

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas Kehoe, :
 :
 Petitioner :
 :
 v. : No. 1231 C.D. 2007
 : SUBMITTED: December 7, 2007
 Workers' Compensation Appeal :
 Board (Sunoco), :
 Respondent :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: February 20, 2008

Thomas Kehoe petitions this court for review of a Workers' Compensation Appeal Board (Board) order that affirmed the decision of a Workers' Compensation Judge (WCJ) denying and dismissing the petition to review compensation benefits and the petition for penalties that Kehoe filed against Sunoco, Inc. (Employer).

On December 5, 2002, Kehoe suffered a work-related stroke while working for Employer. He filed a claim petition, and pursuant to a decision circulated March 4, 2004, the WCJ awarded total disability benefits, as of December 13, 2002. Before the date of the 2004 award, however, Kehoe returned

to work for Employer, in December 2003, in a light-duty cashier job. He continued this modified work through March 13, 2004.¹ Kehoe received partial disability benefits while performing this job and even after leaving work on March 13, 2004. No supplemental agreement or order effectuated this change in Kehoe's benefits. Thereafter, Kehoe filed a petition to review compensation benefits, asking that the description of his injury be expanded to include major depression. He also filed a petition for penalties, alleging that Employer had unilaterally suspended his total disability benefits.

By decision circulated November 17, 2006, the WCJ found in pertinent part:

13. During the proceedings, the claimant did not present any evidence in support of his Petition to Review compensation benefits seeking to amend the description of injury to include major depression.

14. Based upon the competent, credible and sufficient evidence of record, this Workers' Compensation Judge finds that the claimant has failed to sustain his burden of proving that the employer violated the terms and provisions of the Act by unilaterally suspending or modifying his Workers' Compensation benefits. In so finding, this Judge first notes that prior to the issuance of the Decision on the initial Claim Petition which obligated the employer to pay Workers' Compensation benefits, the claimant returned to modified duty work and was paid wages based upon that modified duty work. Following the issuance of the Decision, the employer paid partial disability benefits based upon the difference between the claimant's time of injury average weekly

¹ The WCJ was apparently not aware that Kehoe had returned to modified duty work, which was why he initially awarded him total disability benefits as of December 13, 2002, and continuing.

wage and the wages he was earning at the modified duty work. The employer has continued paying the partial disability benefits since that time. Although a Supplemental Agreement should have been executed by the parties at the time the employer's obligation to pay benefits arose, the employer has continued paying the partial disability benefits it was obligated to pay as a result of the claimant's return to work at wages less than his time of injury average weekly wage. There is nothing in the record to indicate that the modified duty work did not continue to be available to the claimant when he left on March 13, 2004. Having contested the basis for the claimant leaving work at that time, the employer was under no obligation to begin paying total disability benefits.

The WCJ also found that Kehoe was not entitled to "reinstatement" of his total disability benefits, noting in pertinent part:

[T]o the extent that the claimant's witnesses, Dr. Munirji and Dr. Cakanac were of the opinion that the claimant was not capable of performing the modified duty work or driving because of his vision problems, this Judge does not accept the same as credible or persuasive. To the contrary, this Judge accepts as more credible and persuasive the testimony and opinions of the employers' medical witness, Dr. Kasdan, that the claimant's visual deficiency would not prevent him from performing the job duties that he was previously performing in January of 2004.

....

To the extent that either Dr. Munirji, Dr. Cakanac or the claimant testified that he was not capable of performing the modified job duties that he was performing in March of 2004 because of his physical problems, this Judge does not accept the same as credible or persuasive.

WCJ's decision dated November 17, 2006, Findings of Fact Nos. 13-14 at 4-5. The WCJ therefore determined that Kehoe had failed to meet his burden of proving that

the description of his work injury should be expanded to include major depression and he failed to meet his burden of proving that penalties should be imposed on Employer for unilaterally suspending his benefits.

On appeal, the Board affirmed.² Kehoe now argues that the WCJ erred in (1) determining that he was able to return to light-duty work and, therefore, was not entitled to total disability benefits; and (2) denying his penalty petition because Employer unilaterally modified his benefits. Having carefully considered the record, we find no error.³

First, we note that Section 413(a) of the Workers' Compensation Act,⁴ 77 P.S. § 772, authorizes a WCJ to modify benefits upon proof that a claimant's condition has changed since the date of an agreement or award. *Sharon Tube Co. v. Workers' Comp. Appeal Bd. (Buzard)*, 908 A.2d 929, 933 (Pa. Cmwlth. 2006). Here, even before the initial award of total disability benefits, Kehoe returned to light-duty work. Although he later left that job, the WCJ accepted medical evidence that he was capable of continuing to perform it. While Kehoe and his treating neurologist, Dr. Munirji, testified that Kehoe's condition had worsened,

² In doing so, the Board reasoned that a record review established that the WCJ neither committed an error of law nor abused his discretion in denying the penalty petition and that the WCJ did not err in denying the review petition because "while Claimant provided medical testimony, such testimony related solely to the physical ailments associated with the stroke, but none regarding the averred major depression." Board decision dated June 5, 2007, at 4. We note, however, that in his appeal to the Board, Kehoe did not specifically raise the issue of whether his work injury should be expanded to include major depression, but, instead, preserved the issue of whether his total disability benefits should be reinstated due to his work-related vision problems. Of course, we may affirm the Board's order regardless of the reasons for its result, if the order is correct. *Douglas v. Workmen's Comp. Appeal Bd. (Harmony Castings, Inc.)*, 819 A.2d 136, 143 n.9 (Pa. Cmwlth. 2003).

³ Appellate review of questions of law is plenary. *Jeanes Hosp. v. Workers' Comp. Appeal Bd. (Hass)*, 582 Pa. 405, 417, 872 A.2d 159, 166 (2005).

⁴ Act of June 2, 1915, P.L. 736, *as amended*.

the WCJ instead chose to believe the testimony of Employer's neurologist, Richard Kasdan, M.D., that Kehoe "did not see well to the left but certainly had the physical capacity to pump gas and work in the mini mart, and he was doing that with the help of people there,"⁵ and that there was nothing in Kehoe's physical examination that would preclude him from maintaining this modified employment. *Id.* at 8.⁶ Furthermore, the WCJ concluded that Kehoe's vision problems did not preclude him from driving based on a surveillance videotape taken on July 16, 2004, in which Kehoe was apparently recorded driving a motor vehicle to different locations, after Dr. Cakanac had directed that his license be revoked.⁷ The WCJ's findings are supported and Kehoe has pointed us to no error of law arising from the determination that he should receive ongoing partial disability benefits, rather than total disability benefits.

Regarding whether the WCJ's failure to impose a penalty amounted to an error of law, we note that Kehoe was not prejudiced by Employer's action in unilaterally altering Kehoe's benefits where Employer continued to pay Kehoe the difference between his time-of-injury wage and the wages he was earning at the modified job, and the WCJ eventually decided, based on the record before him, that Kehoe was not entitled to more. Although we in no way approve of Employer's failure to follow proper procedure in modifying Kehoe's benefits, the law is clear that the imposition of penalties is a matter for the WCJ's discretion,

⁵ Notes of Testimony (N.T.), Testimony of Dr. Richard Kasdan, March 13, 2006, at 7.

⁶ We note that Kehoe's treating optometrist, Dr. Cakanac, also testified that Kehoe could do the type of light duty work he had been performing, even though he opined that Kehoe could not drive to get there. N.T., Testimony of Chris J. Cakanac, D.O., January 9, 2006, at 17-18.

⁷ It is interesting to observe that, in his brief here, Kehoe does not challenge the accuracy of the WCJ's finding in this regard.

Futura Agency v. Workers' Comp. Appeal Bd. (Marquez), 878 A.2d 167, 172 (Pa. Cmwlth. 2005), which he properly exercised.

Order affirmed.

BONNIE BRIGANCE LEADBETTER,
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas Kehoe,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1231 C.D. 2007
	:	
Workers' Compensation Appeal	:	
Board (Sunoco),	:	
Respondent	:	

ORDER

AND NOW, this 20th day of February 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge