IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Flamingo Bar & Grill, Petitioner | : | |
| v. | : | No. 1776 C.D. 2008 |
| | : | Submitted: December 5, 2008 |
| Workers' Compensation Appeal Board (Cobb), Respondent | : | |

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JIM FLAHERTY, Senior Judge

*OPINION NOT REPORTED*

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER FILED: February 6, 2009

The Flamingo Bar & Grill (Employer) petitions for review of an order of the Workers' Compensation Appeal Board (Board) that affirmed the remand decision of the Workers' Compensation Judge (WCJ) determining that Employer failed to present credible evidence that it had no notice of the proceedings on the claim petition of Frank Cobb (Claimant) pursuant to Section 406 of the Workers' Compensation Act (Act).[1] In her remand decision the WCJ reinstated the original February 2006 decision and order granting Claimant's claim petition and imposing a fifty percent penalty against Employer for violation of the Act. Employer argues

[1]Section 406 of the Workers' Compensation Act, Act of June 2, 1915, P.L. 642, as amended, 77 P.S. §717, provides, in part, as follows:

> For the purposes of this article any notice or copy shall be deemed served on the date when mailed, properly stamped and addressed, and shall be presumed to have reached the party to be served; but any party may show by competent evidence that any notice or copy was not received, or that there was an unusual or unreasonable delay in its transmission through the mails.

that the findings with regard to notice of the proceedings were not supported by substantial evidence and that it was denied the right to defend on the merits.

The WCJ found that Claimant initially worked for People Choice Protection Agency, which assigned Claimant to work for Employer as a bouncer. Claimant then worked directly for Employer at the request of Terry Rainey who managed the Flamingo Bar & Grill for his son Major Rainey, the owner. Terry Rainey directly supervised Claimant. On February 18, 2005, a physical fight broke out at the Bar, and Claimant was stabbed with a knife in his left arm in the course of breaking up the fight.

On June 9, 2005, Claimant filed a claim petition alleging a damaged left radial nerve and a penalty petition alleging that the incident was witnessed by Employer's representatives and that Claimant was not advised of his entitlement to benefits under the Act. No answer was filed. The Board's docket at A07-2131 shows that notices of assignment were sent to Employer on June 24 and 27, 2005. *See* Reproduced Record (R.R.) at 4a. Notice was sent on July 13, 2005 for the August 11, 2005 hearing before the WCJ, but Employer failed to appear. The WCJ directed Claimant's counsel to send Employer a certified letter with a copy of the petitions and hearing notice, but the mail was returned as unclaimed following the attempted deliveries on August 22 and September 1, 2005. Notice was sent on October 7, 2005 for the November 4, 2005 hearing, but Employer again failed to appear. At the hearings, Claimant testified and also submitted his medical records establishing that he was treated by Ronit Wollstein, M.D. for reduced radial nerve innervation and muscle atrophy of the left hand and forearm.

The WCJ found that Claimant met his burden of proof on the claim petition and awarded him $358 in weekly benefits. She also found that Employer

did not have workers' compensation insurance and accordingly granted the penalty petition on the basis that Terry Rainey deliberately misrepresented to Claimant that Employer had insurance coverage, that Claimant was encouraged by Terry Rainey to fraudulently claim injury by a mugger to obtain public assistance for medical coverage, that Claimant's medical treatment is limited due to inadequate insurance and that Employer failed to acknowledge the injury by notifying the Bureau of Workers' Compensation (Bureau) and failed to respond to the petitions.

Employer appealed *nunc pro tunc*, arguing that it received no notice of the petitions or hearings because Major Rainey receives mail at his personal residence at 3101 Lyon Street, not at the Flamingo Bar & Grill at 2407 Wylie Avenue. Both locations are in the Hill District in Pittsburgh. The Board remanded the matter to afford Employer the opportunity to present evidence on the issue of proper mailing address. At hearings on March 8 and April 10, 2007, Major Rainey testified along with Vincent Cizauskas, a U.S. Post Office manager in Pittsburgh, and John Grillo, investigator for Claimant's counsel. The WCJ found, *inter alia*, that Major Rainey testified that he arranged to have business and property-related mail sent to his home on Lyon Street to make sure that he would receive it, which included tax and utility bills. He noted that the Bar had rental units upstairs and that he was concerned with his mail being scattered to the different tenants.

The WCJ further found that Cizauskas verified Claimant's Exhibit 1 as a packet of documents verifying the sending of a unit of mail to the Flamingo Bar & Grill and its delivery and that on cross-examination Cizauskas described the delivery process, stating in part: *"Usually with businesses there is not an outside receptacle. We will take it into the business. So someone had to acknowledge that that piece is viable and that it is a good piece."* WCJ Decision, September 27,

2007, Finding No. 3.B. (emphasis in original). The WCJ found as well that Grillo sent letters to Major Rainey and that the certified mail was returned but not the regular mail, which buttressed Cizauskas' testimony that mail was being delivered to the Bar's address. Additional pertinent findings of fact include the following:

> 5…:
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> ….
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> C. Mr. Cizauskas clearly established that the hearing notices were sent to a valid address for the Bar…. It is obvious he could not confirm that the postal carrier personally handed the mail to Mr. Rainey, *nor is that required*, but it was not returned as undeliverable as addressed….
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> D. A review of the earlier record shows the following documents were sent to the Bar at the Wylie Avenue address and *not* returned by the USPS:
>
> -The June 24, 2005 [Assignment of the claim petition].
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> -The June 27, 2005 [Assignment of the penalty petition].
>
> -A July 13, 2005 Notice of Hearing scheduling the initial August 11, 2005 hearing.
>
> -An October 7, 2005 Notice of Hearing scheduling the second November 4, 2005 hearing.
>
> -A September 19, 2005 letter of claimant's counsel to Mr. Rainey requesting he contact this WCJ.
>
> -The February 15, 2006 decision.
>
> In addition, on remand the following items were sent and not returned:
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> -A January 23, 2007 Assignment of Petition [of the remand].
>
> -A January 31, 2007 hearing notice for the March 8, 2007 remand hearing.
>
> -A March 9, 2007 hearing notice for the April 10, 2007 remand hearing.
>
> Mr. Rainey wants me to accept that in the course of going in and out of his place of business, he missed *all* of this mail.
>
> E. Mr. Rainey agreed that the Wylie Avenue address for the Bar is correct. … He wants me to believe that because he

> receives mail at his personal residence regarding other property that he owns, he has absolutely no contact with anything mailed at the Bar. …I find that not credible.

The WCJ concluded that Employer was provided with the opportunity but failed to present credible evidence to show that it failed to receive notice of the proceedings on the claim petition. The Board affirmed the WCJ, reasoning in relevant part:

> Notice that is mailed and not returned "undelivered" is properly served. Mr. Cizauskas established that mail was sent to the Flamingo and scanned as a delivered article.
>
> ….
>
> Section 416 of Act provides that if a party fails to appear for a hearing without adequate excuse, the WCJ shall decide the matter on the basis of the petition and evidence presented. 77 P.S. §821; Baird v. WCAB (MCTEL), 602 A.2d 452 (Pa. Cmwlth. 1992). Given that substantial evidence supports that notice was served upon Defendant and it offers no alternate excuse for its failure to appear, it was given ample opportunity to defend against Claimant's Petitions. … With regard to Defendant's due process argument, our scope of review has been interpreted as not involving constitutional issues. Ligonier Tavern Inc. v. W.C.A.B. (Walker), 714 A.2d 1008 n.7 (Pa. 1998)….
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> Defendant next argues that it did not share an employment relationship with Claimant and cites Bensing v. WCAB (James D. Morrisey, Inc.), 830 A.2d 1075 (Pa. Cmwlth. 2003) for the proposition that its failure to file an Answer or appear to defend against Claimant's Petitions did not amount to a waiver of the issue since questions of law cannot be waived by a failure to file.
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> ….
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> …Defendant's assertions that questions of law, including the existence of an employment relationship, cannot be waived by a failure to file … is supported by case law. However, it was Claimant's credible testimony that helped him meet his burden.

Board's Opinion, pp. 6 - 10 (citations omitted).[2]

[2]The Court's review is limited to determining whether constitutional rights were violated, an error of law was committed, a practice or procedure of the Board was not followed or the **(Footnote continued on next page…)**

Employer concedes that a notice which is mailed and not returned as "undelivered" is deemed to be properly served according to the Court's holding in *Manolovich* v. *Workers' Compensation Appeal Board* (*Kay Jewelers, Inc. and ITT Hartford*), 694 A.2d 405 (Pa. Cmwlth. 1997), but it asserts that the presumption of proper service under Section 406 of the Act is rebuttable. It likens this case to *Continental Forest Indus.* v. *Workmen's Compensation Appeal Board (Hummel)*, 613 A.2d 629 (Pa. Cmwlth. 1992), where the Court held that the finding that the employer had notice of the hearing was not supported by substantial evidence as there was no evidence that notice was properly mailed and "there is nothing either by way of oral testimony or by way of exhibits, in the record of the hearing as to how the notice was 'sent to' Continental." *Id*., 613 A.2d at 633. Moreover, the WCJ observed only that the notices were sent to Employer without being returned, and Claimant's counsel's letters are insufficient for notice purposes since they were not sent by the Department of Labor and Industry pursuant to *Ross v. Workmen's Compensation Appeal Board (Allied Signal Corp.)*, 616 A.2d 155 (Pa. Cmwlth. 1992) (holding that notice by the Department commences period for filing an answer). Employer received a copy of the WCJ's decision from its neighbor.

Employer claims that it was denied due process because it was not given an opportunity to defend against the claim petition on its merits. Under *Schultz v. Erie Ins. Exch.*, 505 Pa. 90, 477 A.2d 471 (1984), a default judgment in a

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**(continued…)**

findings of fact are not supported by substantial evidence in the record. *Helvetia Coal Co. v. Workers' Compensation Appeal Board (Learn)*, 913 A.2d 326 (Pa. Cmwlth. 2006). Credibility determinations and evaluation of the weight of the evidence are within the province of the WCJ as a fact finder, and the WCJ may accept or reject the testimony of any witness, including medical testimony, in whole or in part. *Canavan v. Workers' Compensation Appeal Board (B & D Mining Co.)*, 769 A.2d 1250 (Pa. Cmwlth. 2001).

civil proceeding can be opened if a petition to open has been promptly filed, a meritorious defense can be shown and the failure to appear can be excused. Credibility is not relevant in determining whether to open a default judgment. Employer states that it promptly filed a petition, has a meritorious defense to the claim, had no reason to expect any workers' compensation claim from a non-employee and Major Rainey receives his official mail only at his home. In *Bensing* the Court held that the employer was entitled to set forth its defense that the injury was not work related although it did not file an answer or appear at hearing.

Claimant responds that under *Manolovich* notice that is mailed and not returned as "undelivered" is properly served. He quotes Cizauskas' testimony on redirect examination that notices were properly mailed and delivered to the bar; that Grillo's certified letter was returned because it was unclaimed; and that a letter with an incorrect address would have been stamped "undeliverable as addressed." On the issue of the existence of an employment relationship, Claimant replies that he credibly testified that he was approached by Employer to work as a bouncer following a contractual problem with People Choice and that he was regularly directed by Employer regarding his job duties. Lastly, pursuant to Section 416 of the Act, the WCJ's decision must be based on the claim petition and the evidence presented where a party fails to appear without an adequate excuse. Claimant submits that substantial evidence supports the finding that notice was served.

After a careful review of the matter, the Court holds that the WCJ's findings regarding notice were supported by substantial evidence of record, which established that the Bureau sent proper notice of the petitions to Employer. When Employer failed to appear at the first hearing, the WCJ directed Claimant's counsel to send notice via certified letter. Employer does not dispute that the 2407 Wylie

Avenue address is the proper mailing address for Flamingo Bar & Grill or that no notices were returned as "undelivered." Claimant thus is entitled to a presumption that the notices reached Employer. *See Manolovich*; 77 P.S. §717. Furthermore, the WCJ did not find credible Major Rainey's testimony that he missed all of the notices sent to Employer. *See Canavan v. Workers' Compensation Appeal Board* (*B & D Mining Co.*), 769 A.2d 1250 (Pa. Cmwlth. 2001).

The *Continental Forest* case is distinguishable because in addition to the evidence of the docket showing that the Bureau sent notice of the petitions, there is evidence that Claimant's counsel sent notice of the petitions and the August 2005 hearing via certified mail at the WCJ's direction. This case is distinguishable from *Ross* as well where the only notice that the employer received of the claim petition came from the claimant. Also, *Bensing* does not apply as it dealt with the narrow issue of whether the employer who failed to file a timely answer could challenge the work relatedness of an injury. It did not involve a notice challenge.

No case law supports the proposition that neglecting to retrieve mail is an adequate excuse under the Act for the failure to appear. Employer had an opportunity to offer evidence that the mailing address was improper but failed to do so. Instead, Major Rainey simply established his inadequate attention to mail received at the bar. In addition, Employer's analogy to default judgment in a civil case is not persuasive where it concedes that the Act rather than the Rules of Civil Procedure controls and that nothing in the Act provides relief under the facts here. Because the WCJ's findings are supported by substantial evidence and the Board committed no error in affirming the WCJ, the Court upholds the Board's order.

DORIS A. SMITH-RIBNER, Judge

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***O R D E R***

AND NOW, this 6th day of February, 2009, the Court affirms the order of the Workers' Compensation Appeal Board.

DORIS A. SMITH-RIBNER, Judge