he could not bend over. Mr. Rea explained that Claimant suggested his pain was attributable to a car accident that Claimant was involved in ten years previously in Bosnia. Mr. Rea added that Claimant referenced that there was “metal” in his leg. Mr. Rea did not fill out an incident report.

Employer submitted into evidence, without objection, Internal Accident Reports completed regarding Claimant's prior work injuries of October of 2003, June of 2004, and December of 2004. Claimant signed each report.

Employer further presented the testimony of Jeanne Pacansky who handles its short-term disability claims. Ms. Pacansky does not handle Employer's workers' compensation matters. She agreed that Claimant told her and Mr. Rea that he hurt himself in an automobile accident in Bosnia. Ms. Pacansky identified the short-term disability forms she processed for Claimant with respect to the January 24, 2005 episode. Ms. Pacansky indicated that Claimant checked off the box that indicated that his condition was not related to his employment.² According to Ms. Pacansky, the first time she became aware that Claimant was attributing his condition to his employment was upon Employer's receipt of the Claim Petition. On cross-examination, Ms. Pacansky agreed that the forms filled out by Claimant did not reference a car accident, but rather a bomb explosion. Nonetheless, as there was still no reference to a work-related injury, she processed Claimant's short-term disability claim.

Based on this evidence, the WCJ concluded that Claimant failed to give Employer timely notice of his work-related injury. The WCJ cited the fact that Claimant, when advising his supervisor of his complaints of pain, attributed his symptoms to the shrapnel inside his leg from the 1995 incident in Bosnia. She added that in completing the forms for short-term disability benefits, Claimant indicated that he had pain in his leg and related the problem to the shrapnel injury. The WCJ concluded that Claimant did not provide notice to Employer that he was claiming a work-related injury as a result of the January 24, 2005 episode until he

² Employer submitted the Short-Term Disability Claim Form into the record.

filed his Claim Petition in November of 2005. As a result of these findings, the WCJ denied Claimant's Claim Petition.

Upon review of the aforementioned, we see no error in the WCJ's determination. Pursuant to Section 311 of the Act and Bolitch, notice must be given within 120 days of the date of the injury. Claimant had the burden in this proceeding to establish notice was actually given. Days. To satisfy the notice requirement, Claimant needed to give his Employer a reasonable description of his work injury and make a statement that his injury is work-related. Wagner. Claimant sustained the injury at issue on January 24, 2005. As such, he was required to give notice of the purported work-relatedness of the injury on or about May 24, 2005. Claimant himself acknowledges the fact that at the time of the January 24, 2005 incident, he informed Mr. Rea and Ms. Pacansky that he thought his pain was related to the shrapnel in his leg. He admits that he did not inform Employer at any time that he believed his back injury was work-related until he filed his Claim Petition on November 3, 2005. This is well after the 120 day requirement. In light of this, we see no error in the WCJ's determination that Claimant did not provide timely notice to Employer or in the WCJ's denial of Claimant's Claim Petition.

Claimant nonetheless argues that the time to give notice did not begin to run until he knew, or by reasonable diligence should have known, that his condition was work-related. He suggests that regardless of the fact that he originally believed his pain was attributable to the shrapnel, he was still capable of providing timely notice of his purported work injury upon receiving information establishing a causal connection.

Section 311 of the Act contains a discovery provision that provides that the time for giving notice shall not begin to run until the employee knows, or by the exercise of reasonable diligence should know, of the existence of the injury and its possible relationship to his employment. Kocher's IGA v. Workers' Compensation Appeal Board (Dietrich), 729 A.2d 145 (Pa. Cmwlth. 1999); See also Ball Icon Glass Packaging v. Workmen's Compensation Appeal Board (Lentz), 682 A.2d 85 (Pa. Cmwlth. 1996). When deciding whether a claimant knew or reasonably should have known that a condition is work-related, it has been held that specific notification by a physician that a condition is indeed work-related is not necessary. Galayda, 671 A.2d at 1192; Bolitch, 572 A.2d at 42.

Notwithstanding the fact that a claimant does not need to receive specific notification by his physician that his condition is work-related in order to make a finding that he knew, or reasonably should have known, that fact, Claimant's argument is belied by his own testimony. Claimant testified that Daniel V. Loesch, M.D., the medical expert he presented in this matter, told him in March of 2005 that Claimant's problems were work-related. (R.R. at 95a). Thus, he still would have needed to provide Employer with notice by July of 2005.³ We reiterate that as Claimant did not inform Employer that he was alleging a work-related

³ Claimant further contends that while he may have known that he sustained a lumbar disc herniation and that he believed it was related to his employment at the time he filed his Claim Petition, he did not know his left leg pain was attributable to the disc injury until Dr. Loesch testified on May 11, 2006. We need not address the nuances of the consequences of receiving knowledge of possible causation of additional injuries during litigation as it relates to the notice issue. We simply point out that Claimant indicated in his Claim Petition that he injured his back on January 24, 2005 resulting in "low back pain" and "left leg pain." Thus, we would be hard pressed to believe that Claimant did not have any inkling that the pain radiating into left leg was possibly related to his employment until taking his own doctor's deposition six months after filing his Claim Petition.

injury prior to filing his Claim Petition in November of 2005, Claimant's argument must fail.⁴

JIM FLAHERTY, Senior Judge

⁴ Because we see no error in the WCJ's determination that Claimant failed to provide timely notice of his work-related injuries, we need not address Claimant's argument that the WCJ further erred in finding he failed to establish causation. In so stating, we reiterate that notice is a prerequisite to receiving workers' compensation benefits. Days.

