

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kathleen E. Deegan, :
Petitioner :
 :
v. : No. 2231 C.D. 2009
 : Submitted: August 27, 2010
Workers' Compensation Appeal :
Board (Chanel, Inc.), :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: September 28, 2010

Kathleen E. Deegan (Claimant) appeals *pro se* from the order of the Workers' Compensation Appeal Board (Board) affirming the decision of the Workers' Compensation Judge (WCJ) granting in part Claimant's claim petition alleging a lower back injury while working as a retail market manager for Chanel, Inc. (Employer). For the reasons that follow, we affirm.

Claimant filed a claim petition on December 27, 2007, alleging a work-related lower back injury on August 17, 2007. Employer denied the averments in the claim, and hearings were held before the WCJ on March 4, July 17 and September 11, 2008. Claimant testified at the March 4 hearing that she was

a retail market manager for Employer. Her duties included planning and executing promotional events at stores that sold Employer's products, which required her to transport, deliver and set up the materials necessary for the events, including boxes of fragrance testers, chairs, tester units, photo lamps and the like. On August 17, 2007, she went to one of the stores where she had an account in order to transport materials to another store where she was going to have an event the following week. In doing so, she picked up a bag that she thought contained one photo lamp, but it actually contained two photo lamps together weighing 50-60 pounds. As she picked up the bag, she felt a pain in her lower back that radiated to her buttocks and legs over the next few days. She missed a couple of days of work in mid-September due to the worsening pain caused by this injury, and she further aggravated the injury on September 26 while unloading other work-related material from her car. On October 1, she emailed her supervisor and notified him for the first time of her injuries. She received medical treatment from a pain management specialist and a chiropractor and performed physical therapy and took various medications to alleviate her symptoms. She further testified that the pain prevented her from returning to her job. She had suffered from lower back pain about 10 years prior but had not had any problems since until her workplace injury. Employer's counsel began to cross-examine Claimant, but did not finish doing so and requested that she be able to continue to cross-examine Claimant at the next hearing, which the WCJ granted.

The second hearing before the WCJ was held on July 17, 2008. Claimant did not appear at the hearing, despite the request at the previous hearing that she be present for further cross-examination. No explanation was given for

her absence. At this hearing, Claimant's supervisor testified. He testified that he and Claimant had a difficult work relationship. Claimant had received a poor performance evaluation a few months prior to her alleged work injury. He also had a conversation with her concerning alleged inappropriate behavior at a national sales meeting. Claimant defended her conduct and performance and threatened to sue Employer. It was Employer's contention that Claimant's injury claim was in retaliation for these earlier incidents. Furthermore, the supervisor testified that after Claimant stopped working but before her computer access was terminated, she ordered approximately \$250,000 worth of product testers not in accord with company policy and that these products could not be located.

The WCJ told Claimant's then-attorney that she was required to be present at the following hearing, which occurred on September 11, 2008, to complete the cross-examination that could not be done at the earlier hearing and to offer testimony to rebut the supervisor's testimony. The WCJ said he wanted Claimant to appear without having to subpoena her. Notice was given to Claimant about one month prior to the hearing (as had also been done for the second hearing). The day before the hearing, Claimant's attorney sent a letter to the WCJ stating without explanation that Claimant would not be attending the hearing. Because the hearing was the next day, Employer did not have time to subpoena her. At that hearing, the WCJ granted Employer's request to draw an adverse inference against Claimant for failing to attend the hearings but denied Employer's motion to dismiss for failure to prosecute.

Both parties also offered deposition testimony from expert medical witnesses. Both experts agreed that Claimant suffered a workplace injury on August 17, 2007, but they disagreed as to whether the injury had healed and whether Claimant could return to work. Significantly, a review of Claimant's medical history showed repeated lower back problems over several years. Claimant's expert downplayed these previous back problems while Employer's expert emphasized them because he testified that they showed a degenerative rather than an acute condition.

Finding that Claimant was only partially credible, the WCJ made an adverse inference that Claimant avoided the final two hearings in order to avoid cross-examination on her injury and on her alleged ulterior motives for filing her workers' compensation claim. He also found that Employer's medical witness was more credible than Claimant's. Because both medical witnesses found that she was injured at work, the WCJ granted her claim in part, finding that she was injured on August 17, 2007, but that her injury had healed as of December 10, 2007.

Claimant appealed to the Board *pro se*, claiming that the WCJ erred by drawing an adverse inference from her failure to appear at the final two hearings. The Board affirmed in all respects, and Claimant filed the instant appeal.¹

¹ This Court's standard of review is limited to determining whether substantial evidence supports the WCJ's necessary factual findings, whether the Board violated its procedures, and whether any constitutional rights were violated or any error of law was committed. *City of* **(Footnote continued on next page...)**

On appeal, Claimant again contends that the WCJ erred by drawing an adverse inference from her failure to appear at the final two hearings. She claims that she did not know she was supposed to appear at the hearings or that they were important. Furthermore, her counsel never informed her that she needed to appear, and she was not subpoenaed. Finally, she argues that the WCJ's decision to draw an adverse inference from her absence constituted a denial of her procedural due process.²

The missing witness rule permits an adverse inference to be drawn against the party with the burden of proof where the uncalled witness is peculiarly within the reach and knowledge of only that party, and the party fails to call the witness without satisfactory explanation. *Bonegre v. Workers' Compensation Appeal Board (Bertolini's)*, 863 A.2d 68 (Pa. Cmwlth. 2004); *Marriott Corporation v. Workers' Compensation Appeal Board (Knechtel)*, 837 A.2d 623 (Pa. Cmwlth. 2003). Here, the WCJ did not err in applying the missing witness rule to Claimant because she was told, both personally and through her counsel, that she needed to appear to have her cross-examination concluded, that she

(continued...)

Philadelphia v. Workers' Compensation Appeal Board (Brown), 830 A.2d 649, 653 n. 2 (Pa. Cmwlth. 2003).

² Claimant repeatedly contends that her failure to appear at the hearings was her then-attorney's fault. However, Claimant was present at the first hearing and knew she would be recalled for further cross-examination. Additionally, Claimant received notice of each hearing approximately one month ahead of time, but did not notify anyone that she would not be there until the last minute and with no explanation. In any event, even if Claimant could show that her absences were the fault of her attorney, her attorney's conduct is not before us and is irrelevant to the disposition of this case.

nevertheless failed to appear twice without explanation, and that she gave very little notice, preventing Employer from reaching her through a subpoena.

Claimant's allegation that she suffered a deprivation of due process due to the application of the missing witness rule likewise is untenable. The hallmark of due process is notice and opportunity to be heard. *Stafford v. Workers' Compensation Appeal Board (Advanced Placement Services)*, 933 A.2d 139 (Pa. Cmwlth. 2007). Claimant received notice of every hearing and had every opportunity to attend. In fact, she was required to attend but chose not to. Her failure to submit herself to cross-examination was her own fault, not a flaw in the hearing process.

In any event, while the WCJ was justified in making the adverse inference, we fail to see how Claimant was harmed. The WCJ's finding that Claimant had recovered as of December 10, 2007, was based on his finding that Employer's medical witness was more credible than Claimant's, which has nothing to do with the adverse inference drawn that she did not submit to cross-examination on her injury or on her alleged ulterior motives for filing the workers' compensation claim.

For the foregoing reasons, the order of the Board is affirmed.

DAN PELLEGRINI, JUDGE

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ORDER

AND NOW, this 28th day of September, 2010, the order of the Workers' Compensation Appeal Board dated October 15, 2009, is affirmed.

DAN PELLEGRINI, JUDGE