

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Budd Company, :  
Petitioner :  
 :  
v. : No. 1688 C.D. 2010  
 :  
Workers' Compensation : Submitted: February 11, 2011  
Appeal Board (Tracy), :  
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE KELLEY

FILED: March 24, 2011

The Budd Company (Employer) petitions for review of an order of the Workers' Compensation Appeal Board (Board) affirming the remand decision and order of the Workers' Compensation Judge (WCJ) granting Roosevelt Tracy's (Claimant) reinstatement petition. We vacate and remand.

This case, which began in 1997, has a long and protracted history of remands and appeals. On March 20, 1997, Claimant filed two claim petitions. In the first claim petition, Claimant alleged that he sustained a hearing loss in both ears while working for Employer on May 24, 1996. In the second claim petition, Claimant alleged that he injured his right knee and lower back when he tripped over a metal strip in Employer's dispensary on May 24, 1996. On May 15, 1997, Claimant filed a reinstatement petition seeking reinstatement of disability benefits

as of October 15, 1996, based on Employer's failure to provide work within his medical restrictions due to a carpal tunnel syndrome injury in May 1993. Employer denied all three petitions, which the WCJ consolidated for disposition.

Claimant testified that he was employed as an operations worker, which involved welding, lifting and manipulating automobile parts for welding. In May 1993 he developed carpal tunnel syndrome and received disability benefits for this work-related injury. After undergoing surgery, he returned to work in July 1995 in a modified-duty position, which involved taking layover accounts, recording down time and monitoring the restrooms. Claimant testified that Employer required him to perform additional duties in his modified position, and he was laid off in October 1996 due to his inability to perform the work. He returned to work in modified positions at various times but was subsequently laid off. While working in the modified jobs, he experienced pain and swelling in his hands, and pursuant to his doctor's instructions he has not worked for Employer since February 1997. Also Claimant injured his knee and back when he tripped at the dispensary and sustained a hearing loss from excessive occupational noise.

Claimant also presented the deposition testimony of Dr. Noubar Didizian, a board-certified orthopedic surgeon; Dr. Steven Ladenheim, board-certified in otolaryngology; and Mr. Edward J. Foster, a union committeeman for Employer. Dr. Didizian diagnosed Claimant as suffering from bilateral carpal tunnel syndrome, a torn medial meniscus and lumbosacral spine pathology, and he opined that Claimant's current torn medial meniscus and back injuries were directly related to his May 1996 injury. Dr. Didizian also opined that Claimant's condition has significantly contributed to his inability to work, but he is capable of working in a modified capacity provided that Employer adheres to his medical restrictions. Dr. Ladenheim opined that Claimant suffered from moderate to

severe, mid-to-high frequency hearing loss and that the loss was work-related due to his exposure to high levels of noise.

Mr. Foster testified that Claimant's light-duty work consisted of carrying a clipboard and notifying the supervisor how many times employees used the restrooms. Mr. Foster testified further that in October 1996, Claimant's previous light duty assignment was being phased out and he was transferred to a modified position requiring him to put a beta patch on a 10-to-15 pound door and transfer the door to another rack, which Employer's nurse indicated was within his capabilities. Mr. Foster testified that Claimant complained that he was having trouble lifting and pushing the truck doors with his hands. Mr. Foster stated that when Claimant's supervisor laid him off due to a lack of effort, he advised Claimant to go back and try the job, but Claimant refused.

Employer presented the following witnesses: (1) Dr. James Bonner, board-certified in physical medicine and rehabilitation; (2) Dr. Joseph Sataloff, a board-certified otologist; (3) Michael Clayton, Employer's supervisor of human resources; and (4) Dr. Habib Tonsey, Employer's medical director. Dr. Bonner examined Claimant in November 1997 and opined that his right knee and lumbar injuries had resolved, that his knee injury resulted from a long-standing degenerative condition rather than from the May 1996 incident and that he was fully capable of returning to the modified position that he held in July 1995. Dr. Sataloff examined Claimant in 1990 and 1993 and again in 1997, and he opined that his hearing loss was not work-related.

Mr. Clayton stated that Claimant returned to work in June 1995 as an operations worker, that he receives extended monthly disability benefits of \$1,200 and that he was assigned to the beta patch job on October 7, 1996. On October 15, 1996, he was discharged due to a lack of production.

Dr. Tonsey examined Claimant in May 1996. He discerned no objective findings to substantiate Claimant's subjective complaints, no causal relationship between his knee injury and the May 1996 incident and no connection between his hearing loss and employment as evidenced by a pre-employment audiogram.

The WCJ rejected Claimant's testimony, finding that it was not credible or persuasive, and he found Dr. Bonner's, Dr. Tonsey's and Dr. Sataloff's testimony more credible and persuasive than that offered by Dr. Didizian and Dr. Ladenheim. He also found both Mr. Foster's and Mr. Clayton's testimony credible and persuasive. Concluding that Claimant had failed to sustain his burden of proving that he suffered a disabling injury or a hearing loss on March 24, 1996, or a recurrence of his February 1993 injury, the WCJ denied all three petitions. The Board affirmed the WCJ's decision in part, concluding that there was substantial competent evidence to support the finding that Claimant did not sustain work-related injuries on May 24, 1996. The Board could not discern why the WCJ denied Claimant's reinstatement petition and remanded for additional findings as to whether he was entitled to a reinstatement of benefits after November 4, 1996.

The WCJ did not take any additional evidence on remand. Citing testimony from Dr. Bonner, Dr. Tonsey and Mr. Clayton, the WCJ found that Claimant was offered the beta patch job in accordance with his medical and union restrictions and that his refusal of the position was in bad faith. The WCJ found Dr. Bonner's testimony credible that as of February 1998 Claimant was capable of returning to work at his original spot welder position and that Claimant presented no medical testimony regarding his inability to perform any of the positions to which he was recalled after November 4, 1996. The WCJ concluded that once modified work is available to a claimant who rejects the employment in bad faith,

the employer is not obligated to offer continuous modified positions each time a claimant is recalled based on seniority. The Board affirmed and Claimant appealed to this Court.

Upon review, this Court vacated and remanded. See Tracy v. Workers' Compensation Appeal Board (The Budd Company) (Pa. Cmwlth., No. 59 C.D. 2002, filed October 9, 2002). We stated as follows:

The WCJ relied on testimony of Dr. Bonner and Dr. Tonsey and of Clayton to support the finding that [Claimant] was offered the beta patch job in accordance with his medical restrictions, and he specifically relied on Dr. Bonner's testimony that as of his examination in February 1998 [Claimant] was capable of returning to his pre-carpal tunnel injury position. However, after fully reviewing the testimony relied upon by the WCJ, the Court cannot discern any competent evidence to support the WCJ's finding that [Claimant] was capable of performing the beta patch position and that his refusal to perform the position was due to his bad faith. Dr. Bonner never offered an opinion as to whether the beta patch position was within [Claimant's] medical restrictions when it was assigned to him, and although Dr. Tonsey was aware of Dr. Didizian's medical restrictions and did not change them he testified that a certified hand expert, Mark Walsh, determined that the offered job was within [Claimant's] medical restrictions. Dr. Tonsey never testified that he concluded that the job was in accord with Dr. Didizian's restrictions. Moreover, Clayton testified that Employer's nurse, Joyce Kelly, and Mark Walsh determined that [Claimant] was able to perform the modified position and that [Claimant's] supervisor stated that [Claimant] was laid off due to insufficient effort on his part. None of these individuals testified. After examining the record, the Court concludes that none of the credited witnesses offered an independent opinion that [Claimant] was capable of performing the offered position.

Based on the bad faith finding, the WCJ concluded that [Claimant] failed to show a change in his physical condition to warrant a reinstatement of benefits. The

WCJ's findings, however, that [Claimant] was capable of performing the modified position and that he refused to perform in bad faith are not based on substantial evidence in the record. Moreover, the WCJ imposed an improper burden of proof upon [Claimant], who was required to merely show that as of October 15, 1996 his earning power was once again adversely affected by his disability through no fault of his own and that his original disability continues. The Court therefore vacates the order of the Board and remands this case for findings and a decision on whether [Claimant] met the appropriate burden under *Pieper*[ v. *Ametek-Thermox Instruments Div.*, 526 Pa. 25, 584 A.2d 301 (1990)] to warrant a reinstatement of his benefits as of October 15, 1996.

Tracy, slip op. at 6-7.

Without taking any additional evidence, the WCJ circulated a remand decision and order on February 10, 2004. The WCJ again denied Claimant's reinstatement petition, finding that the "contest in which this reinstatement petition must be decided is based upon the credible testimonies of Mr. Foster, Mr. Clayton, Dr. Tonsey, and Dr. James Bonner." February 10, 2004 WCJ Remand Decision at Finding 1. Claimant again appealed to the Board.

On January 4, 2005, the Board issued an opinion and order again vacating and remanding this matter to the WCJ. The Board noted that the WCJ relied upon the hearsay testimony of Mr. Foster. Although the WCJ found this evidence was not objected to by Claimant's counsel, the Board noted that unobjected to hearsay remains hearsay, and is inadequate to support findings without corroboration by competent evidence of record. See Walker v. Unemployment Compensation Board of Review, 367 A.2d 366 (Pa. Cmwlth. 1976). In addition, the Board also determined that the WCJ failed to adhere to this Court's previous decision specifically remanding this matter for the WCJ to issue an adjudication by applying Pieper.

Accordingly, the Board vacated the WCJ's February 10, 2004, decision and remanded for the WCJ to address whether competent evidence corroborated Mr. Foster's testimony, to apply the burden of proof as set forth in Pieper, and to address Claimant's request for attorney fees, interest, and a penalty.

Without taking any additional evidence, the WCJ circulated a remand decision and order on March 29, 2006, again denying Claimant's reinstatement petition. The WCJ again credited the testimonies of Mr. Foster, Mr. Clayton, Dr. Tonsey, and Dr. Bonner. Claimant appealed to the Board.

By opinion and ordered issued February 26, 2007, the Board once again vacated the WCJ's decision and remanded this matter for re-assignment to a different WCJ. In so doing, the Board noted that both the Board and the WCJ are bound by the mandates of this Court in this matter. The Board stated that "[e]ven if one is to believe, argumentatively, that Commonwealth Court engaged in creating its own findings of fact and weighing of the evidence in this matter, the fact remains that the Commonwealth Court's directives must be complied with upon remand." February 26, 2007 Board Op. at 5. The Board remanded this matter with the directive that the case be assigned to a different WCJ noting that:

[R]eview of the present Remand Decision and Order reveals that the WCJ, for the second time fails, or refuses to address this matter under the Commonwealth Court's directives. Therefore, rather than be caught in a continuous quagmire surrounding remands to this WCJ, this matter shall be remanded with directives that it be assigned to another WCJ. The WCJ to whom this matter is assigned is directed to be cognizant of Commonwealth Court's prior determinations and directives in this matter.

Id.

On remand, this matter was assigned to a different WCJ. Without taking any additional evidence, the second WCJ circulated a remand decision and

order on October 7, 2009. The second WCJ's findings are based on what the WCJ believes this Court did or did not find in our October 9, 2002, decision and order vacating and remanding this matter for findings and a new decision in accordance with our opinion. See October 7, 2009 WCJ Remand Decision at Findings 12-17. Specifically, the second WCJ found, in pertinent part, as follows:

12. The Commonwealth Court has found as fact that, after fully reviewing the testimony relied upon by the original Workers' Compensation Judge, the court could not discern any competent evidence to support the finding that the Claimant was able to perform the beta patch position and this (sic) his refusal to perform said position was due to his bad faith.

13. As the Commonwealth Court has found that there is no competent evidence to sustain Claimant's ability to return to work to the beta patch position, Claimant's Petition for Reinstatement relating to his 1993 work injury must be granted.

14. The Commonwealth Court has found that there was no competent evidence to support the finding that Claimant's refusal to perform the beta patch position was due to his bad faith. This Claimant's benefits must be reinstated effective October 15, 1996.

15. Claimant sustained his burden of proving as found by the Commonwealth Court, that as of October 15, 1996, his earning power was once again adversely affected by his disability through no fault of his own and that his original disability continues. Thus, Claimant's benefits must be reinstated effective that date.

16. A review of the record reveals two average weekly wages for Claimant. In his decision circulated November 17, 1998, the WCJ found Claimant's average weekly wage to be \$745.18 with an applicable compensation rate of \$496.79. A later decision notes Claimant's average weekly wage to be \$891.89 with an application compensation rate of \$475.00. As the Commonwealth

Court made no findings on this issue, this Judge accepts the original average weekly wage of \$745.18 and compensation rate of \$496.79 to be accurate.

Id. Accordingly, the second WCJ granted Claimant's reinstatement petition. Both Claimant and Employer appealed to the Board.

Upon review, the Board affirmed the second WCJ's October 7, 2009, remand decision and order. With respect to Employer's appeal, in a very short discussion, the Board determined that a review of the record revealed that the second WCJ was correct in finding that this Court found that there is no competent evidence to sustain Claimant's ability to return to the beta patch position. Thus, the Board determined that the second WCJ did not err in granting Claimant's reinstatement petition.<sup>1</sup> This appeal by Employer followed.<sup>2</sup>

Initially, we note that 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. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Mrs. Smith's Frozen Foods v. Workmen's Compensation Appeal Board (Clouser), 539 A.2d 11 (Pa. Cmwlth. 1988).

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<sup>1</sup> With respect to Claimant's appeal alleging that the second WCJ erred in failing to clarify the specific credit Employer was entitled to receive, the Board also affirmed.

<sup>2</sup> Claimant did not appeal the Board's August 4, 2010 Decision and Order and by order entered January 25, 2011, Claimant was precluded from filing a brief in this matter.

It is axiomatic that the WCJ, and **not** this Court, is the ultimate fact finder in workers' compensation cases. 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 such, the WCJ, and **not** this Court, has exclusive province over questions of credibility and evidentiary weight, and is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part. Id.

Upon review of the second WCJ's decision and the Board's affirmance thereof, we are constrained to conclude that this matter must be remanded once again. Herein, the second WCJ, in violation of this Court's October 9, 2002, decision and the Board's February 26, 2007, remand decision and order, utterly failed to make any findings of fact and issue a decision on whether Claimant met the appropriate burden to warrant a reinstatement of his benefits as of October 15, 1996. To the contrary, the second WCJ merely recites what she believes this Court "found" and adopted those so called "findings." Therefore, regardless of whether or not the Board or the second WCJ believed that this Court had engaged in fact finding, the second WCJ was required to follow this Court's directives on remand. Those directives clearly included the mandate that the WCJ apply the correct burden of proof for a reinstatement petition where a claimant's benefits have been suspended and issue a new decision with findings of fact addressing that burden.

Accordingly, the second WCJ erred by merely restating what this Court "found" in our October 9, 2002, memorandum opinion and granting Claimant's reinstatement petition based on what the second WCJ believed were this Court's findings. Therefore, this matter must be remanded for findings specifically addressing the following questions:

(1) Whether there is competent and credible evidence of record to support a finding that the beta patch position offered to Claimant was within Claimant's medical restrictions;

(2) If the answer to question (1) is no, then Claimant is entitled to a reinstatement of benefits;

(3) If the answer to question (1) is yes, then the next question is whether Claimant has shown that his earning power is once again adversely affected by his disability, and that such disability is a continuation of that which arose from his original claim – See Bufford v. Workers' Compensation Appeal Board (North American Telecom), \_\_\_ Pa. \_\_\_, 2 A.3d 548 (2010) (clarifying a claimant's burden pursuant to Pieper and Stevens v. Workers' Compensation Appeal Board (Consolidation Coal Co.), 526 Pa. 25, 584 A.2d 301 (1990), where a claimant seeks reinstatement of suspended benefits pursuant to Section 413(a) of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §772);

(4) If the answer to question (3) is yes, then the next question is whether Employer has met its burden of proving that Claimant's loss of earnings is, in fact, caused by Claimant's bad faith rejection of available work within the relevant required medical restrictions or by some circumstance barring receipt of benefits that is specifically described under the provisions of the Act or in decisional law – Bufford;

(5) If the reinstatement petition is granted, what is Claimant's correct average weekly wage and corresponding benefits rate; and

(6) Whether there is competent and credible evidence to support the finding that Claimant was capable of returning to work at his original spot welder position as of February 1998.

The Board's order is vacated and this matter is remanded for further remand to the WCJ for proceedings consistent with the foregoing opinion.<sup>3</sup>

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JAMES R. KELLEY, Senior Judge

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<sup>3</sup> Due to our disposition of this matter, we will not address the remaining issues raised by Employer in this appeal at this time.

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	:	
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v.	:	No. 1688 C.D. 2010
	:	
Workers' Compensation	:	
Appeal Board (Tracy),	:	
	:	
Respondent	:	

**ORDER**

AND NOW, this 24th day of March, 2011, the August 4, 2010 order of the Workers' Compensation Appeal Board is vacated and this matter is remanded for further remand to the Workers' Compensation Judge for proceedings consistent with the foregoing opinion.

Jurisdiction relinquished.

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JAMES R. KELLEY, Senior Judge