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Government of the District of Columbia

Department of Employment Services

Office of the Director • Employment Security Building • 500 C Street, N.W. • Suite 600 • Washington, D.C. 20001

In the Matter of)
ASZLEE FRANKLIN,)
Claimant)
v.) H&AS No. 84-26
BLAKE REALTY CO.,) OWC No. 25856
&)
FIREMAN'S FUND INS. CO.,)
&)
HOME INSURANCE CO.,)
Employer/Carriers.)

FINAL COMPENSATION ORDER

I. Preliminary Statement

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act, as amended, D.C. Law 3-77, D.C. Code, Sec. 36-301 et seq. (1981 Ed. & Supp.)(hereinafter the "Act").

On November 6, 1984, Hearing Examiner Brownell, after a full and impartial consideration of the whole record, issued a Recommended Compensation Order. On November 14, 1984, I issued a Proposed Compensation Order which adopted the Hearing Examiner's findings and conclusions.

On November 19, 1984, Claimant filed exceptions and written argument to the Proposed Compensation Order. Home Insurance filed exceptions on November 28, 1984. Fireman's Fund filed a response to such exceptions on December 12, 1984. Thereafter, I reviewed those portions of the record pertinent to those exceptions and reconsidered both the recommended and proposed orders.

Background

This proceeding involves the claim of an office cleaner who experienced a cumulative traumatic injury to her shoulder and arm. In late June, 1983, Claimant testified, a tenant of the building in which she performed her duties vacated the premises leaving behind an inordinate amount of bulk trash. As a consequence, Claimant had to discard heavy boxes of paper and books and to vacuum three to five times more than usual. By mid-July of 1983, Claimant experienced so much discomfort and pain that she had to ask her supervisor for help and eventually cease working altogether.

At the hearing, both of Employer's insurance carriers denied their liability. Fireman's Fund, Employer's carrier until the end of June, 1983, offered several theories to disclaim its liability. Initially, for example, Fireman's Fund characterized the injury as a recurrence of Claimant's 1978 or 1979 automobile accident or of Claimant's 1982 work injury. In the alternative, Fireman's Fund argued that the injury actually occurred in July but that, if it occurred in June, the July work activity aggravated the injury. Under any of these theories, it is argued, Fireman's Fund would not be liable.

Home Insurance, Employer's carrier beginning on July 1, 1983, sought to avoid liability by arguing that the injury occurred in June. Home Insurance viewed Claimant's activities in July as unrelated to the disability since there was nothing unusual about her work activity in July.

Claimant argued that if a precise injury date could not be determined, both carriers should be found liable.

The Hearing Examiner found that Claimant suffered stiffness in her right arm and shoulder in June, 1983. She also found that the injury became painful and finally debilitating in July. Without making a finding about the actual date of injury, the Hearing Examiner concluded that since Claimant's "most recent injury causing activity" was in July and that since the "last injurious exposure rule" should apply to gradual injuries, Employer's carrier in July, Home Insurance, was the liable carrier.

Home Insurance filed exceptions on two grounds. The Hearing Examiner's initial error, contends Home Insurance, was her failure to find that the injury occurred in June. Her second mistake, according to Home Insurance, was her application of the "last injurious exposure rule" to a traumatic injury case. Home Insurance proposes that these two errors require a reversal of the Hearing Examiner's findings and conclusions and a decision favorable to Home Insurance.

Discussion

As a cumulative traumatic injury, Claimant's physical misfortune is a hybrid. Unlike most other accidental injuries, the cumulative traumatic injury is the result of repetitive minor traumas or insults to the body or a bodily part which occur over a period of time. There is no one, single work event which occurs on any particular day to which one can attribute a cumulative traumatic injury. Because of its gradual nature, the cumulative accidental injury resembles the occupational disease. Yet, the cumulative traumatic injury which Claimant suffered cannot be catalogued under the Act as a generally recognized occupational disease. See §11 of the Act [D.C. Code 1981, §36-310].^{1/}

Because of the hybrid nature of the injury, there are two possible approaches to arrive at a solution to the liable carrier problem in this proceeding. Under one approach, one would view the injury just as one would view any other accidental injury and thereby fix the date of the injury. The carrier on risk on the date of the injury would be the liable carrier. Under the other approach, the injury is treated as if it were an occupational disease and the carrier on risk at the time of Claimant's "last known exposure" would be the liable carrier. See §11 of the Act [D.C. Code 1981, §36-310]. Under either approach, Home Insurance is the liable carrier under the facts found by the Hearing Examiner.

Assuming for purposes of this proceeding that the only proper approach for determining carrier liability requires me to view Claimant's injury purely in terms of an accidental personal injury, I nevertheless find that the injury occurred while Home Insurance was on risk. According to Professor Larson, most jurisdictions have solved the practical problem of affixing a specific date for the accident by simply selecting the date on which "the disability manifests itself." 1B A. Larson, supra, §39.50 at 7-350.27 (Rel. 45). Other jurisdictions select the date which the onset of pain occasions medical attention although the effect of the pain does not result in the employee's discontinuance of work. Id. at 7-350.28. Michigan, Professor Larson reports, selects the last day of work in which the employee was subjected to the debilitating conditions that contributed to this injury. Id.

^{1/} The Courts in West Virginia, California and a few other states have held that back pain resulting from a series of microtraumatic injuries constituted an occupational disease within the respective state statutes. See, e.g., Lilly v. Workmen's Compensation Commission, 225 S.E.2d 214 (W. Va. 1976), *Fruehauf v. Workers' Compensation Appeals Board, 68 Cal.2d 569, 68 Cal. Rptr. 164, 440 P.2d 236 (1968). The issue of status was not raised in this proceeding.

While it is not clear from the Recommended Compensation Order which of these three methods for selecting an injury date the Hearing Examiner found most appropriate under the Act, I conclude that the date of injury for a cumulative traumatic injury is the date on which the injury manifests itself. The date on which the injury manifests itself is (1) the date on which employee first sought medical attention for his painful symptoms, whether or not he ceased work or (2) the date of disability, whichever first occurred. Common experience commands the view that when a person seeks medical attention or stops working because of pain, an injury has become manifest. Although an employee's continuance of work after medical attention might or might not have an impact on subsequent carrier liability, the fact that the employee continued working after medical attention does not negate the fact of the employee's injury, whatever the degree of impairment. By concluding that the date of injury is either the date of medical attention or the date of disability, whichever first occurs, I have adopted a test perhaps broader than, but not inconsistent with, the vast majority of jurisdictions.^{2/}

The Hearing Examiner found that Claimant first sought medical attention for her arm and shoulder on Tuesday, July 12, 1983, at Howard University Hospital. She also found that Claimant worked through July 20, 1983, after which date Claimant could no longer work because of her shoulder. It is clear from these facts, therefore, that Claimant's injury first became manifest on July 12, 1983, when Claimant sought medical attention at Howard University Hospital. At the time that this injury became manifest, Home Insurance was on risk. I therefore conclude that because Claimant first sought medical treatment for her cumulative traumatic injury while Home Insurance was on risk, Home Insurance was the carrier on the date of the injury and is therefore the liable carrier.

If, in the alternative, the injury is viewed as one would view an occupational disease causing gradual disability, Home Insurance is still the liable carrier. In occupational disease cases, the Act places liability upon the employer of last known

^{2/} In many instances an employee will seek medical attention for a diagnosable injury long before he ceases working. I see no rationale for setting the date of the injury coincidentally with the date of disability when it is apparent to the employee and doctor that the employee has suffered an injury requiring medical attention.

exposure. Although this proceeding does not require a choice to be made regarding the employer, it is clear that the "last known exposure" test in the Act was meant to determine not only employer liability but carrier liability as well. Thus, the Act places liability upon the carrier on risk at the time of Claimant's last known exposure to employment conditions causing or contributing to the injury.

With more than adequate support in the record, the Hearing Examiner found that the employment conditions which caused or contributed to Claimant's injury, namely, Claimant's work activity, existed in July after Home Insurance assumed the risk. Claimant's work activities in June and July did not differ; so that, there was no reason not to infer that Claimant's July activity caused, aggravated or contributed to Claimant's injury. Since, as a consequence, Home Insurance was on risk at the time of Claimant's last known exposure to injurious work conditions, Home Insurance is the liable carrier.

In its written argument accompanying its exceptions, Home Insurance makes reference to portions of the record in an attempt to prove that the injury occurred in June. Because I have, in ~~this order, established a test for the injury date and none of the~~ portions of the record cited are relevant to the test, I need not address Home Insurance's references. I note, however, that Home Insurance proffers several statements not supported by the record.^{3/} Home Insurance also decries the Hearing Examiner's adoption of the "last exposure rule" to traumatic, accidental injuries. Home Insurance suggests that that standard "will significantly alter risks to carriers where historically the carrier on the risk at the time of the injury was the responsible carrier." Home Insurance's Exceptions at 10.

^{3/} Home Insurance claims, for example that Claimant said the tenant began moving at the beginning of June, that Claimant required bed rest for her injury on July 2, 3, and 4, that Claimant uses the words "stiffness" and "pain" interchangeably. An unstrained reading of the record indicates that there is not a reference to the beginning of June in the record, that Claimant's bed rest was for a nose and throat ailment and that Claimant indicated in her testimony and through the report of Dr. Hurston that she did not use "stiffness" and "pain" interchangeably but that she suffered both at different times. See Employer's Exhibit #2.

In responding to Home Insurance's concern, I think that two points should be emphasized. First, although the injury at issue here is a traumatic injury, it is a cumulative traumatic injury. The rules established by this order pertaining to carrier liability relate to cumulative traumatic injuries only. Nowhere have I or the Hearing Examiner suggested a broader application, that is, an application to all traumatic injuries.

Second, the type of injury at issue here is not the type of injury hypothesized by Home Insurance. The hypothetical posed by Home Insurance parallels the facts in Continental Insurance Co. v. Hickey, 139 Ga. App. 31, 227 S.E.2d 848 (1976).^{4/} In Continental Insurance, the claimant sustained a back injury on December 18, 1972, but continued working until March 6, 1974. At the time of the injury the Insurance Company of North America was on risk. The employer had changed to Continental Insurance Company by time of the disability. Although the administrative law judge ruled that the Insurance Company of North America was liable, the workers' compensation board ordered Continental Insurance to pay. The Courts, however, reversed finding any agreement by Continental Insurance to pay to be a mere gratuity.

~~In Continental Insurance, the administrative and judicial decision makers were neither faced with the question of the date of a cumulative traumatic injury nor provided circumstances where continuous work was found to have caused or aggravated an original injury. In this proceeding, unlike Continental Insurance, there is neither a significant time lag nor a change of carriers between the date of the injury and the date of disability. To the extent that there are any facts and rationale akin to those in this proceeding, I am persuaded by those in Utica Square Salon of Beauty v. Barron, 595 P. 2d 459 (Okla. App. 1979), where the Court found the last carrier liable for the entire disabling injury although the carrier had insured but 10 months of the 13 years of the Claimant's inhaling toxic chemicals. Confined to instances where there is a cumulative traumatic injury resulting from repetitive insults to the body, the rules adopted herein do not significantly affect carrier liability in other contexts. I therefore reject Home Insurance's arguments.~~

^{4/} Home Insurance cited similar cases: Halstead Industries v. Jones, 603 S.W. 2d 457 (Ark. App. 1980), Hartford Accident and Indemnity Co. v. Mauldin, 147 Ga. App. 230, 248 S.E.2d 528 (1978), U.S. Fid. & Guar. Co. v. Bitumenous Cas. Corp., 52 Tenn. App. 43, 371 S.W.2d 801 (1963).

Having rejected the arguments by Home Insurance, I adopt the findings of the Hearing Examiner and to the extent modified by this opinion her legal conclusions.

ORDER

After consideration of Home Insurance's exceptions and written arguments, of Fireman's Fund's response, of Claimant's exceptions, of designated portions of the record and of persuasive authority, it is hereby

ORDERED That Claimant's request for temporary total disability benefits from July 11, 1983, through July 14, 1983, and from July 21, 1983, through January 2, 1984, for permanent partial disability benefits for a 10% loss of use of the right arm, for related medical expenses and interest, be and hereby is, GRANTED. The Proposed Compensation Order in this matter is adopted and incorporated to the extent not inconsistent with this order.



MATTHEW F. SHANNON
Director
Department of Employment Services

AUG 18 1985

Date