IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Benjamin Ferguson, Petitioner	:	
v.	:	
Worker's Compensation Appeal Board (Gas Exposition Services), Respondent	:	No. 1895 C.D. 2010
	:	Submitted: January 28, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: March 21, 2011

Benjamin Ferguson (Claimant) challenges the order of the Workers' Compensation Appeal Board (Board) that affirmed the Workers' Compensation Judge's (WCJ) decision to deny and dismiss Claimant's claim petition.

Claimant worked for Gas Exposition Services (Employer) as a forklift operator. He prepared and dismantled trade shows at convention centers and exhibit halls. On October 11, 2008, in Washington, D.C. at a convention center, Claimant fell off the back of a truck when it started to move and landed on the concrete floor on his back and shoulders. Claimant received approximately three weeks of workers' compensation payments as the result of his workers' compensation claim in the District of Columbia.

On December 3, 2008, Claimant petitioned for benefits and alleged that while he worked at the Washington, D.C. Convention Center, he suffered injuries to his "lower back with related bladder problem, left and right shoulders, numbness in both feet" on October 11, 2008, "while working in a trailor [sic], trailor [sic] pulled away from dock and Plaintiff [Claimant] fell onto the ground on his back." Claim Petition, December 3, 2008, at 1; Reproduced Record (R.R.) at 3a.

Before the WCJ, Claimant testified that he worked from the Laborers Local 332 union hall in Philadelphia and got job assignments through the union. Notes of Testimony, February 24, 2009, (N.T.) at 7; R.R. at 111a. Claimant usually worked at the Pennsylvania Convention Center in Philadelphia. On October 11, 2008, Claimant worked at the convention center in Washington, D.C. for Employer. N.T. at 7-9; R.R. at 111a-113a. Claimant was hired from the Laborers Local 332 for this assignment. N.T. at 9; R.R. at 111a-113a. After the injury Claimant attempted to work light duty at PA Working Gear but only worked three days. N.T. at 17; R.R. at 121a. On cross-examination, Claimant explained that the job in the District of Columbia was a two week job and he was hired by Employer from the union hall in Philadelphia. He admitted that he worked jobs with exhibitors other than Employer. N.T. at 23; R.R. at 127a. He explained that he worked for Employer at the Buyer's Market in Philadelphia in September 2008. He then worked for another exhibitor at the Philadelphia Convention Center before going to Washington for the job assignment where he was injured. N.T. at 24; R.R. at 128a. Claimant admitted that he was free to take a job through the union

for another company after a job with Employer was finished. N.T. at 28; R.R. at 132a.

Claimant presented the deposition testimony of Maxwell Stepanuk, Jr., D.O. (Dr. Stepanuk), a board-certified orthopedic surgeon and Claimant's treating physician. Dr. Stepanuk first treated Claimant on December 15, 2008. He also examined him on March 16, 2009, and December 20, 2009. Dr. Stepanuk testified that Claimant could not return to his time of injury job. Deposition of Maxwell Stepanuk, Jr., D.O., April 24, 2009, (Dr. Stepanuk Deposition) at 22; R.R. at 173a. Dr. Stepanuk found that Claimant's "lumbar spine showed a disc bulge at several levels, with the bulge and bone spurring at L-3, with facet arthritis, with foraminal narrowing. And all of these findings can cause impingement of the nerves, can cause the radicular symptoms and the back pain that he was complaining of." Dr. Stepanuk Deposition at 14; R.R. at 165a. Dr. Stepanuk opined that this condition was either caused by or aggravated by the work injury. Dr. Stepanuk Deposition at 15; R.R. at 166a. He also testified that radicular symptoms in Claimant's legs were directly related to his fall on October 11, 2008. Dr. Stepanuk Deposition at 16; R.R. at 167a. Dr. Stepanuk also noted disc bulging at C-5 and C-6 and a spur at the AC Joint of the shoulder, tendonitis caused by the work injury or at least the pain was caused by the work injury. Dr. Stepanuk Deposition at 17; R.R. at 168a. Dr. Stepanuk described Claimant's prognosis as guarded and mentioned the possibility of surgery for his neck, back, and right shoulder. Dr. Stepanuk Deposition at 21; R.R. at 172a. On cross-examination, Dr. Stepanuk admitted that spondylosis, foraminal narrowing, and any degenerative

changes were all preexisting. Dr. Stepanuk Deposition at 32-33; R.R. at 183a-184a.

Brian Thomas Norwood (Norwood), senior operations manager for Employer, testified that his job was to oversee operations, plan events, execute events and show sites. He was partially responsible for warehouse operations. Notes of Testimony, May 12, 2009, (N.T. 5/12/09) at 7; R.R. at 62a. Employer had shows in Washington, D.C. for approximately twenty weeks each year in 2007 and 2008. N.T. 5/12/09 at 18; R.R. at 73a. Norwood explained that in Pennsylvania Claimant did not work for Employer because a labor contractor known as Elliott-Lewis Corporation (Elliott-Lewis) provided the workers, coordinated the workers, paid them, and paid for any workers' compensation. N.T. 5/12/09 at 21; R.R. at 76a. Norwood referenced a Customer Satisfaction Agreement which was placed into evidence. The Agreement was between the Pennsylvania Convention Center, Elliott-Lewis and various unions. It indicated that a Labor Supplier would be the employer of all show labor workers utilized in connection with trade shows, conventions, and other events at the Pennsylvania Convention Center. N.T. 5/12/09 at 28; R.R. at 82a. Norwood explained that the general foreman who worked for Elliott-Lewis would direct Claimant's activities at the Pennsylvania Convention Center. N.T. 5/12/09 at 29-30; R.R. at 83a-84a. Norwood testified that Claimant began working at the Washington Convention Center for Employer on October 1, 2008, and that he was not an employee of Employer immediately prior to that. Deposition of Brian Norwood, August 6, 2009, (Norwood Deposition) at 11; R.R. at 274a. Norwood testified that Claimant's employment was going to end on October 11, 2008, after the close of

the show in Washington, D.C. On cross-examination, Norwood explained that in October 2008, Employer obtained twenty workers from the Philadelphia Labor Union Hall to work at a show in Washington, D.C. N.T. 5/12/09 at 47; R.R. at 101a.

The WCJ denied and dismissed Claimant's claim petition and made the following relevant findings of fact:

> 9. This Workers' Compensation Judge has carefully reviewed the testimony of Claimant and finds his testimony credible based on his demeanor and affect during his live testimony. However, this matter involves a legal issue and Claimant's testimony is not dispositive of the jurisdictional issue. In fact Claimant admits that he worked for another employer immediately prior to taking the job in Washington DC [sic] and that he was injured while working in Washington DC [sic].
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> 10. This Judge has carefully reviewed the evidence as a whole and finds the testimony of Mr. Norwood credible and persuasive based on his demeanor and affect during his live testimony. Furthermore, this Judge finds that his testimony is more directly related to the jurisdictional issue in this matter. The documentary evidence supports his testimony.
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> 11. This Workers' Compensation Judge has carefully reviewed the evidence as a whole and finds that Claimant was not a continuous employee with GES. In fact, his employment lasted only as long as the trade show on which he was working. When the trade show was completed he was free to take employment with another employer and did so. Therefore, each time he worked on a GES show he was newly hired. As a result this Judge does not feel that it is necessary to determine whether GES or Elliot-Lewis was Claimant's statutory employer for the trade shows at the Pennsylvania Convention Center. It is not relevant to the instant matter because

> Claimant was newly hired to work on the trade show in Washington D.C. in October 2008. Although the contract for hire was made in Pennsylvania when GES contacted Claimant's labor union, the job was not principally localized in Pennsylvania but was rather clearly principally localized in Washington D.C. where the trade show was being conducted and where Claimant was clearly working on the job. Therefore, Pennsylvania does not have jurisdiction over his injury that occurred while working in Washington D.C.

WCJ's Decision, October 30, 2009, Findings of Fact Nos. 9-11 at 4-5; R.R. at 16a-17a.

Claimant appealed to the Board which affirmed.

Claimant contends that Pennsylvania has jurisdiction because Claimant had a continuous employment relationship with Employer at the time of his work injury and that the terms of the Customer Satisfaction Agreement in place at the Pennsylvania Convention Center confirmed that there was a continuous employment relationship between Claimant, his union, and Employer.[1]

Section 101 of the Workers' Compensation Act (Act)[2], provides, "That this act shall be called and cited as the Workers' Compensation Act, and shall apply to all injuries occurring within this Commonwealth, irrespective of the place where the contract of hiring was made, renewed, or extended, and extraterritorially as provided by Section 305.2."

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[1] This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact were supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

[2] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §1.

Section 305.2(a) of the Act, 77 P.S. §411.2,[3] provides

> If an employe, while working outside the territorial limits of this State, suffers an injury on account of which he, or in the event of his death, his dependents, would have been entitled to the benefits provided by this act had such injury occurred within this State, such employe, or in the event of his death resulting from such injury, his dependents, shall be entitled to the benefits provided by this act, provided that at the time of such injury:
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> (1) His employment is principally localized in this State, or
>
> (2) He is working under a contract of hire made in this State in employment not principally localized in any state, or
>
> (3) He is working under a contract of hire made in this State in employment principally localized in another state whose workmen's compensation law is not applicable to this employer, or
>
> (4) He is working under a contract of hire made in this State for employment outside the United States and Canada.

Here, it is clear that Claimant's employment was not principally localized in Pennsylvania as he was injured while working in Washington, D.C. He was not working under a contract for hire made in Pennsylvania for employment not principally localized in any state because the employment was localized in Washington, D.C. Claimant was not working under a contract of hire made in this state but was employed in a state whose workers' compensation laws were not applicable to Employer because it is undisputed that he received workers'

[3] This Section was added by the Act of December 5, 1974, P.L. 782.

compensation benefits in the District of Columbia. It is also clear that Claimant was not working under a contract for hire for employment outside the United States and Canada.

It would appear that Pennsylvania has no jurisdiction over Claimant's workers' compensation claim.

Claimant argues, however, that Section 305.2 of the Act applies because Claimant was working under a "contract for hire" made in his Pennsylvania union hall between Employer and Claimant's union in employment not principally localized in any state. Claimant asserts that the Board erred when it affirmed the WCJ's conclusion that Claimant's employment with Employer lasted only from October 1, 2008, until October 11, 2008. Claimant asserts that he was a union laborer hired on a job to job basis.

Claimant cites Atkins v. Workers' Compensation Appeal Board (Geo-Con, Inc.), 651 A.2d 694 (Pa. Cmwlth. 1994) for the proposition that a continuous employment situation may exist where a claimant is hired on a per job basis. In Atkins, Dale W. Atkins (Atkins) filed a claim petition and alleged that he suffered a work-related injury while in the employ of Geo-Con, Inc. (Geo-Con). The claim petition alleged that the injury occurred in Georgia. Geo-Con denied all allegations. The referee[4] found that Pennsylvania did not have jurisdiction because Atkins was working under a contract of hire in Pennsylvania for employment principally located in another state (Georgia) and there was no indication that the

[4] At the time, WCJs were known as referees.

workers' compensation law of Georgia was inapplicable. Atkins appealed to the Board which affirmed. Atkins, 651 A.2d at 696-697.

Atkins petitioned for review with this Court. One of the issues he raised was whether Pennsylvania has jurisdiction when an employer maintains its principal place in Pennsylvania, hires an employee in Pennsylvania, but sends him to a temporary location for a temporary job. Atkins, 651 A.2d at 697. This Court found that the referee did not err when he determined that Atkins's employment was not principally localized in Pennsylvania because Atkins frequently worked for Geo-Con in other states besides Pennsylvania. This Court determined that the referee did err when he concluded that Atkins's employment was principally localized in Georgia. This Court determined that Atkins worked under a contract for hire made in Pennsylvania in employment and not localized in any other state. Atkins testified that he was hired to work wherever Geo-Con needed him whether in Pennsylvania or another state. Atkins, 651 A.2d at 699. Atkins was hired on a per job basis, but this Court stated:

> [I]t is clear from the record evidence that claimant [Atkins] and employer [Geo-Con] had an ongoing employment relationship. In order to consider what are usually distinct jobs as a single period of employment, there must be evidence of an ongoing employment relationship. . . .
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> There is evidence in this case of an ongoing employment relationship. Claimant [Atkins] testified that although he was considered part time he has worked continuously for employer [Geo-Con] since his date of hire, and the referee found that claimant [Atkins] has worked for employer [Geo-Con] for four years. . . .

> Employer [Geo-Con] did not present any evidence to indicate that claimant [Atkins] was terminated and rehired after each job assignment. Although claimant [Atkins] testified that he was required to have a physical prior to each job, he explained that the reason for such a requirement was that he worked with contaminants and the purpose of the physical was to make sure he was healthy enough to wear respirators and suits. . . .
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> Based on the foregoing facts, the referee erred in concluding that claimant's [Atkins] employment was centered in Georgia at the time of the alleged work-related injury. Accordingly, claimant [Atkins] is eligible for compensation under section 305.2(a)(2) of the Act as he was working under a contract of hire made in Pennsylvania in employment not principally localized in any state. (Citations omitted).

Atkins, 651 A.2d at 699-700.

Here, Claimant's situation contrasts with that of Atkins. Atkins worked continuously for Geo-Con since he was hired though he had periods of unemployment. Also, a representative of Geo-Con testified that personnel records were kept for unemployment purposes. Here, Claimant worked thirteen days for Employer in 2006, seventeen days in 2007, and forty-two days in 2008. Although Claimant argues that this employment indicates a "continuous employment relationship," this Court does not agree. Claimant worked five days for Employer in January 2006, and then eight days in October 2006. He then did not work for Employer until September 30, 2007. After working seventeen days for Employer between September 30, 2007, and October 24, 2007, Claimant did not work for Employer until four days in January 2008, nine days in February 2008, five days in April 2008, four days in July 2008, four days in August 2008, two days in September 2008, eleven days in October 2008, and three days in December 2008.

This sporadic employment does not provide proof of a continuous employment relationship. Further, Claimant admitted that he was free to work for other employers and did so just before taking the job in Washington, D.C. which resulted in his work-related injury.

Claimant also asserts that Reifsnyder v. Workers' Compensation Appeal Board (Dana Corp.), 584 Pa. 341, 883 A.2d 537 (2006) and Turbomachinery Company v. Workers' Compensation Appeal Board (Sandy), 898 A.2d 640 (Pa. Cmwlth. 2006) support his position. Reifsnyder dealt with whether the calculation of an average weekly included periods of lay off. In Reifsnyder, the laid off employees retained seniority rights, health and other benefits, and contributions by the employer to retirement accounts. Here, there is no indication that any formal relationship, as in Reifsnyder, was maintained between Employer and Claimant. It appears that once Claimant's work at a trade show was finished, his employment was finished. There was no ongoing relationship.

In Turbomachinery, this Court held that the term "employed" was not limited to the actual days an employee performed work but included the period of time that an employment relationship is maintained between the parties. Claimant argues that there was continuous communication between Employer and Claimant's union because Employer obtains employees from the union through Elliott-Lewis whenever it puts on a trade show in Philadelphia. This Court does not agree. Turbomachinery also dealt with a layoff situation which was not present here. Given the limited time that Claimant worked for Employer, this Court is not persuaded that Employer and the union were in constant communication.

Claimant next contends that the terms of the Customer Satisfaction Agreement at the Pennsylvania Convention Center confirm that the employment relationship between Claimant, his union, and Employer was continuous.

The Board addressed this issue:

> Claimant argues nonetheless that the WCJ erred because the Customer Satisfaction Agreement (Agreement) submitted by Defendant [Employer] clearly evidences an ongoing employment relationship between it and Claimant's union. . . . To the extent that Claimant argues that the Agreement supports a finding that there was an ongoing relationship between Defendant [Employer] and Claimant's union, and thereby, with Claimant, we noted that the Agreement itself is signed by representatives of various unions, Elliott-Lewis, and the Pennsylvania Convention Center Authority. . . . There is no mention of either Defendant [Employer] or Claimant in the Agreement, and we cannot agree that the Agreement between the union, the labor contractor, and the Convention Center is indicative of any ongoing relationship between Claimant and Defendant [Employer]. Therefore, we reject Claimant's argument.

Workers' Compensation Appeal Board Opinion, September 7, 2010, at 7-8. R.R. at 37a-38a. This Court agrees.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

Judge Butler did not participate in the decision in this case.

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v.	:	
Worker's Compensation Appeal Board (Gas Exposition Services), Respondent	:	No. 1895 C.D. 2010

O R D E R

AND NOW, this 21st day of March, 2011, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge