IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Linda May Reilly,	:	
Petitioner	:	
	:	
v.	:	No. 1352 C.D. 2009
	:	Submitted: October 2, 2009
Workers' Compensation Appeal	:	
Board (Emilie Road Day Care	:	
Center and State Workers'	:	
Insurance Fund),	:	
Respondents	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: January 28, 2010

Linda May Reilly (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 her Claim Petition. We affirm.

Claimant filed a Claim Petition alleging she sustained multiple injuries in the course and scope of her employment on Saturday, July 14, 2007. Claimant alleged these injuries were sustained in a motor vehicle accident (MVA) while waiting in the drive-thru lane of a fast food restaurant. Claimant asserts in her Petition that the vehicle she was in is owned by Emilie Road Day Care Center (Employer).

Claimant testified that in addition to working on-site for Employer, she would have to go to training classes, buy groceries, and pick up supplies. According to Claimant, she is permitted to make purchases at Pathmark and to pay by check from Employer's account. She also is authorized to use the Employer's accounts at Sam's Club and Target. Claimant indicated she made purchases for Employer at any time, including weekends.

Claimant explained that on the date of her MVA, she was driving a 2005 PT Cruiser, owned by Employer. She had gone to some yard sales in the morning to purchase items for the day care center as she had done in the past. Claimant denied ever purchasing anything for her own personal use at these yard sales. Claimant further stated she purchased some items at the senior citizens center. That afternoon she was rear-ended in a McDonald's parking lot whereupon she alleges she sustained injury. According to Claimant, she had intended to go to Pathmark that day. That night, she informed her brother that as a result of her accident, she was unable to make the grocery purchases for the day care and he would need to do so by Monday. Claimant agreed that at the time of the MVA, her brother's ex-wife was a passenger in the vehicle. The woman had accompanied Claimant to the yard sales and senior citizens center earlier in that day and, per Claimant, was to join in the grocery shopping as well. According to Claimant, other employees have used the PT Cruiser.

Claimant presented the testimony of her brother, Russell Tisone, the owner of Employer. He explained that Claimant is the vice president of operations and is responsible for the day to day operations of the day care center. Per Mr. Tisone, it is understood that Claimant is to be

available 24 hours a day, seven days a week. He stated that Claimant worked on-site, but also performed duties off the premises as needed. Claimant may be required to purchase items or transport children. An automobile, specifically a PT Cruiser, is provided to Claimant at Mr. Tisone's expense to conduct off premises activity or respond to on-site emergencies. Mr. Tisone stated he pays for the maintenance and gasoline for the vehicle. He acknowledged the vehicle is registered in his name, not the corporation's, and is insured by his personal insurance. According to Mr. Tisone, he is in charge of paying Employer's bills.

According to Mr. Tisone, Claimant called him later in the evening following the MVA to inform him that she was unable to complete shopping for the day care that she was going to do on that day. Mr. Tisone stated that based on that conversation, it was incumbent on him to complete the task by Monday. He agreed that Claimant regularly did food shopping for the day care on weekends. He did not know why Claimant was at McDonald's at the time of the MVA.

The WCJ denied Claimant's Claim Petition in a decision dated November 25, 2008. He concluded that Claimant failed to meet her burden of establishing that at the time of her injury, she was engaged in the course and scope of her employment.[1] In so doing, the WCJ rejected Claimant's testimony, noting his personal observations of Claimant at the hearing.[2] The

[1] Because the WCJ found Claimant's injuries were sustained outside the course and scope of her employment, he did not address her medical evidence.

[2] A WCJ is free to accept or reject, in whole or in part, the testimony of any witness. Greenwich Collieries v. Workmen's Compensation Appeal Board (Buck), 664 A.2d 703 (Pa. Cmwlth. 1995). His credibility determinations are not reviewable by this

WCJ further found that "Claimant while testifying to what she was allegedly doing for the day care center presented no evidence in the way of receipts or reimbursement to her or payment for items allegedly purchased for the day care center purchased at the yard sale or senior citizen center." Reproduced Record (R.R.) at 208a. The WCJ added that despite the fact that Claimant had a passenger with her at the time of the accident, she did not call on her as a witness to corroborate Claimant's assertion that both before and after her stop at McDonald's on Saturday, July 14, 2007, she had plans to purchase items for the day care center.

The WCJ further rejected Mr. Tisone's testimony. The WCJ referenced his observations of Mr. Tisone at hearing. The WCJ further cited the fact that he did not know why Claimant was at McDonald's at the time of the MVA other than the naturally assumed fact that she was purchasing food. The WCJ added that although Claimant purportedly called Mr. Tisone following her MVA to inform him that he would have to complete the necessary food shopping for the day care by the following Monday, no evidence was presented that Mr. Tisone acted in accordance with that request. Most importantly, the WCJ indicated "Mr. Tisone alleged the Claimant regularly did food shopping for the day care center on weekends, but presented no receipts with corresponding checks issued by the corporation in payment reflecting the date of expense July 14, 2008 (sic) or *any other weekend date*." (Emphasis added). R.R. at 207a.

Court. Campbell v. Workers' Compensation Appeal Board (Pittsburgh Post Gazette), 954 A.2d 726 (Pa. Cmwlth. 2008).

The Board affirmed the WCJ's decision on June 16, 2009. This appeal followed.[3]

Claimant argues on appeal that she is entitled to benefits as she is a traveling employee and was acting in the course and scope of her employment at the time of her MVA. She contends that inasmuch as she is a travelling employee, a break to take lunch does not remove herself from the course and scope of her employment. According to Claimant, there is a presumption that she was operating in the course and scope of her employment once she set off to perform tasks on behalf of Employer and that Employer had the burden to rebut that presumption.

Under the "coming and going rule," an injury sustained while an employee is going to or coming from work does not occur in the course of employment unless at least one of the following exceptions is met: (1) the claimant's employment contract includes transportation to and from work; (2) the claimant has no fixed place of work; (3) the claimant is on a special mission for employer; or (4) special circumstances are such that the claimant

[3] 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. Young v. Workers' Compensation Appeal Board (LGB Mechanical), 976 A.2d 627 (Pa. Cmwlth. 2009). In a claim petition, the burden of establishing a right to compensation and of proving all necessary elements to support an award rests with the claimant. Inglis House v. Workmen's Compensation Appeal Board (Reedy), 535 Pa. 135, 634 A.2d 592 (1993). The claimant must establish that the injury was sustained during the course and scope of employment. Wachs v. Workers' Compensation Appeal Board (American Office Sys.), 584 Pa. 478, 884 A.2d 858 (2005). Whether an employee is in the course of his employment at the time of his injury is a question of law which must be based on the findings of fact. Roman v. Workers' Compensation Appeal Board (Department of Envtl. Res.), 616 A.2d 128 (Pa. Cmwlth. 1992). It is an issue that is reviewable *de novo*. Jamison v. Workers' Compensation Appeal Board (Gallager Home Health Serv.), 955 A.2d 494 (Pa. Cmwlth. 2008).

was furthering the business of the employer. Sloane Nissan v. Workers' Compensation Appeal Board (Zeyl), 820 A.2d 925 (Pa. Cmwlth. 2003). This rule is grounded on the recognition that in the usual case, an employee traveling to and from work is not engaged in the furtherance of the employer's affairs. Bradshaw v. Workmen's Compensation Appeal Board (Bell Hearing Aid Ctr.), 641 A.2d 664 (Pa. Cmwlth. 1994).

When an injury occurs off of the employer's premises, the employee must show that he was injured while actually engaged in the furtherance of the employer's business or affairs in order for her injury to be compensable. Fonder v. Workers' Compensation Appeal Board (Fox Integrated), 842 A.2d 512 (Pa. Cmwlth. 2004). The course of employment is necessarily broader for traveling employees and is liberally construed to effectuate the humanitarian purposes of the Pennsylvania Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1 - 1041.4, 2501-2708. Investors Diversified Serv. v. Workmen's Compensation Appeal Board (Howar), 520 A.2d 958 (Pa. Cmwlth. 1987). One with no fixed place of employment is a traveling employee. Jamison, 955 A.2d at 498.

When a traveling employee is injured after setting out on the business of his employer, it is presumed that she was furthering the employer's business at the time of the injury. Howar, 520 A.2d at 960. The employer bears the burden of rebutting this presumption. Lenzner Coach Lines v. Workmen's Compensation Appeal Board (Nymick), 632 A.2d 947 (Pa. Cmwlth. 1993) To meet its burden, the employer must prove that the claimant's actions were so foreign to and removed from her usual employment that they constitute an abandonment of that employment. Id.

When considering whether an employee's injury is compensable and whether she is a traveling or stationary employee, each claim is determined on a case-by-case basis. The Baby's Room v. Workers' Compensation Appeal Board (Ryan), 860 A.2d 200, 204, fn. 5 (Pa. Cmwlth. 2004). Factors to be considered are whether the claimant's job duties include travel, whether the claimant works on the employer's premises, or whether the claimant has no fixed place of work. Jamison, 955 A.2d at 498-9. See also Beaver and Casey, Inc. v. Workers' Compensation Appeal Board (Soliday), 661 A.2d 40 (Pa. Cmwlth. 1995).

Neither small temporary departures from work to administer to personal comforts or convenience, nor inconsequential or innocent departures break the course of employment. Baby's Room, 860 A.2d at 203. See also U.S. Airways v. Workers' Compensation Appeal Board (Dixon), 764 A.2d 635 (Pa. Cmwlth. 2000). This includes lunch breaks. Roman, 616 A.2d at 130.

Upon review of the aforementioned, we see no error in the WCJ's determination. Claimant sustained her injuries when she was involved in an MVA off of Employer's premises at a McDonald's drive-thru. Because she was injured outside of the day care, she must establish her case falls within one of the four exceptions of the coming and going rule in order for her injury to be deemed compensable. Sloane Nissan; Bradshaw.

Claimant asserts that she was a "traveling employee." The term "traveling employee" has been interpreted as referring to someone who has no fixed place of work. Jamison. Assuming Claimant is considered to be a traveling employee, she would be afforded the presumption that once she set out to perform actions on Employer's behalf, she was furthering Employer's

business at the time of the injury. Howar. Thus, assuming her testimony was credited, Claimant's actions of purchasing items at the yard sales would be a sufficient triggering event to establish she set forth on Employer's business rendering her injury following those actions causally related to her employment. This is bolstered by the fact that Claimant's testimony, if credited, indicated that Claimant intended to go grocery shopping for the day care following her stop at McDonald's. As stated above, traveling employee's injured while on minor deviations from their duties, including lunch breaks, have not broken the course and scope of their employment. Baby's Room; Dixon; Roman.

Claimant's contentions, however, are belied by the statements in her own brief. Claimant readily admits she has a fixed place of employment and that much of her work is performed on site. In her brief, she states as follows:

> This record competently and persuasively shows (and is uncontradicted) that a large part of petitioner's regular and customary work duties are regularly and frequently performed at the physical location of this DAY CARE CENTER and its 10 week summer day camp program… [H]owever, as shown and developed in this record, she regularly performed assigned work responsibilities and duties which she performed off site or off premises on an "as-needed" basis…

Claimant's brief, p. 10.

We recognize, however, that a determination as to whether an employee is a traveling or stationary employee must be made on a case-by-case basis. Baby's Room. Factors to be considered are whether Claimant's job duties include travel, whether she works on Employer's premises, or

whether she has a fixed place of work. Jamison; Soliday. As this matter proceeded on a claim petition, it was incumbent on Claimant to present evidence establishing a right to compensation. Inglis House. The testimony of Claimant and Mr. Tisone suggesting that although Claimant worked primarily on the premises of the day care center, she was also required to pick up supplies for employer, particularly on the weekend, was rejected. Consequently, Claimant was unable to establish she was a traveling employee. Therefore, there was no presumption that she was in the course and scope of her employment at the time of her injury that Employer would need to rebut in order to defeat an award of compensation. Howar; Nymick.

Claimant nonetheless asserts that the WCJ capriciously disregarded uncontradicted evidence in denying her Claim Petition. We disagree.

Where the WCJ's findings reflect a deliberate disregard of competent evidence that logically could not have been avoided in reaching a decision, those findings represent a capricious disregard of competent evidence. Pryor v. Workers' Compensation Appeal Board (Colin Serv. Sys.), 923 A.2d 1197 (Pa. Cmwlth. 2006). A fact finder capriciously disregards competent evidence when he arrives at a decision where the losing party has presented overwhelming evidence that could require him to arrive at a different outcome and he fails to address that evidence by resolving critical conflicts or by making essential credibility determinations. Frog, Switch & Mfg. v. Pennsylvania Human Relations Comm'n, 885 A.2d 655 (Pa. Cmwlth. 2005). Section 422 of the Act, 77 P.S. § 834, expressly states, however, that a WCJ may reject uncontested testimony so long as he provides adequate reasoning. A review for a capricious disregard of

evidence is not to be applied in such a manner that intrudes upon the fact-finding role. Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002). It should remain a rare instance that an appellate body would disturb an adjudication based upon the capricious disregard of material, competent evidence. Williams v. Workers' Compensation Appeal Board (USX Corp.), 862 A.2d 137 (Pa. Cmwlth. 2004).

The WCJ reviewed both the testimony of Claimant and Mr. Tisone. The WCJ's findings make clear that inasmuch as Claimant was injured off of Employer's premises he was aware of the fact that Claimant had to show that she was injured while actually engaged in the furtherance of Employer's business or affairs in order for her injury to be compensable. While the WCJ recognized that Claimant and her brother testified that Claimant would routinely go off site to purchase items for the day care, he pointed out Claimant was injured at McDonald's on a weekend date where she was purchasing food for personal use. He rejected these individuals' testimony based in part on their demeanor and presentation at hearing and because no independent objective evidence existed in the record supporting their allegations. The WCJ reiterated that there were no receipts or corresponding checks reflecting a payment on behalf of Employer on July 14, 2007 or any other weekend date. Further, despite the fact that Claimant had a passenger in her vehicle at the time of the accident, Claimant did not call this person as a witness to corroborate Claimant's story.[4] The WCJ

[4] Claimant further argues that the WCJ inappropriately drew an adverse inference due to her failure to present testimony from the passenger in her vehicle at the time of the MVA. The missing witness rule provides that where evidence that would properly be part of a case is within the control of the party whose interest it would be naturally to

added that while Mr. Tisone explained he was told by Claimant that he needed to purchase groceries for the day care prior to it reopening the Monday following her injury, no evidence was presented that this was ever done.

Despite the fact that Claimant's testimony and that of Mr. Tisone was uncontradicted, we decline to find a capricious disregard of competent evidence. As stated previously, it should remain a rare instance that this Court will disturb an adjudication based upon the capricious disregard of material, competent evidence. Williams. Section 422 of the

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produce it, and without satisfactory explanation fails to do so, an unfavorable inference may be drawn. Marriott Corp. v. Workers' Compensation Appeal Board (Knechtel), 837 A.2d 623 (Pa. Cmwlth. 2003). The missing witness rule is inapplicable, however, when the witness in question is equally available to both sides of the litigation. Id. at 631. The Board disposed of Claimant's argument by stating:

> The Judge, in our view, did not draw an adverse influence (sic) from Claimant's failure to call her passenger as a witness. He merely observed that if it was Claimant's intent to do shopping for Defendant after lunch at McDonalds (sic), her passenger's testimony confirming that intent would have *bolstered* Claimant's credibility. (Emphasis added).

R.R. at 256a.

Claimant characterizes the Board's statements as a "rationalization" that is "neither legally effective nor correct." Claimant's brief, p. 65. The WCJ's decision can be read, however, favorable to the Board's analysis. Specifically, the WCJ stated "[t]he claimant while having a witness with her on July 14, 2007, did not present the witness *to support her allegations...*" (Emphasis added). R.R. at 245a. Based on the fact that the WCJ's other findings further discuss the lack of independent corroborative evidence of Claimant's allegations, we cannot discount the Board's analysis. Nonetheless, the WCJ does not expressly state he was not drawing an adverse inference when he made his finding. Thus, the WCJ's determination regarding the failure to call Claimant's passenger at the time of the MVA *may* be converse to the holding in Marriott Corp. Even so, the WCJ provided several other reasons for his credibility determinations. Consequently, we find no reversible error.

Act permits a WCJ to reject uncontradicted evidence so long as he provides adequate reasoning. We believe the WCJ provided sufficient reasoning to support his credibility determinations. If we were to accept Claimant's contention, we would merely be usurping the WCJ's role as fact-finder. Wintermyer. It must be noted that because Claimant's brother was Claimant's witness and because Mr. Tisone is the owner of Employer, the WCJ cannot be faulted for indicating a preference for independent, unbiased evidence to support Claimant's assertions that she was in the course and scope of her employment at the time of injury. See William F. Rittner Co. v. Workers' Compensation Appeal Board (Rittner), 464 A.2d 675 (Pa. Cmwlth. 1983) (providing a familial relationship between the claimant and the principle stockholder of an employer "reasonably justified more careful scrutiny of the claim in order to eliminate any suggestion of collusion").[5]

Claimant further takes exception to the WCJ's rejection of her testimony and her brother's testimony based on their conduct and demeanor at the hearing. This argument is readily dismissed. In Daniels v. Workers'

[5] Claimant does not specifically raise the issue on appeal that she falls within an exception to the "coming and going" rule espoused in Sloane Nissan in that her employment contract includes transportation to and from work. She does, however, repeatedly state throughout her brief that the PT Cruiser is provided by "Employer" and is to be used to travel for miscellaneous work assignments. Although we need not delve into the significance of the distinction, the automobile is registered and insured in Mr. Tisone's name, not the Day care center. Regardless, the employment contract exception to the "coming and going" rule is still viable. Wachs v. Workers' Compensation Appeal Board (American Office Sys.), 584 Pa. 478, 884 A.2d 858 (2005). There is not an automatic entitlement to benefits, however, when an individual is injured in a company vehicle. Id., 584 Pa. at 486-487, 884 A.2d at 863. The injury must occur in the course of employment. Id., 584 Pa. at 487, 884 A.2d at 863. The WCJ's findings and credibility determinations preclude such a conclusion here. WCJ's findings further preclude a determination that Claimant was on a special mission for Employer or that special circumstances exist otherwise putting Claimant within an exception to the "coming and going" rule. Sloane Nissan.

Compensation Appeal Board (Tristate Transp.), 574 Pa. 61, 828 A.2d 1043 (2003), the Supreme Court stated:

> [W]hen the issue involves the credibility of contradictory witnesses who have actually testified before the WCJ, it is appropriate for the judge to base his or her determination upon the demeanor of the witnesses. In such an instance, there often is not much to say, nor is there a need to say much, in order for a reviewing body to determine that the decision was reasoned.... The basis for the conclusion that certain testimony has the "ring of truth," while other testimony does not, may be difficult or impossible to articulate -- but that does not make such judgments invalid or unworthy of deference.

Daniels, 574 Pa. at 77, 828 A.2d 1052-1053.

It is acknowledged that there is no contradictory testimony in this case. We believe, given the decision as a whole and the facts of this case, Daniels is nonetheless applicable. Based on Daniels, the WCJ was able to rely on his personal observation and assessment of the witnesses to serve as one of the bases to reject Claimant's and Mr. Tisone's testimony given live at hearing. We reject Claimant's argument on this issue.[6]

[6] Employer submitted a discovery deposition given by Claimant as evidence into the record. Claimant contends this documentary evidence is tantamount to an admission that she was a traveling employee injured in the course and scope of her employment. We cannot accept Claimant's position. Employer, when questioning Claimant at the deposition, made no admission of liability. Indeed, certain questions posed by Employer were phrased in a manner reflecting its intention not to accept liability. For instance, Claimant was asked, "[i]ts your *allegation* that you were in furtherance of your duties for [Employer] that day?" (Emphasis added). R.R. at 22a. Claimant was further questioned, *inter alia*, about who owns the PT Cruiser and what other vehicles were owned, or

After a review of the record, we conclude that the Board did not err in affirming the WCJ's order. Accordingly, the opinion of the Board is affirmed.

JIM FLAHERTY, Senior Judge

allegedly owned, by Employer. Claimant's discovery deposition, submitted by Employer, in no way can be considered an admission of liability.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Linda May Reilly,	:	
Petitioner	:	
	:	
v.	:	No. 1352 C.D. 2009
	:	
Workers' Compensation Appeal Board (Emilie Road Day Care Center and State Workers' Insurance Fund),	:	
Respondents	:	

O R D E R

AND NOW, this 28th day of January, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

JIM FLAHERTY, Senior Judge