IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Everett Harding, Petitioner	:	No. 1303 C.D. 2010
v.	:	Submitted: October 22, 2010
Workers' Compensation Appeal Board (SEPTA), Respondent	:	

OPINION NOT REPORTED

MEMORANDUM OPINION
PER CURIAM FILED: May 5, 2011

Everett Harding (Claimant) appeals from the June 8, 2010, order of the Workers' Compensation Appeal Board (Board), which affirmed the decision of Workers' Compensation Judge Susan Kelley (WCJ) granting Claimant benefits for a closed period of time and terminating benefits thereafter.

Claimant filed a claim petition alleging that he sustained injuries to his ankle and knee in the scope and course of his employment with SEPTA (Employer) on June 7, 2004. The claim petition was assigned to the WCJ on October 14, 2004, and the first hearing was scheduled for November 9, 2004; however, Claimant continued the November 9th hearing and then failed to appear at the next two scheduled hearings. The WCJ expressed concern about the length of time the claim petition had been pending and, on May 10, 2005, the WCJ directed Claimant to complete his medical evidence within 90 days. Approximately 121 days later, at the September 8, 2005 hearing, Claimant's medical evidence was not yet completed. Consequently, the WCJ dismissed the claim petition for failure to timely present medical evidence. Claimant appealed to the Board, which affirmed the WCJ's order.

Claimant filed a second claim petition in September of 2005, which was assigned to the WCJ. At the beginning of the October 18, 2005 hearing, Claimant's counsel, Allen L. Feingold, Esquire, commenced an attack on the WCJ's integrity and competence:

> JUDGE KELLEY: …The first Claim Petition was dismissed for Counsel's failure to proceed with the presentation of Claimant's evidence ---
>
> ATTORNEY FEINGOLD: Medical. Medical Evidence.
>
> JUDGE KELLEY: ---in a timely fashion. Mr. Feingold, I believe that if you review the record, the presentation of Claimant's testimony was also untimely. It took you several hearings to get that made. But in any event ---
>
> ATTORNEY FEINGOLD: Because I was on trial, Judge. Something you evidently know nothing about.
>
> JUDGE KELLEY: Mr. Feingold? ---
>
> ATTORNEY FEINGOLD: Have you ever been on trial Judge, or just push papers like this for your entire life?
>
> JUDGE KELLEY: You are out of line, Mr. Feingold.
>
> ATTORNEY FEINGOLD: I know I am.
>
> JUDGE KELLEY: And I think what you're trying to do ---
>
> ATTORNEY FEINGOLD: And you caused a man who has no money, who has no place to live, to live in the street because you took away his chance for compensation.
>
> ….
>
> JUDGE KELLEY: ---you're out [of] line and this conduct as it's being recorded here will be sent up to the disciplinary board, if you continue to act in this fashion.

> ATTORNEY FEINGOLD: Ma'am, please send it up. Because then you'll have to testify and I can cross examine you---
>
> JUDGE KELLEY: Mr. Feingold?
>
> ATTORNEY FEINGOLD: ---and find out what gives you the right to ruin people's lives.
>
> ….
>
> JUDGE KELLEY: While we were off the record, not only were you making inappropriate and inaccurate statements, you also asked for my refusal ---
>
> ATTORNEY FEINGOLD: Recusal, not refusal.
>
> JUDGE KELLEY: And I refuse to recuse….
>
> ATTORNEY FEINGOLD: Ma'am, then I'll file the appropriate injunction and I'll sue you and then you can play your games and I'll play mine.
>
> JUDGE KELLEY: Mr. Feingold, ---
>
> ATTORNEY FEINGOLD: You don't deserve to be on this case and probably a lot of others.
>
> JUDGE KELLEY: Mr. Feingold, you're now being admonished, yet again, that your behavior is inappropriate, out of line, and it will not be tolerated. Your request for the recusal is denied….

(Notes of Testimony (N.T.) 10/18/2005, at 5-9.)

Thereafter, Claimant was represented by Dora R. Garcia, Esquire, who moved for the WCJ's recusal based on the WCJ's decision to dismiss the original claim petition as well as comments the WCJ purportedly made regarding Attorney

Feingold.[1] The WCJ conducted a hearing on June 22, 2006, to address the motion, and the following discussion took place:

> ATTORNEY GARCIA: Your Honor, I'm prepared to present testimony in support of my position….
>
> ….
>
> JUDGE KELLEY: And it is [Attorney Feingold's] testimony that you intend on presenting?
>
> ATTORNEY GARCIA: And Your Honor's testimony as well.
>
> JUDGE KELLEY: I will not be testifying on that. The way to handle this thing is we will have the transcripts from the other proceedings and you can use those as the basis for your motion, but there is no need for testimony.
>
> ATTORNEY GARCIA: Well, I don't know how I can make a record to show your actions without having testimony in this matter.
>
> JUDGE KELLEY: Because, Ms. Garcia, all the actions that took place in this matter, took place on the record during the proceedings.
>
> ATTORNEY GARCIA: Your Honor, not all of them because I've been --- I was present during a hearing where you made some remarks regarding Mr. Feingold and there was no record at that time, so that's not correct. And, also,

[1] The record indicates that Attorney Feingold's license to practice law was suspended for three years in 2006. (N.T., 5/9/2006, at 5-6.) Furthermore, although Attorney Garcia appeared at the May 9, 2006, hearing on behalf of Claimant, the record indicates that Claimant was unaware that Attorney Feingold's license was suspended and that Claimant had never spoken to Attorney Garcia or agreed to have her represent him. (Id. at 9-11.) Claimant elected at the hearing to have Attorney Garcia represent him in this matter. (Id. at 11.)

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Mr. Feingold was present before Your Honor when there wasn't a record.

JUDGE KELLEY: Ms. Garcia, let me stop you there. I always go on the record when Mr. Feingold is in my hearing room, so that's an inaccurate statement. And Ms. Coleman [Employer's counsel] has been here during this whole proceeding. You're really working hard to try and get me recused in this matter, and the bottom line is I've been charged with hearing the petitions and moving the case along consistent with the special rules and consistent with how I think these petitions should be handled. And I was very generous in allotting additional time.

Now, simply because Mr. Feingold believed that his trial schedule took precedent over a Workers' Compensation proceeding doesn't mean that I had any personal feelings toward Mr. Feingold … or any negative feelings. It's all professional when I hear a case….

….

ATTORNEY GARCIA: Your Honor, I don't believe, based on the comments that you've made regarding Mr. Feingold and the handling of this matter you can be impartial in rendering a decision and that's my concern.

JUDGE KELLEY: I understand that's your concern. And as I said to Mr. Feingold when he made this motion for recusal, I can be fair. And Ms. Garcia, the other thing to point out to you is that Mr. Feingold is not even on this filing. You're on this filing.

ATTORNEY GARCIA: Yes.

JUDGE KELLEY: And any of my rulings and directives and motions went to the conduct of Counsel and are on the record. They do not reflect how I will decide the case.

….

[T]he Appeal Board affirmed my dismissal of the initial Claim Petition for Mr. Feingold's failure to go forward with it. And I did not dismiss it with prejudice because certainly it's not my intention to harm Claimant. It was my intention to tell Mr. Feingold to get his ducks lined up to be used as evidence and then he can go forward with his case.

….

JUDGE KELLEY: … The motion for recusal is denied….

….

ATTORNEY GARCIA: I would ask for leave to supplement my motion because there are---it is on the transcripts. We do have records of the comments that you continued to make about Mr. Feingold. You have gone off the record when you don't want ----

JUDGE KELLEY: Ms. Garcia, what comments have I made about ---

ATTORNEY GARCIA: --- certain things to be heard.

JUDGE KELLEY: ---Mr. Feingold? I'm sorry…. When I go off the record, I go off because Mr. Feingold goes on ad nauseum making inflammatory and inaccurate statements. And if he will not stop when I ask him to stop talking, which he does not do, then I go off the record. That is how I control my courtroom. You may not appreciate that and Mr. Feingold may not appreciate that, but that is one way I would have to move to control an attorney that is not respectful to the Court and the proceedings.

….

…Now, perhaps Mr. Feingold would have liked me to have been a little sweeter to him, but I don't have to be sweet, and I can make sure that I remain above court and impartial and untouchable to these types---so enough. I am not recusing myself. I've been fair and impartial. I think that

> my conduct set forth on the transcript establishes that. The motion is denied.

(N.T., 6/22/2006, at 7-11.) Following her denial of the motion, the WCJ returned to the merits of the claim petition and proceeded to discuss with the parties their plans for the presentation of evidence. (N.T. 6/22/2006, at 6 - 11, 13 - 16.)

The parties litigated the case before the WCJ and presented evidence, including medical evidence, in support of their respective positions. The WCJ circulated a decision on March 23, 2007, granting Claimant's claim petition. She found that Claimant sustained work-related injuries to his left ankle and right knee, which disabled him for a closed period of time from June 11, 2004 through January 25, 2006. The WCJ terminated benefits as of January 26, 2006, based upon the credible opinions of Employer's medical expert, Richard Mandel, M.D.

In her decision, the WCJ also denied Claimant's motion for recusal, explaining her rationale as follows:

> 16. Claimant's counsel's Motion for Recusal of the Workers' Compensation Judge is denied as without merit. Initially, the motion was based on this WCJ's dismissal of the original Claim Petition. Dismissing the Claim Petition for failure to present medical evidence within the time period proscribed does not form the grounds for recusal. The dismissal was affirmed by the WCAB.
>
> 17. Subsequently, the Motion for Recusal was based on alleged bias exhibited while off the record. In order to control the proceedings, this WCJ would go off the record. Claimant's counsel's (Allen Feingold and later Dora Garcia's) self serving statements, speaking over the WCJ and failure to stop speaking necessitated such action. Going off the record would stop Claimant's counsel's inappropriate behavior, generally briefly, at which time the matter would go back on the record. The records speak for

> themselves. Failing to comply with the orders/instructions of the Judge which are consistent with the Special Rules of Administrative Practice and Procedure resulting in actions or rulings adverse to counsel's liking are not grounds for recusal.

(WCJ's Decision, 3/23/2007, Findings of Fact Nos. 16-17.)

Claimant and Employer filed cross-appeals to the Board. The Board affirmed the WCJ's decision to deny the recusal motion and affirmed the WCJ's decision on the merits of the claim petition. However, the Board agreed with Employer that the WCJ failed to consider whether it was entitled to credit for sick benefits paid to Claimant. The Board, therefore, remanded the matter for additional findings of fact and conclusions of law regarding Employer's entitlement to a credit. On remand, the WCJ granted Employer a credit in the amount of $3,912.21. Claimant appealed to the Board, which affirmed on all issues.

On appeal to this Court,[2] Claimant raises the following contentions for our review: "The WCJ erred in limiting the damages sought by the claim petition and in failing to decide appellant's recusal motion before deciding the case itself."[3] (Claimant's brief at 8.)

We begin with the recusal issue. It is presumed in Pennsylvania that a judge is unbiased and impartial, Beharry v. Mascara, 516 A.2d 872 (Pa. Cmwlth.

[2] 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. McKenna v. Workers' Compensation Appeal Board (SSM Industries), 4 A.3d 211 (Pa. Cmwlth. 2010).

[3] Claimant is represented in this appeal by Jeffry S. Pearson, Esquire. The record reflects that Attorney Garcia's license to practice law was suspended, (N.T., 7/22/2008, at 5-6), and that Claimant retained Attorney Pearson in 2008. (N.T., 9/9/2008, at 5-6.)

1986), and that a judge has the ability to assess his or her ability to make rulings impartially and without prejudice. Commonwealth v. Tedford, 598 Pa. 639, 960 A.2d 1 (2008). "The issue of recusal is addressed particularly and peculiarly to the conscience and sound discretion of the judge; therefore, if the judge feels that he or she can hear and dispose of the case fairly and without prejudice, that decision will be final absent an abuse of discretion." In re Hunter, 782 A.2d 610, 613 (Pa. Cmwlth. 2001).

The standard for determining whether recusal is required is whether there is substantial reasonable doubt as to the judge's ability to preside impartially. Steinhouse v. Workers' Compensation Appeal Board (A.P. Green Services.), 783 A.2d 352 (Pa. Cmwlth. 2001). A judge's impartiality is called into question whenever he or she has doubts regarding the ability to preside objectively and fairly in the proceeding or where there exist factors or circumstances that may reasonably question the judge's impartiality in the matter. Hunter. Before we can conclude that a judge should have recused himself or herself, the record must clearly show prejudice, bias, capricious disbelief, or prejudgment. Id. The party who seeks to disqualify a judge has the burden to produce evidence establishing bias, prejudice, or unfairness necessitating recusal. Id.

Claimant contends that the WCJ abused her discretion by failing to decide the recusal motion before deciding the merits of his case in accordance with this Court decision in Steinhouse. In that case, a medical provider filed a motion for recusal of the WCJ following the close of the record. The WCJ subsequently issued a decision in the case without ruling on the motion for recusal. When the matter was appealed to the Board, the WCJ finally issued an interlocutory order denying the

motion. On appeal to this Court, we held that a WCJ erred by failing to decide the motion for recusal before issuing a decision on the merits, reasoning as follows:

> With regard to Provider's motion for recusal, the WCJ erred by failing to rule on this motion before issuing his decision. The 'Interlocutory Order' is not interlocutory, as it was not issued while this matter was still pending but was improperly issued after the Utilization Review Petition had already been decided. Additionally, it is not even part of the original record in this case because the WCJ never admitted it into the record. The WCJ's failure to resolve a necessary issue raised by the parties before issuing the decision requires that we vacate his decision and remand this case to allow him to address this issue before rendering a new decision. Furthermore … the decision of whether or not to recuse must initially be made by the WCJ and is a matter of his discretion. *Because the WCJ failed to exercise his discretion and make a determination as to whether he should recuse himself before rendering a decision in this matter, this Court is unable to conduct an effective appellate review of the WCJ's decision*.

Steinhouse, 783 A.2d at 357 (emphasis added) (citations omitted).

Although Claimant correctly observes that Steinhouse requires a WCJ to rule on a recusal motion before issuing a decision on the merits, the record here establishes that the WCJ denied Attorney Garcia's motion from the bench on June 22, 2006, approximately nine months before she decided the merits of the case on March 23, 2007.[4] When she denied the motion on June 22, 2006, the WCJ placed on the record her reasons for denying the motion and affirmed that she was capable of fairly deciding Claimant's claim petition. The reasons the WCJ articulated at the June 22,

[4] The WCJ also denied Attorney's Feingold's October 18, 2005, oral motion for recusal from the bench.

2006, hearing are sufficient to allow for meaningful appellate review. We also note that, unlike the WCJ in Steinhouse who never ruled on the recusal motion until the matter was appealed, the WCJ here addressed Claimant's motion for recusal in the decision on the merits. Therefore, we conclude that the WCJ complied with Steinhouse.[5]

Claimant argues that the WCJ demonstrated hostility and bias toward him. However, the record demonstrates that it was Claimant's counsel who behaved in a hostile manner toward the WCJ, expressing anger over the WCJ's dismissal of the original claim petition, attacking the WCJ's competence and character, and making accusations of bias. To deal with this conduct, the WCJ took reasonable and necessary steps to control her courtroom. Our review of the record does not reveal that the WCJ was biased; nor does it contradict the WCJ's conclusion that she could decide the claim petition in a fair and impartial manner.[6] Therefore, because the

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[5] Claimant does not argue in his brief that the WCJ violated section 131.24 of the Special Rules of Administrative Practice and Procedure Before Workers' Compensation Judges, which directs a WCJ, when faced with a recusal motion, to conduct an evidentiary hearing and issue a decision within fifteen days following receipt of the hearing transcript and submissions of the parties. 34 Pa. Code §131.24. However, even if this issue had been raised and briefed, we would observe that the WCJ provided Claimant with a hearing on the recusal motion on June 22, 2006, and conclude that the procedure utilized by the WCJ here fairly resolved the issues in the motion and did not prejudice Claimant.

[6] With regard to the original claim petition, Claimant argues that, despite his counsel's best efforts to schedule a medical deposition, the WCJ dismissed the case. However, it is clear from the record that the WCJ gave Claimant ample time to produce his medical evidence. Also, the WCJ's decision was affirmed by the Board, which concluded that the WCJ did not abuse her discretion by dismissing the claim petition. Claimant did not appeal to this Court.

Furthermore, Claimant asserts that the WCJ improperly excluded him and his counsel from the courtroom during the examination of Employer's medical expert on November 30, 2006. Although it is true that Claimant and counsel were excluded from the courtroom, the record demonstrates that such action was not unreasonable.

(Footnote continued on next page…)

record does not establish substantial reasonable doubt as to the WCJ's ability to be impartial, we conclude that the WCJ did not err or abuse her discretion by denying the motion to recuse.

(continued…)

At the September 21, 2006, hearing the WCJ scheduled the deposition of Employer's medical expert for October 5, 2006; Claimant's counsel was unhappy with the date selected by the WCJ. On the day of the deposition, the following exchange took place:

> It is now, approximately, 3:40 p.m. We were going to start the deposition; however, we received a fax minutes ago from Feingold, Feingold and Garcia. It happens to be a 19 page fax, which indicates that there is a Civil Complaint filed against the Doctor, as well as other parties, including myself, again, filed by Dora Garcia in the form of a Complaint and Civil Action.
>
> The Doctor would prefer to have this matter and have this complaint reviewed by his counsel and, therefore, he has requested that we not proceed with this deposition…. So, we will not go forth with the deposition in light of the fact that the Doctor has just received, by fax, suit filed by Claimant's counsel.

(Statement on the Record of Stephanie Coleman, Esquire, 10/5/2006, at 4-5.) The WCJ reasonably concluded that Claimant's civil suit was a tactic designed to defeat the deposition and, consequently, she arranged to take the deposition of Employer's medical expert in her courtroom on November 30, 2006. On that date, while preparing to administer the oath to Employer's expert, Claimant's counsel interrupted the WCJ and engaged in conduct that WCJ found offensive. The WCJ ruled as follows:

> Due to the unprofessional, inappropriate, uncivil and just down right rude behavior of Attorney Garcia, I have precluded her from participating in the deposition of the doctor this morning.

(Deposition of Richard J. Mandel, M.D., 11/30/2006, at 14.) The WCJ's actions, in our view, were not erroneous or an abuse of discretion.

Claimant cites in his brief portions of the record where the WCJ allegedly refused to allow Claimant to place matters on the record or berated Claimant's counsel. However, we reviewed the cited portions of the record and conclude that they do not establish that the WCJ was biased or otherwise acting in an improper manner.

Claimant also contends that the WCJ drastically limited his benefits "based upon a biased, one-sided view of the evidence presented in the case and gave no consideration whatsoever to the evidence presented by the claimant." (Claimant's Brief at 8.) This contention is completely unfounded. It is absolutely clear from the WCJ's decision that she reviewed the evidence introduced by both parties, assessed the weight and credibility of the evidence, and concluded consistent with the credible evidence that that Claimant was entitled to benefits for a closed period of time only. [7] Therefore, this argument is without merit.

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[7] The WCJ summarized the evidence presented by both parties and fully explained her assessment of the weight and credibility the evidence. The WCJ explained her reasoning, which clearly supports her decision, as follows:

> 9. Based upon a review of the evidentiary record as a whole, this Judge accepts Claimant's testimony of sustaining an injury to his left ankle and right knee in the course and scope of his employment with SEPTA resulting in disability as credible and persuasive. Significant in reaching this determination is that Claimant's testimony of sustaining an injury and reporting the same is uncontradicted. Additionally, the medical evidence of record from both Claimant and SEPTA establishes that Claimant sustained a work injury. The Judge rejects Claimant's testimony regarding the severity of injuries and as to sustaining an injury to his right ankle as not credible and persuasive. Significant in reaching these determinations is this Judge's observation of Claimant's demeanor while testifying and hearing his testimony first hand. Additionally, Claimant's testimony in May 2005 regarding how he sustained his work injuries is different from the histories he provided to Dr. Smith and Dr. Mandel. Also, the incident report he completed contemporaneous with the work incident only reflects injuries to his left ankle and right knee. Detracting further from Claimant's credibility is that he denied prior right knee problems while the 1998 medical records establish otherwise.
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> 10. Based upon a review of the evidentiary record as a whole, the Judge finds the testimony of Dr. Mandel more credible and persuasive than any contrary testimony of Dr. Smith. Accordingly, the testimony

(Footnote continued on next page…)

Accordingly, the Board's order is affirmed.

(continued…)

> of Dr. Smith is rejected wherever inconsistent with the testimony of Dr. Mandel and Dr. Mandel's testimony is accepted as fact. Significant in reaching this determination is that Dr. Mandel's testimony is based on and supported by his examination of Claimant and his review of medical records and diagnostic studies, including records and studies not reviewed or considered by Dr. Smith. Dr. Smith did not consider the medical records from 1998 and thus was unaware of Claimant's prior treatment of his right knee. He also did not consider the records from Mercy Health Care. Notably, Dr. Smith's findings on physical examination were essential subjective, in the nature of pain, discomfort and tenderness and Dr. Smith acknowledges stability of the ankles and knee.

(WCJ's Decision, 3/23/2007, Findings of Fact Nos. 9-10.)

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Petitioner	:	
	:	No. 1303 C.D. 2010
v.	:	
	:	
Workers' Compensation Appeal Board (SEPTA),	:	
Respondent	:	

PER CURIAM

ORDER

AND NOW, this 5th day of May, 2011, the June 8, 2010, order of the Workers' Compensation Appeal Board is hereby AFFIRMED.