

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Alltel Pennsylvania, Inc. and	:	
Liberty Mutual Insurance Co.,	:	
Petitioners	:	
	:	
v.	:	
	:	
Workers' Compensation Appeal	:	
Board (Kovalik),	:	No. 1643 C.D. 2009
Respondent	:	Submitted: December 4, 2009

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

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: January 7, 2010

Alltel Pennsylvania, Inc. (Employer) and Liberty Mutual Insurance Company petition for review of the August 5, 2009 order of the Workers' Compensation Appeal Board (WCAB) that reversed the Workers' Compensation Judge's (WCJ) denial of a petition for reinstatement of benefits filed by George Kovalik (Claimant). The issue before this Court is whether the Board erred in reversing the WCJ's denial of Claimant's reinstatement petition on the basis of its finding that the testimony of Employer's medical expert was not competent. For the reasons that follow, we reverse the Board's order.

Claimant was employed by Employer in its computer room conducting cellular phone service billing. On February 10, 2003, Claimant sustained a lumbar strain at work when the chair in which he was sitting was struck by a briefcase. He immediately felt pain in his back which radiated down the inside of his leg, and he

was unable to continue his shift. A notice of compensation payable was issued. As a result of his work injury, Claimant was treated by Dr. Alan Gillick, a board-certified orthopedic surgeon who was, at that time, treating Claimant for hip and L5-S1 low back problems related to a 2001 car accident.¹ Dr. Gillick provided Claimant with medications and epidural injections for his work injury and, ultimately, performed an L5-S1 surgical discectomy in September of 2003. On November 2, 2003, Claimant returned to work with Employer in a light-duty capacity 20 hours per week.

In March of 2005, Employer filed a termination petition, claiming that Claimant fully recovered from his lumbar strain as of February 21, 2005. In April of 2005, Claimant filed a claim petition alleging that he sustained an aggravation to his low back, resulting in L4-5 and L5-S1 disc herniations. On February 24, 2006, a WCJ dismissed Employer's termination petition and granted Claimant's claim petition for an aggravation of his work injury, but only as to an L5-S1 disc herniation. Based upon the WCJ's decision, Claimant was again paid partial benefits. Both parties appealed and, on February 7, 2007, the WCAB affirmed the WCJ's decision.

On May 8, 2005, due to continued complaints of pain in his low back and down his legs which affected his ability to drive, walk and sit in a chair, Dr. Gillick took Claimant out of work, and Employer resumed paying him total disability benefits. On February 15, 2007, Claimant filed a petition seeking to reinstate his full benefits effective May 8, 2005, the date when Dr. Gillick took him out of work.² At

¹ Claimant was able to work full time, without restrictions, prior to his work injury.

² In his decision circulated February 27, 2006, the WCJ recognized that Claimant stopped working on May 8, 2005, due to a finding of disability by Dr. Gillick. Since there was no petition for reinstatement before him, and Dr. Gillick's testimony was not in evidence, the WCJ rejected any inference that Claimant was totally disabled as of May 8, 2005. The Board stated that, since Claimant's entitlement to reinstatement of total disability benefits was not adequately raised before the WCJ, and only incidental references were raised at the hearing before the WCJ, the WCJ erred by even addressing the issue of reinstatement. The Board, nonetheless affirmed the decision of the

the hearing before the WCJ, Claimant's evidence consisted of his testimony and that of Dr. Gillick. Employer presented the testimony of Dr. David J. Sedor, a board-certified neurosurgeon, who examined Claimant on June 12, 2006 and April 2, 2007. Based upon Claimant's history, and his physical examination, Dr. Sedor opined that the symptoms about which Claimant complained were likely related to the 2001 accident, as opposed to the bump he received at work in 2003. However, based upon Claimant's condition as he saw it, Claimant was capable of performing sedentary to light-duty work, as long as there was no bending or twisting, and he could change positions when necessary. Based upon the evidence presented, the WCJ deemed Claimant's testimony not to be credible, and he found the testimony of Dr. Sedor to be more credible than that of Dr. Gillick. Accordingly, by decision circulated June 12, 2008, the WCJ denied Claimant's petition for reinstatement.

Claimant appealed the decision to the Board, which reversed the WCJ's decision on the basis that Claimant's request for reconsideration turned on his claim of increased low back pain and, by stating that Claimant's back problems were likely due to the 2001 accident, Dr. Sedor failed to accept the WCJ's determination that Claimant's L5-S1 problems were due to his work injury and, therefore, his opinion is not competent to support the WCJ's findings of fact. Employer filed the instant appeal to this Court.³

Employer argues that the Board erred in reversing the WCJ's denial of Claimant's reinstatement petition, based upon its finding that Employer's medical

WCJ as to the issues properly before the WCJ. Claimant filed the petition for reinstatement now before us immediately after the Board issued its decision.

³ "The Court's review of the Board's order is limited to determining whether Claimant's constitutional rights have been violated, whether an error of law has been committed or whether the necessary findings of fact are supported by substantial evidence." *ESAB Welding & Cutting Prods. v. Workers' Comp. Appeal Bd. (Wallen)*, 978 A.2d 399, 401 n.2 (Pa. Cmwlth. 2009).

expert's testimony was not competent. We agree. Section 413 of the Workers' Compensation Act⁴ permits a WCJ to reinstate a claimant's total workers' compensation benefits after they have been reduced.

In the context of a reinstatement petition, 'where it has already been determined that a claimant is presently partially disabled, it is claimant's burden to show that he or she is further disabled . . . such that **claimant can no longer perform even the light-duty work which claimant could previously perform.**'

Weissman v. Workers' Comp. Appeal Bd. (Podiatry Care Ctr., P.C.), 878 A.2d 953, 958 (Pa. Cmwlth. 2005). In a reinstatement proceeding, it is only after a claimant has sustained his burden that the burden shifts to the employer to prove otherwise. *Hinton v. Workers' Comp. Appeal Bd. (City of Phila.)*, 787 A.2d 453 (Pa. Cmwlth. 2001).⁵

Thus, before the WCJ in this case considered Employer's evidence, it had to weigh the evidence presented by Claimant. Claimant testified that his job, before and since his work injury, consisted of a desk job at which he operated a computer and was able to sit and stand as necessary. Reproduced Record (R.R.) at 33a, 39a, 41a-42a, 112a. After November 2, 2003, he worked five hours, four nights per week for approximately one and one-half years. R.R. at 102a, 105a. Claimant testified that "it wasn't easy," because he had trouble sitting, standing and walking due to radiating pain that required him to use a cane, but that he had to work because he had a daughter in college. R.R. at 32a-34a, 39a-41a, 48a, 105a-106a.

⁴ Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 772.

⁵ We recognize that the claimant in *Hinton* was seeking reinstatement after suspension rather than, as here, reinstatement of total benefits after receipt of partial benefits. The Pennsylvania Supreme Court has held, however, that when examining the burden of proof in actions taken under Section 413 of the Workers' Compensation Act, "an award of benefits for partial disability may be viewed as a 'partial suspension' of benefits." *Dillon v. Workmens' Comp. Appeal Bd. (Greenwich Collieries)*, 536 Pa. 490, 503, 640 A.2d 386, 392 (1994).

Dr. Gillick testified that the symptoms of Claimant's work injury had worsened over time and were relentless to the point that he could not sit for any period, it was difficult for him to stand and walk, and no form of treatment brought him any significant improvement. R.R. at 66a-68a. Dr. Gillick stated that, as of May 8, 2005, Claimant was, therefore, "unable to work in any capacity" as a result of his work-related injury and subsequent back surgery. R.R. at 67a, 69a. MRIs conducted in March of 2004 and in June of 2005, however, demonstrated no objective changes in Claimant's low back during that period. R.R. at 65a, 67a-68a, 71a.

"The WCJ, as fact finder, has exclusive province over questions of credibility and a reviewing court is not to reweigh the evidence or review the credibility of witnesses." *City of Phila. v. Workers' Comp. Appeal Bd. (Reed)*, 785 A.2d 1065, 1068 (Pa. Cmwlth. 2001). "Notwithstanding the authority of the WCJ over questions of weight and credibility of evidence, the WCJ's findings must still be supported by substantial evidence of record. Substantial evidence is relevant evidence that a 'reasonable person might accept as adequate to support a conclusion.'" *Wieczorkowski v. Workers' Comp. Appeal Bd. (LTV Steel)*, 871 A.2d 884, 890 (Pa. Cmwlth. 2005). Moreover, "[i]n reviewing a decision for substantial evidence, the court must view the evidence in the light most favorable to the party who prevailed before the WCJ and draw all reasonable inferences from the evidence in favor of the prevailing party." *Id.*

Based upon the evidence presented in this case, the WCJ concluded that:

The claimant has failed to meet his burden of proof to establish that he is entitled to a reinstatement of total disability benefits on and after May 2005, failing to prove that his condition changed to the extent that he is physically incapable of performing part time duty work made available to him by the employer at 20 hours per week.

WCJ Decision at 6. Viewing the evidence in a light most favorable to Employer, it is clear that the WCJ carefully considered and weighed the evidence provided by Claimant and concluded that Claimant did not meet his burden. Since Claimant did not meet his burden, it was unnecessary for the WCJ to have reached a determination as to Dr. Sedor's credibility. We hold, therefore, that the Board erred in reversing the WCJ's denial of Claimant's reinstatement petition on the basis of its finding that the testimony of Employer's medical expert was not competent.

Accordingly, the Board's order is reversed.

JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 7th day of January, 2010, the August 5, 2009 decision of the Workers' Compensation Appeal Board is reversed.

JOHNNY J. BUTLER, Judge