

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David C. Scibelli, :
Petitioner :
 :
v. :
 :
Workers' Compensation Appeal :
Board (Carlson, IBE Co., and :
Harleysville Insurance Co.), : No. 1452 C.D. 2009
Respondents : Submitted: January 15, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: March 17, 2010

David C. Scibelli (Claimant) appeals *pro se* from the order of the Workers' Compensation Appeal Board (Board) which affirmed the Workers' Compensation Judge's (WCJ) dismissal of his claim petition, with prejudice.

This controversy involves an alleged injury which happened almost a decade ago in May of 2002, when Claimant was working on a broken pipe in a basement of a property owned by IBE Construction.

It appears that Claimant, with the exception of a very brief period in May of 2002, was unrepresented by counsel. At all times relevant hereto, IBE Construction has denied an employment relationship with Claimant. From what the Court discerns from the certified record, it appears that Claimant actually filed two claim petitions alleging the same injury. Both petitions allege injuries to head, neck, spine, in May 2002, and aver that the injury was caused by a broken pipe in

the basement of property owned by IBE Construction. Although there were seven hearings before three different WCJs, Claimant failed to produce any evidence whatsoever to support his claim that he was injured during the course and scope of his employment with IBE Construction. Part of the dilemma appears to be Claimant's misunderstanding of a claimant's burden on a claim petition and his misconception that all he was required to do was file a claim petition on the Form LIBC-362 provided by the Workers' Compensation Bureau. For the reasons that follow, this Court affirms the decision of the Board.

The First Claim Petition

The circumstances surrounding the first claim petition are far from clear. The Court was compelled to try to piece the puzzle together from the certified record. Even though this appeal is from the dismissal of the **second** claim petition, Claimant's entire argument relates back to the first claim petition that appears to have been dismissed, also with prejudice.

The **first** claim petition was filed on May 5, 2004, and for some reason, is a part of the certified record in this matter. The **first** claim petition was completed and signed by Claimant. According to IBE Construction's "Letter Brief" to the Board which summarized the litigation between the parties, four hearings were held on June 18, 2004, August 23, 2004, November 29, 2004, and January 24, 2005. At each hearing, Claimant appeared *pro se* and was unable to produce medical records or evidence that he was employed by Employer. The **first** claim petition was dismissed on February 24, 2005, for failure to prosecute. Claimant did not appeal that decision.

The Second Claim Petition

Claimant, *pro se*, filed a ***second*** claim petition on April 15, 2005, and again alleged that he sustained injuries to his head, neck/spine, shoulder, back and leg on May 5, 2002, while he was working on broken pipes in the basement of a property owned by IBE Construction. IBE Construction answered and denied all allegations, including that Claimant was an “employee.”

A hearing was scheduled for May 25, 2005, but continued at Claimant’s request. At a hearing on June 20, 2005, Claimant appeared *pro se* but presented no evidence. The WCJ advised Claimant to get an attorney who could assist as necessary. The hearing was continued.

At the next scheduled hearing on September 19, 2005, Claimant again appeared before the same WCJ unrepresented, unprepared and unable to produce any evidence.

The WCJ dismissed the claim petition with prejudice in a decision circulated November 18, 2005. The WCJ found that Claimant failed to present any medical bills after being advised repeatedly to obtain an attorney to present his case.

Claimant appealed to the Board which vacated and remanded for Claimant to obtain counsel, if possible, to present his case. The Board held that Claimant must be ready to proceed even if he did not have counsel. Order of the Board, September 25, 2006, at 3-4.

On remand, a second WCJ was assigned. A hearing was scheduled for January 8, 2007. Claimant failed to attend the hearing or provide an excuse for his failure to appear. On January 10, 2007, the second WCJ issued a one-sentence order that dismissed the claim petition for failure to prosecute.

The Claimant again appealed to the Board. He alleged he was not given notice of the January 8, 2007, hearing. The Board again vacated and remanded because it was not clear from the record whether Claimant received adequate notice of the hearing. The Board directed that Claimant be given “extended notice...of the scheduled hearing date” and specifically directed that “Claimant’s failure to appear will constitute grounds of dismissal with prejudice considering Claimant’s May 5, 2002, injury date.” Board Opinion, December 12, 2007, at 4.

On remand, a hearing was scheduled for March 19, 2008, before a third WCJ. The Claimant’s request for a continuance was denied because the matter was specifically listed at Claimant’s request. Hearing Transcript, March 19, 2008, at 3. Despite the Board’s admonition, Claimant did not appear.

At the hearing, Robert Carlson (Carlson), IBE Construction’s president and sole shareholder appeared before the WCJ. He testified that no employer-employee relationship existed between Claimant and IBE Construction. Claimant never received a paycheck or W-2 form from Carlson or IBE Construction. The only connection between Claimant and IBE Construction was a lawsuit commenced by Carlson against Claimant concerning a property purchased in May of 2002.

Accepting Carlson's testimony as credible, the third WCJ concluded that Claimant was not an employee of IBE Construction in May of 2002, or at any other time. The WCJ also noted that Claimant had numerous opportunities to proceed before three WCJs but produced no evidence. The WCJ concluded that Claimant was not credible due to his failure to appear and that IBE Construction credibly established that Claimant was not an employee. Because Claimant failed to meet his burden of proving the existence of an employment relationship, the WCJ concluded that there was no compensable injury and dismissed the claim petition with prejudice.

In his third appeal to the Board, Claimant again argued that his claim petition was erroneously dismissed. He argued that the WCJ erred when he denied his request for a continuance, that he was not given sufficient timely notice of the hearing, that he did not have counsel, and that medical problems resulted in his failure to attend the hearing. The Board found no abuse of discretion. Specifically, the Board noted that Claimant was warned that if he failed to appear at the scheduled hearing, his Claim Petition would be dismissed with prejudice. The Board also found that Claimant failed to meet his burden of proving that he was an employee of IBE Construction and the lack of an employment relationship was supported by substantial, competent evidence. Accordingly, the Board affirmed the WCJ's order on that ground as well.

On appeal¹, Claimant argues that his *second* claim petition was erroneously dismissed. His brief is barely coherent but the Court believes he

¹ This Court's scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law or whether necessary **(Footnote continued on next page...)**

argues that since he originally filed a claim petition on Workers' Compensation Bureau forms, with the assistance of an attorney, he met his burden. His argument focuses on the first claim petition, which he mistakenly states was filed in 2002, instead of 2004. He also claims that the first claim petition was filed with the assistance of an attorney, even though it is obvious from the first claim petition that it was filed *pro se*. In his words:

...Claimant's injuries occurred on the job while working for IBE Construction, Respondents, on May 5, 2002 (sic). Thereafter, by his then Attorney in 2002 (sic) his claim was filed (Attorney Andrew Ostrowski, Hbg., Pa.), on forms sent to the Attorney by Respondents, along with medical bills and doctors diagnosis. (emphasis added).

I cannot get an attorney. I believe I filed my legal claim with my attorney or through my attorney, timely in 2002 (sic), on Respondent's supplied forms that they sent to him and he filed (sic) them out with medical records and medical bills and returned. Respondents have these record (sic) filed timely, by my attorney legally. (emphasis added).

Claimant's Brief at 6; Claimant's Reply Brief at 2.

The problem with Claimant's argument is that his second claim petition was neither dismissed because it was not "filed" properly nor because it was filed on the "wrong forms." Rather, Claimant's claim petition was dismissed

(continued...)

findings of fact are supported by substantial evidence. Stables v. Workers' Compensation Appeal Board (Wyatt), 739 A.2d 1084 (Pa. Cmwlth. 1999).

because he failed to attend the scheduled hearing and the WCJ found he was not an employee of IBE Construction.

Claimant failed to come forward with evidence in the form of testimony, medical records, or employment records, to support his claim that he was injured during the course and scope of his employment with IBE Construction. Given that IBE Construction denied that Claimant was an “employee” it was essential for Claimant to establish through competent, credible evidence that an employment relationship existed at the time he was injured. Leibensperger v. Workers’ Compensation Appeal Board (Thomas H. Louis Builders, Inc.), 813 A.2d 28 (Pa. Cmwlth. 2002). Claimant produced no evidence whatsoever to describe the nature of his relationship with IBE Construction, or how he was paid, the skill required for his job performance, how much supervision IBE Construction exerted over his activities or whether IBE had the right to control his activities. Claimant simply rested on the unsupported averment in his claim petition that he was an employee, which was not enough to establish this element of his case. Claimant was also required to prove that he sustained a compensable and disabling work injury to the parts of his body identified in the claim petition. This is so even though he filed his claim petition on the proper forms.

A claimant’s burden does not stop at filing the claim petition. In Cipollini v. Workmen’s Compensation Appeal Board (Philadelphia Electric Company), 647 A.2d 608 (Pa. Cmwlth. 1994), this Court affirmed a WCJ’s decision to dismiss a claim petition with prejudice because the claimant had not presented any medical evidence regarding her alleged work-related injury. The WCJ granted numerous continuances to allow claimant’s counsel to depose his witnesses. The depositions were neither scheduled nor taken, despite a warning by

the WCJ that the record would be closed. Similarly, in Clayton v. Workers' Compensation Appeal Board (Carpentry Concepts), 881 A.2d 51 (Pa. Cmwlth. 2005), this Court affirmed the dismissal of a claim petition for failure to prosecute where the claimant failed to appear at three hearings and presented no medical or lay evidence to support her claim petition. See also US Airways v. Workers' Compensation Appeal Board (McConnell), 870 A.2d 418 (Pa. Cmwlth. 2005) (finding no abuse of discretion in the dismissal of the claim petition, with prejudice, where the claimant had received two warnings and a request to show cause why the petition should not be dismissed, failed to comply with the deadlines imposed by the workers' compensation judge).

Here, Claimant has been dilatory. Three different WCJs accommodated Claimant and continued the case several times to allow Claimant to hire an attorney or come forward with evidence. The Board twice vacated orders which dismissed the Claim Petition for failure to prosecute and remanded the matter to allow Claimant to present evidence in support of his Claim Petition. However, Claimant failed to come forward with any lay or medical evidence in support of either claim petition, despite multiple opportunities, over several years. In spite of extended notice and the Board's warning that Claimant's failure to appear at the scheduled hearing would result in the dismissal of the Claim Petition with prejudice, Claimant failed to appear at the March 19, 2008, hearing.

On the other hand, IBE Construction appeared and presented evidence at the March 19, 2008, hearing that no employment relationship existed with Claimant. The WCJ accepted this testimony as credible and concluded that IBE Construction affirmatively established that Claimant was not an employee.

Because Claimant failed to meet his burden to prove the existence of an employment relationship with IBE Construction, he failed to come forward with any medical evidence that he sustained a disabling injury while employed by IBE Construction and because substantial evidence exists in the record to support the WCJ's finding that Claimant was never an employee of IBE Construction, this Court finds the Board did not err when it affirmed the WCJ's dismissal of the claim petition with prejudice.

The Order of the Board is affirmed.

BERNARD L. McGINLEY, Judge

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ORDER

AND NOW, this 17th day of March, 2010, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby affirmed.

BERNARD L. MCGINLEY, Judge