

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jose Andrickson (Anderson), :
Petitioner :
v. : No. 1424 C.D. 2010
Workers' Compensation Appeal : Submitted: November 12, 2010
Board (Hannahoe Pallets, Inc.), :
Respondent :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE PATRICIA A. MCCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: February 4, 2011

Jose Andrickson (Anderson) (hereinafter, referred to as Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board), which affirmed the decision of a workers' compensation judge (WCJ) granting in part Claimant's Claim Petition. We affirm.

Claimant filed a Claim Petition alleging that he sustained a work-related injury while working for Hannahoe Pallets, Inc. (Employer) on April 14, 2008. In response, Employer filed an answer denying the material allegations contained therein. A hearing on the Claim Petition then ensued before the WCJ.

Before the WCJ, Claimant testified and offered the deposition testimony of Norman B. Stempler, D.O. Employer presented the testimony of Stacey Hannahoe, owner of Employer, and the deposition testimony of S. Ross Noble, M.D. The WCJ rejected Claimant's testimony in its entirety as not credible. The WCJ also discredited the testimony of Dr. Stempler because his testimony was based upon

information received from Claimant and because he failed to provide an explanation for his diagnosis or opinions. The WCJ credited the testimony of Employer's witnesses.

Based upon the credible testimony and evidence presented, the WCJ made the following relevant findings of fact. Claimant sustained a work-related soft tissue injury to the distal right thigh from the discharge of a nail gun on April 14, 2008. Claimant did not provide any medical excuses or notes to Employer establishing a disability from work starting April 14, 2008. Claimant offered no evidence of unpaid medical expenses incurred for the soft tissue injury to the distal right thigh. Claimant fully recovered from the soft tissue injury to the distal right thigh as of August 27, 2008 (the date of Dr. Noble's examination), at the very latest. Claimant offered no evidence he was ever disabled from work as a result of this injury.

The WCJ ultimately found that the injury was not disabling and that Claimant was entitled to medical benefits only through April 14, 2008. The WCJ further found that Claimant is entitled to reimbursement of litigation expenses incurred, except for the alleged cost of Dr. Stempler. While Dr. Stempler testified that he has a fee of \$3,000 to testify, the WCJ found that the evidence did not establish Claimant actually incurred a \$3,000 fee for Dr. Stempler's deposition. No evidence was presented that Claimant either paid the fee or incurred the obligation to pay the fee.

By order dated September 11, 2009, the WCJ granted Claimant's Claim Petition in part. The WCJ awarded Claimant payment of any reasonable and necessary medical expenses incurred only on April 14, 2008, for treatment of the work injury. The WCJ did not award any disability benefits. The WCJ ordered Employer to reimburse Claimant \$685 in litigation costs.

From this decision, Claimant filed an appeal with the Board, which affirmed. This appeal now follows.¹ Claimant raises the following issues for our review:

1. Whether the Board erred in affirming the decision of the WCJ granting Claimant's Claim Petition for a work-related injury, but denying payment for any wage loss and medical benefits after April 14, 2008.
2. Whether the Board erred in affirming the WCJ's denial of reimbursement of Claimant's medical witness's deposition fee where Claimant's claim petition was granted in part and Claimant's medical witness testified as to the amount of his deposition fee.

First, Claimant contends that the WCJ erred by granting Claimant's Claim Petition for a work-related injury, but denying payment for any wage loss and medical benefits after April 14, 2008, where the WCJ's findings are not supported by the evidence and the WCJ failed to issue a reasoned decision as required under Section 422(a) of the Workers' Compensation Act (Act).² We disagree.

The WCJ, as fact finder, has exclusive province over questions of credibility and evidentiary weight, and the WCJ's findings will not be disturbed when they are supported by substantial, competent evidence. Northeastern Hospital v. Workmen's Compensation Appeal Board (Turiano), 578 A.2d 83 (Pa. Cmwlth. 1990). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Mrs. Smith's Frozen Foods

¹ This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of appeal board procedures, and whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

² Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §834.

Co. v. Workmen's Compensation Appeal Board (Clouser), 539 A.2d 11 (Pa. Cmwlth. 1988). The WCJ is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part. General Electric Co. v. Workmen's Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), petition for allowance of appeal denied, 529 Pa. 626, 600 A.2d 541 (1991).

As this Court has previously noted:

To constitute a reasoned decision within the meaning of Section 422(a), a WCJ's decision must permit adequate appellate review. *Daniels v. Workers' Comp. Appeal Bd. (Tristate Transp.)*, 574 Pa. 61, 828 A.2d 1043 (2003). Where medical experts testify by deposition, a WCJ's resolution of conflicting evidence must be supported by more than a statement that one expert is deemed more credible than another. *Id.* "[S]ome articulation of the actual objective basis for the credibility determination must be offered for the decision to be a 'reasoned' one which facilitates effective appellate review." *Id.* at 78, 828 A.2d at 1053.

There are countless objective factors which may support a WCJ's credibility determinations. *Id.* These factors must be identified and articulated. *Id.*

However, Section 422(a) does not permit a party to challenge or second-guess the WCJ's reasons for credibility determinations. *Kasper v. Workers' Comp. Appeal Bd. (Perloff Bros.)*, 769 A.2d 1243 (Pa. Cmwlth. 2001). Unless made arbitrarily or capriciously, a WCJ's credibility determinations will be upheld on appeal. *Id.*; *Empire Steel Castings, Inc. v. Workers' Comp. Appeal Bd. (Cruceta)*, 749 A.2d 1021 (Pa. Cmwlth. 2000).

Dorsey v. Workers' Compensation Appeal Board (Crossing Constr. Co.), 893 A.2d 191, 194-195 (Pa. Cmwlth. 2006), petition for allowance of appeal denied, 591 Pa. 667, 916 A.2d 635 (2007).

It is not the function of this Court to reweigh evidence and to substitute its judgment for that of the WCJ. Vitelli v. Workmen's Compensation Appeal Board (St. Johnsbury Trucking Co.), 630 A.2d 923 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 537 Pa. 627, 641 A.2d 591 (1994). Rather, the function of the Board and this Court is to determine, upon consideration of the evidence as a whole, whether the WCJ's findings have the requisite measure of support in the record. Bethenergy Mines v. Workmen's Compensation Appeal Board (Skirpan), 531 Pa. 287, 612 A.2d 434 (1992). Testimony and evidence found not credible by a WCJ are irrelevant for purposes of an appeal. Hoffmaster v. Workers' Compensation Appeal Board (Senco Products), 721 A.2d 1152 (Pa. Cmwlth. 1998).

A claimant bears the burden of establishing a right to compensation and proving all necessary elements to support an award. Inglis House v. Workmen's Compensation Appeal Board (Reedy), 535 Pa. 135, 634 A.2d 592 (1993). This includes a claimant's burden of proving that his or her injury arose in the course of employment and was related thereto. Krawchuk v. Philadelphia Electric Co., 497 Pa. 115, 439 A.2d 627 (1981). Generally, if there is no obvious relationship between the disability and the work-related incident, unequivocal medical testimony is required to meet this burden of proof. Lewis v. Commonwealth, 508 Pa. 360, 498 A.2d 800 (1985). Additionally, a claimant has the burden of proving that the work-related injury caused a loss of earning power. Bissland v. Workmen's Compensation Appeal Board (Boyertown Auto Body Works), 638 A.2d 493 (Pa. Cmwlth. 1994). Although a claimant may suffer a work-related physical disability, it is only if that disability occasions a loss of earnings that the claimant will be "disabled" and entitled to receive compensation. Id.

Here, although Claimant testified and presented the deposition testimony of his medical witness, the WCJ found their testimony incredible. The WCJ rejected Claimant's testimony based upon his observation of Claimant's demeanor during his live testimony. The WCJ rejected Dr. Stempler's testimony explaining:

Dr. Stempler's testimony, insofar as it is based on information received from Claimant is tainted. Second, Dr. Stempler's testimony about his initial examination revealed no explanation for either his diagnosis or opinions. It merely stated some physical description of his observations and Claimant's history. Dr. Stempler mentions a couple diagnostic tests, but he does not related [sic] whether he reviewed the reports or the actual results or films. Last, Dr. Stempler does not point to any of his physical findings to support his opinions other than Claimant worked without restriction or difficulty before April 14, 2008.

WCJ's Decision at 4. The WCJ instead relied upon the testimony of Employer's medical witness, Dr. Noble, which he found credible. The WCJ explained that Dr. Noble offered detailed testimony regarding his examination and findings as well as his review of past medical records. Id. at 5. Dr. Noble supported his opinion with reference to his examination and past medical records. Id. These objective bases underlying the WCJ's determination that Dr. Noble's testimony was more credible than that of Dr. Stempler amply satisfy the reasoned decision requirements of Section 422(a).

In the absence of credible evidence presented by Claimant, Claimant failed to meet his burden of proof to show any disability arising from the work injury or medical expenses arising after April 14, 2008. Although Claimant proved he sustained a work-related injury on April 14, 2008, for which he was treated, Claimant failed to establish that the injury was disabling. Employer requested

Claimant to produce a release from his doctor before returning to work, but Claimant did not provide any medical excuses or notes to Employer establishing a disability starting April 14, 2008. Although Dr. Noble acknowledged that Claimant was treated for an infection related to the work injury after April 14, 2008, Claimant offered no evidence of any unpaid medical expenses incurred following April 14, 2008. See William Penn School Dist. v. Workers' Compensation Appeal Board (Westerman), 717 A.2d 589 (Pa. Cmwlth. 1998), petition for allowance of appeal denied, 568 Pa. 652, 794 A.2d 365 (1999) (WCJ erred by directing the employer to pay medical bills that were not presented as evidence while the record was open).

Based upon our review of the record, the WCJ's findings are supported by substantial evidence. We, therefore, conclude that the WCJ did not err by granting Claimant's Claim Petition for a work-related injury, but denying payment for wage loss and medical benefits after April 14, 2008.

Next, Claimant contends that the Board erred in affirming the WCJ's denial of reimbursement of Claimant's medical witness's deposition fee where Claimant's claim petition was granted in part and Claimant's medical witness testified as to the amount of his deposition fee. We disagree.

A workers' compensation claimant who prevails on a petition in whole or in part is entitled a "reasonable sum for costs *incurred* for attorney's fee, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend the proceedings: Provided, That cost for attorney fees may be excluded when a reasonable basis for the contest has been established by the employer or the insurer." Section 440 of the Act, 77 P.S. §996 (emphasis added); see Budd Co. v. Workers' Compensation Appeal Board (Kan), 858 A.2d 170 (Pa. Cmwlth. 2004). The purpose of this section is to deter unreasonable contests by employers and to insure that a successful claimant receives compensation undiminished by necessary costs of

litigation. Papernik v. Workmen's Compensation Appeal Board, 399 A.2d 1205 (Pa. Cmwlth. 1979).

Here, the WCJ found that Claimant is entitled to reimbursement of litigation expenses incurred except for the alleged cost of Dr. Stempler. The WCJ found that the evidence did not establish Claimant actually incurred a \$3,000 fee for Dr. Stempler's deposition. While Dr. Stempler testified that he has a fee of \$3,000 to testify,³ no evidence was presented that Claimant either paid the fee or incurred the obligation to pay the fee.⁴ See St. Mary's Home of Erie v. Workmen's Compensation Appeal Board (Stadtmitter), 683 A.2d 1266 (Pa. Cmwlth. 1996) (claimant who failed to submit evidence of litigation costs prior to close of the record was not entitled to reimbursement). We, therefore, conclude that the WCJ did not err or abuse his discretion in denying reimbursement for the alleged cost of Dr. Stempler's deposition fee.

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

³ At the deposition, counsel and Dr. Stempler engaged in following colloquy:

Q. Okay, do you have a fee or charge for taking time out of your busy schedule to testify on behalf of the Claimant?

A. Yes.

Q. And what is that fee?

A. \$3,000.

Deposition of Dr. Stempler, November 25, 2008, at 19.

⁴ Invoices were presented for the other litigation expenses incurred. See Claimant's Exhibit C-3.

