IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Hillcrest Farms, Inc., Petitioner	:	
v.	:	No. 1685 C.D. 2007
	:	SUBMITTED: February 15, 2008
Workers' Compensation Appeal Board (Castaneda), Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** April 29, 2008

Employer Hillcrest Farms, Inc. petitions for review of the July 30, 2007 order of the Workers' Compensation Appeal Board (Board) that affirmed the order of the Workers' Compensation Judge (WCJ) denying employer's petition to modify and/or suspend the workers' compensation benefits of claimant Israel Castaneda. We affirm.

In February 2000, claimant sustained a back injury in the course of his employment as a farm laborer with employer for which he received workers' compensation benefits pursuant to a May 2000 notice of compensation payable. In April 2002, employer filed a petition to modify and/or suspend claimant's workers' compensation benefits, alleging that work was generally available to him as of December 14, 2001. In his answer, claimant denied all material allegations.

In support of its petition, employer *inter alia* presented the testimony of certified rehabilitation counselor Rosemary Hieronymous. She acknowledged that claimant had received only a first grade education in Mexico, had done only farming work since immigrating to the United States in 1987, did not drive, did not speak English and had physical restrictions. Nonetheless, she testified as to three jobs which she opined were suitable for claimant as they were repetitive, entry-level and capable of being learned visually: food service assistant at the Terrace restaurant at Longwood Gardens; food assembler at McDonald's and a pizza maker/short-order cook at Pizza Hut.

In October 2003, the WCJ denied employer's petition. He concluded that although claimant physically could perform the jobs at issue, they were not vocationally suitable or geographically appropriate. In so determining, the WCJ took into account claimant's extremely limited education and sole experience as a farm laborer.

On appeal to the Board, employer argued that the WCJ failed to issue a reasoned decision in violation of Section 422(a) of the Workers' Compensation Act (Act).[1] The Board agreed, remanding the matter to the WCJ with directions to resolve any conflicts between the finding that claimant was not vocationally suitable for the jobs given his farming background and limited education and Ms. Hieronymous' contrary testimony that she took those factors into account when choosing jobs for the labor market survey. The Board specifically directed the WCJ to make credibility findings with respect to Ms. Hieronymous' testimony and to give reasons for discrediting any competent evidence.

On remand, the WCJ made one additional fact-finding:

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 834.

> 2. The undersigned does not find credible Ms. Rosemary Hieronymous'[s] testimony that the three jobs offered to Claimant were all within the capabilities of someone with a first grade education who does not speak English. It is noted that no testing was done to establish Claimant's level of mental functioning. While her testimony makes the tasks seem extremely easy, the job analysis in Hieronymous 1 differs from her testimony. The tasks include placing prepared dough in pizza pans and adding the ingredients; setting the controls for the oven; and baking for a specified time. The analysis for pie maker includes: mixing pastry ingredients to make various doughs, and mixing fillings and creams. The undersigned is familiar with making pastry doughs, pizza and cooking on a grill and making sandwiches to order. The undersigned does not find they are as easy as described by the vocational expert. The undersigned finds that the Defendant did not present credible evidence to show that Claimant was vocationally able to perform the jobs.

WCJ's March 15, 2006 Decision, Finding of Fact No. 2.

The issues before us are (1) whether the Board erred in determining that the WCJ complied with its remand order directing him to resolve any conflicts between the finding that claimant was vocationally unsuitable for the jobs and Ms. Hieronymous' contrary testimony, to make credibility findings with respect to Ms. Hieronymous' testimony and to give reasons for discrediting any competent evidence; and (2) whether the WCJ issued a reasoned decision. As these issues are intertwined, we will discuss them together.

We begin by noting that the reasoned decision requirement in Section 422(a) of the Act mandates, in pertinent part, as follows:

> The workers' compensation judge shall specify the evidence upon which the workers' compensation judge relies and state the reasons for accepting it in conformity with this section. When faced with conflicting evidence,

> the workers' compensation judge must adequately explain the reasons for rejecting or discrediting competent evidence. Uncontroverted evidence may not be rejected for no reason or for an irrational reason: the workers' compensation judge must identify that evidence and explain adequately the reasons for its rejection. The adjudication shall provide the basis for meaningful appellate review.

77 P.S. § 834.

Employer argues that the WCJ's fact-finding on remand is not supported by substantial evidence and that the decision continues to be in violation of the reasoned decision requirement. It acknowledges that the WCJ made a credibility determination and gave reasons for his decision, but contends that his reasons for rejecting Ms. Hieronymous' uncontradicted vocational evidence find no support in the record and that the WCJ once again rejected uncontroverted evidence without offering adequate reasons. Employer addresses each of the WCJ's three reasons for finding claimant to be vocationally unsuitable for the three jobs.

The WCJ's first reason was that no one administered a specific test to assess claimant's level of mental functioning. Employer acknowledges that no one administered such a test, but points out that Ms. Hieronymous, who had approximately twenty years of experience in the vocational field and whom the WCJ found competent to testify, assessed claimant's mental capacity via her vocational work-up. She conducted a transferable skills analysis which took into account claimant's vocational history and education. In addition, employer points out that Ms. Hieronymous communicated claimant's personal situation to prospective employers, including the fact that he could not speak English, and targeted repetitive, entry-level positions that claimant could learn visually. Finally, employer notes that the WCJ failed to explain why testing to assess claimant's

level of mental functioning would be necessary in light of the other testing conducted and the vocational expert's focus on appropriate positions for someone like claimant.

The WCJ's second reason was that Ms. Hieronymous made the positions sound easier than that which was set forth in the job analysis forms. Employer argues that, contrary to the WCJ's finding, Ms. Hieronymous' testimony regarding the job duties was substantially similar to the written job descriptions. Employer maintains that any minimal differences could be explained by the fact that she was not reading the job analysis forms into the record.

The WCJ's third reason was that he was familiar with the job duties and that the positions were not as easy as described by the vocational expert. Employer maintains that it was improper for the WCJ to substitute his own opinion for that of the vocational expert and that there was no foundation provided of record for the WCJ's alleged personal familiarity with the job duties. *Zeigler v. Workers' Comp. Appeal Bd. (Jones Apparel Group, Inc.)*, 728 A.2d 421 (Pa. Cmwlth. 1999) (WCJ who was not qualified as an expert medical witness impermissibly substituted and relied upon her opinion to make fact-finding as to medical significance of test results.)

In response, claimant maintains that employer's appeal constitutes an improper challenge to the WCJ's credibility determinations. He concedes that a WCJ may not substitute his personal experience or knowledge for evidence, *Zeigler*, but points out that the WCJ in the present case additionally relied upon the reasoning that the jobs were vocationally unsuitable for a claimant who had only worked as a farm laborer, had only a first grade education and did not speak English. Claimant also emphasizes that the WCJ found that the job duties as orally

described by employer's vocational expert differed from their written descriptions and were not as easy as she asserted.

As for the WCJ's personal observations regarding the requirements of the respective jobs,[2] we agree that he could not substitute his expertise for that of the vocational expert. *Zeigler*. Moreover, the facts concerning the requirements of the jobs at issue are not such that they properly should have been the subject of judicial notice. *See Kashuba v. Workers' Comp. Appeal Bd. (Hickox Constr.)*, 713 A.2d 169, 172 (Pa. Cmwlth. 1998) ("[j]udicial notice is properly taken where the fact is of common and general knowledge, is authoritatively settled, and is known within the limits of the court's jurisdiction.") The WCJ's reliance upon his personal experience, while clear error, is not determinative of the result in the present case.

The WCJ also found Ms. Hieronymous' oral summaries of the jobs at issue to be at odds with the written job analysis forms. Even though there are no major discrepancies between the two, we decline to reweigh those differences and impermissibly substitute our own fact-finding for that of the WCJ. *Lehigh County Vo-Tech Sch. v. Workmen's Comp. Appeal Bd. (Wolfe)*, 539 Pa. 322, 652 A.2d 797 (1995). In addition, the WCJ discredited the vocational expert because she did not conduct a test to assess claimant's mental functioning. Having previously described in great detail the process by which the vocational expert assessed claimant's capabilities, including the transferable skills analysis,[3] the WCJ acknowledged his awareness of what already had been done to measure claimant's

[2] We disagree with employer that the WCJ did not reference the McDonald's job in his fact-finding on remand. He mentioned cooking on a grill and making sandwiches to order, which would encompass that position. Job Analysis of McDonald's Position; R.R. 131a.

[3] WCJ's October 30, 2003 Decision, Finding of Fact No. 5.

ability to perform the three jobs at issue. As fact-finder, however, the WCJ concluded that, given this individual claimant's situation, a mental functioning test also was warranted. Notwithstanding the reasoned decision requirement, it remains within the purview of the WCJ as the final arbiter of evidence to determine the weight to be accorded evidence. *Roccuzzo v. Workers' Comp. Appeal Bd. (Sch. Dist. of Phila.)*, 721 A.2d 1171 (Pa. Cmwlth. 1998). In short, while we might have found the facts differently, the WCJ's credibility determinations are binding upon us here.

Accordingly, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 29th day of April, 2008, the order of the Workers' Compensation Appeal Board in the above captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge