



Smith v. Workers' Compensation Appeal Board

2004 | Cited 0 times | Supreme Court of Pennsylvania | August 19, 2004

Submitted: July 9, 2004

OPINION NOT REPORTED

MEMORANDUM OPINION

Daniel Smith (Claimant) petitions for review from that portion of the March 12, 2004, order of the Workers' Compensation Appeal Board (WCAB), which affirmed, as modified, the decision of the workers' compensation judge (WCJ) granting, in part, Claimant's reinstatement petition. The WCJ awarded Claimant specific loss benefits for the loss of use of his left fifth toe but allowed Employer a credit for total disability benefits paid up to the date of Claimant's specific loss. We affirm.

On August 17, 1999, Claimant sustained a work-related crush injury to his left foot, and Ransom Industries - Tyler Pipe (Employer) issued a notice of compensation payable (NCP) accepting responsibility for the injury. (WCJ's Findings of Fact, Nos. 1, 2.) Claimant was receiving temporary total disability benefits, but, ultimately, Claimant was released to return to full duty effective May 11, 2000. (WCJ's Findings of Fact, No. 5.) Subsequently, Claimant filed a reinstatement petition seeking, inter alia, specific loss benefits for the loss of use of his left fifth (little) toe,¹ (R.R. at 1), and hearings were held before the WCJ.

At the hearings, Claimant testified and submitted various medical records regarding his injuries and treatment. According to an August 23, 1999, office note of Claimant's treating physician, Prodromos A. Ververeli, M.D., Claimant suffered a "left foot crush injury with disruption of intermetatarsal ligaments, 4 th to 5 th metatarsal. Fracture dislocation of the proximal phalanx, MTP joint, and distal tuft fracture of the distal phalanx of the 5 th toe." (R.R. at 59; see WCJ's Findings of Fact, No. 5.)² Claimant subsequently developed cellulitis, which was debrided, and, ultimately, he underwent internal screw fixation to treat the fracture and also had left fifth metatarsal MTP arthroplasty. (WCJ's Findings of Fact, Nos. 4, 5; R.R. at 76-80.) On October 10, 2000, Dr. Ververeli indicated that Claimant had suffered a loss of function of the fifth toe. (WCJ's Findings of Fact, No. 5.)

Based on Dr. Ververeli's October 10, 2000, report, the WCJ found that Claimant suffered a loss of use of his left fifth toe. (WCJ's Findings of Fact, No. 17.) The WCJ also found that there was no medical evidence indicating that Claimant suffered disability separate and apart from the loss of use of his left fifth toe. (WCJ's Findings of Fact, No. 19.)³ Accordingly, the WCJ granted Claimant's reinstatement petition insofar as it sought a loss of use of the left fifth toe; however, the WCJ allowed



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Employer a credit for total disability benefits paid to Claimant up to October 10, 2000, the date of Claimant's specific loss. Claimant appealed to the WCAB, which affirmed. Claimant now petitions this court for review of the WCAB's order,⁴ arguing that the WCJ and WCAB erred in allowing Employer a credit for total disability benefits paid to Claimant.

In cases of specific loss claims, the well established rule is that an employee who sustains an injury adjudged compensable under section 306(c) of the Workers' Compensation Act⁵ (Act) (the specific loss provisions), is not entitled to compensation beyond that provided by section 306(c), even though he may be totally disabled by the injury, unless the employee proves that he sustained a separate and distinct disabling injury. *Mosier v. Workmen's Compensation Appeal Board (Jessop Steel Co.)*, 601 A.2d 1319 (Pa. Cmwlth. 1992); see *Allegheny Ludlum Steel Corp. v. Workers' Compensation Appeal Board (Malobicky)*, 753 A.2d 330, 335 (Pa. Cmwlth. 2000).

Thus, to determine if Claimant is entitled to both total disability and loss of use benefits, where, as here, only one injury occurred, we must examine the facts to see if Claimant sustained any disability to his foot that was separate and distinct from the disability caused by the loss of use of Claimant's left fifth toe. See *Allegheny Ludlum*. If the disability caused by the loss of use of Claimant's left fifth toe is not separate and distinct from the disability due to the foot crush injury, then Employer would be entitled to a credit for the total disability benefits it paid to Claimant, as the WCJ and WCAB found. See *id.*

Claimant argues that Employer should not receive a credit because it paid total disability benefits for a left foot crush injury, as recognized by the NCP. Claimant argues that his specific loss to the left fifth toe is a separate and distinct injury, and, in fact, he remained disabled due to his left foot injury. In support of his argument, Claimant points out that: (1) sections 306(c)(4) and 306(c)(18) of the Act⁶ recognize a distinction between the foot and the toes; and (2) medical sources demonstrate that the foot contains twenty-six bones, and the little toe contains three bones. Claimant argues that common sense would lead one to conclude that, by losing the function of only three bones in his foot, twenty-three bones remain as the source of Claimant's pain from his crush injury.

Here, however, Claimant presented no evidence to establish that he suffered any disability separate and apart from that caused by the specific loss of use of his left fifth toe. Claimant submitted no evidence to establish that any pain or resulting disability came from a source other than his fifth toe. Indeed, although Claimant alludes generally to the record and maintains that his medical expert's testimony requires that the WCJ find two separate and distinct injuries, Claimant admits that his "medical expert did not come out and directly express the distinction between the left foot crush injury and loss of use of the left fifth toe...." (Claimant's brief at 10.) After reviewing the evidence in its entirety and being mindful that Claimant bore the burden of proof, we cannot say that the WCAB and WCJ erred in allowing Employer a credit for total disability benefits paid.

Accordingly, we affirm the WCAB's order.



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ORDER

AND NOW, this 19th day of August, 2004, the order of the Workers' Compensation Appeal Board, dated March 12, 2004, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Judge

1. Claimant also sought reinstatement of his total disability benefits, alleging that he favored his right leg as a result of the injury to his left foot, and, consequently, he damaged his right knee such that he could no longer work as of January of 2001. (R.R. at 1.) Claimant also sought to amend the NCP to include a right knee injury. However, the WCJ found that Claimant's right knee injury was not work-related. (WCJ's Findings of Fact, No. 18.) Because Claimant does not challenge the WCJ's findings related to the right knee injury, we will not address it.

2. We note that, in Findings of Fact, No. 5, the WCJ refers to an open fracture of Claimant's left fifth metacarpal. (WCJ's Findings of Fact, No. 5.) However, because a metacarpal is a bone in the hand, Stedman's Medical Dictionary 25th Edition 952 (1990), and the treatment note discusses an injury to the foot only, we believe that is a typographical error, and it should be metatarsal.

3. The WCJ's Findings of Fact, No. 19 states right fifth toe; however, the WCAB modified the WCJ's decision to correct this typographical error. (WCAB's op. at 3, n.3.)

4. Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

5. Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§513.

6. 77 P.S. §§513(4) and (18). These sections provide the schedule of specific loss benefits for the foot and any toe other than the great toe, respectively.

