IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jermail Crawford,	:	
Petitioner	:	
	:	
v.	:	
	:	
Workers' Compensation Appeal	:	
Board (Four Seasons Hotel	:	
Philadelphia),	:	No. 1791 C.D. 2009
Respondent	:	Submitted: December 31, 2009

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: February 1, 2010

Jermail Crawford (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) affirming the decision of the Workers' Compensation Judge (WCJ) suspending her benefits because her loss of earning power was the result of her willful misconduct rather than the recognized work-related injury. Finding no error in the Board's decision, we affirm.

Claimant worked for Four Seasons Hotel (Employer) as a housekeeper for approximately five years. While working on December 12, 2006, she discovered a large lump on her left knee. She received medical treatment at WorkNet that same day, was diagnosed with pre-patellar bursitis, and was released

to modified duty with restrictions, including no kneeling, climbing or crawling. Claimant returned to a light-duty position in Employer's laundry room, which complied with these conditions and where she could sit or stand as needed. Claimant performed this job for several months during which time she admitted that her knee pain had resolved itself. She returned to her pre-injury, full-duty position as a housekeeper until May 11, 2007, when her knee pain flared up again and Employer again offered Claimant a light-duty position in the laundry room to accommodate her injury; however, Claimant refused to do the job because it was "too hot." She was suspended from work for one day because this refusal was a violation of the employee handbook. The following day, Claimant allegedly had a telephone conversation with a supervisor in which she again refused to do the work and used profanity. Claimant's employment was then terminated on May 13, 2007.

On May 17, 2007, Claimant filed a Claim Petition alleging that on December 12, 2006, she suffered a work-related injury in the nature of left knee pre-patellar bursitis. Employer had Claimant undergo an independent medical evaluation with Kevin Freedman, M.D. (Dr. Freedman) on August 20, 2007. Dr. Freedman determined that Claimant suffered left knee pre-patellar bursitis as a result of the kneeling required at her job, but that Claimant was capable of gainful employment with the restriction of no kneeling. As a result of this examination, Employer stipulated that Claimant had sustained left knee pre-patellar bursitis as a result of her work activities, but Employer disputed any resulting disability and filed an answer denying Claimant's allegations. Therefore, the only issue before the WCJ was whether Claimant's loss of earning power was due to disability from her work-related injury, her refusal to accept an available light-duty position, or because she was terminated for cause.

Before the WCJ, Claimant testified that during her shift on December 12, 2006, she was kneeling to clean one of her assigned bathrooms and when she stood up, she noticed a large lump on her left knee and experienced pain. She immediately informed her supervisor who referred her to a panel physician through WorkNet. The WorkNet doctor prescribed physical therapy and ibuprofen and placed Claimant on light-duty. After being off work for approximately one week, Claimant testified that she returned to a light-duty position in the laundry room in which she claimed she still had to bend and kneel. After approximately two months, Claimant returned to her full-duty job as a housekeeper until her bursitis flared up again on May 11, 2007. She initially testified that she stopped working for Employer in May 2007, because "they didn't have nothing for me to do."

On cross-examination, Claimant testified that on May 12, 2007, Employer's executive housekeeper and her supervisor, Darrien Williams (Supervisor Williams), informed her that the only light-duty position they had available was in the laundry room. She admittedly told him that it was "real hot" in the laundry room and asked if she could possibly get something to drink, but she denied refusing the job. Supervisor Williams allegedly told Claimant that because she refused to go to the laundry, she was being suspended for one day. She maintained that Employer never offered her the light-duty position in the laundry room again after May 12, 2007, but if they would have offered it, she would have accepted. Claimant repeatedly denied using profanity towards Supervisor Williams or even having a telephone conversation with him regarding her employment. Claimant initially denied receiving any unsatisfactory performance notices from Employer. However, she admitted that her signature appeared on seven notices between August 2003 and February 2007.

Employer presented the deposition testimony of Christopher Burkhardt (Mr. Burkhardt), assistant director of human resources. Mr. Burkhardt testified that on May 12, 2007, Supervisor Williams[1] informed Claimant she was being assigned to the laundry room position again because WorkNet placed her back on light-duty with the restrictions of no kneeling or squatting. Claimant allegedly told Supervisor Williams that she was not going to work in the laundry because it was too hot and he should send her home. Because this work refusal was considered insubordination and a violation of Employer's employee handbook, Claimant was suspended for one day. Mr. Burkhardt testified that on May 13, 2007, Supervisor Williams sent him an e-mail[2] stating that Claimant called him just prior to her scheduled start time and said "I'm not coming in to that f- - - - place" and "f- - - you all," and she hung up the phone. The following day, Mr. Burkhardt met with Supervisor Williams to discuss this incident, after which he terminated Claimant's employment because her profanity towards a supervisor was considered an automatic terminable offense under the employee handbook. Mr. Burkhardt testified about the verbal and written warnings and suspensions Claimant received. He also testified that Claimant's employee reviews reflected that she was counseled about her relationship with her peers, her attitude towards managers, creating a hostile work environment, and that the profanity and work refusal was the "last straw." Mr. Burkhardt stated he was familiar with the laundry room position, it fit Claimant's light-duty work restrictions because it did not

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[1] Supervisor Williams did not testify because he moved to Chicago to accept another job.

[2] On appeal, Claimant does not raise the issue that the testimony regarding Mr. Burkhardt's conversation with Mr. Williams and the email he received from him is uncorroborated hearsay testimony. Therefore, for the purpose of this opinion, we consider this testimony to be substantial evidence.

require her to kneel, crawl or climb, and it would still be available to Claimant but for her termination due to her insubordination.

Employer also presented the deposition testimony of Maxine Weeks (Manager Weeks), assistant manager of the laundry. She testified that she supervised Claimant in the laundry room from December 2006 through March 2007. Claimant's restrictions of no kneeling, squatting, crawling or climbing were communicated to Manager Weeks at that time. She testified that Claimant's light-duty position included folding towels and feeding towels and linens through the ironer, and that Claimant was not required to kneel, squat, crawl or climb in order to accomplish these duties. Manager Weeks stated that she informed Claimant she was allowed to take as many breaks as she needed, provided that she took them in the employee break room, and that she never reprimanded Claimant for doing so. Claimant never complained to her about knee pain during her employment in the laundry, and Claimant did not have any performance or disciplinary issues while she was working in the laundry.[3]

The WCJ did not find Claimant's testimony credible because she claimed she did not remember telling Supervisor Williams the laundry job was "too hot" and she was not going to do it, she denied using profanity or telling Supervisor Williams she would not work in the laundry during their phone conversation, and she initially denied receiving an unsatisfactory performance notice on May 12, 2007, or at any other time. He found that this last point was contradicted by a long history of employment problems that Claimant only

[3] Claimant has never contended that the light-duty position in Employer's laundry room does not fit the medical restrictions imposed due to her bursitis.

admitted to after being confronted with the actual notices upon which her signature appeared. The WCJ also found Mr. Burkhardt's testimony credible that Claimant was initially suspended for one day for refusing to do the laundry job and that he terminated her employment after receiving the e-mail from Supervisor Williams regarding her profanity and insubordination because this was a terminable offense. The WCJ found Manager Weeks' and Mr. Burkhardt's testimonies credible that the laundry room job was a light-duty position within Claimant's job restrictions, it did not require her to kneel, crawl or climb, and that the position would have been available to her but for her termination. The WCJ determined that Claimant's loss of earning power was the direct result of her termination for justifiable reasons due to her willful misconduct on the job and bad faith towards Employer, not because of her recognized work injury. Claimant then appealed to the Board which affirmed, and this appeal followed.[4]

Claimant raises numerous arguments on appeal;[5] however, what is truly at issue in this case is whether Claimant's benefits were properly suspended. This issue depends upon the reason for Claimant's separation from her employment – whether there was a light-duty position available to her within her

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[4] While the WCJ's order states that he denied Claimant's claim petition and suspended her benefits as of the injury date, December 12, 2006, both parties agreed that Claimant suffered a work-related injury which never resolved itself. Therefore the issue was whether her benefits should be suspended. The WCJ's order in actuality *granted* Claimant's claim petition and suspended her benefits as of December 12, 2006, because she was terminated for cause.

[5] Our review of a decision of the Board is limited to determining whether errors of law were made, constitutional rights were violated or whether the record supports the necessary findings of fact. *Ward v. Workers' Compensation Appeal Board (City of Philadelphia)*, 966 A.2d 1159 (Pa. Cmwlth. 2009).

medical restrictions and/or whether she was terminated for cause due to insubordination.

Claimant does not argue that any of the specific findings of the WCJ regarding the alleged insubordination and profanity were not based on substantial evidence but instead argues that the WCJ erred in determining Employer's witnesses were credible and that she was not. Intertwined in that argument is that the WCJ's decision does not comply with the requirement of Section 422(a) of the Workers' Compensation Act (Act)[6] that "parties to an adjudicatory proceeding are entitled to a reasoned decision."

In *Daniels v. Workers' Compensation Appeal Board (Tristate Transport)*, 574 Pa. 61, 828 A.2d 1043 (2003), our Supreme Court addressed what was required for a WCJ's decision to comply with Section 422(a) when addressing the creditability of witnesses. It stated:

> [A]bsent the circumstance where a credibility assessment may be said to have been tied to the inherently subjective circumstance of witness demeanor, some articulation of the actual objective basis for the credibility determination must be offered for the decision to be a "reasoned" one which facilitates effective appellate review.

[6] Act of February 8, 1972, P.L. 25, *as amended*, 77 P.S. §834.

Claimant contends that because the WCJ simply declared that he found the testimony of Mr. Burkhardt and Ms. Weeks to be credible and persuasive without articulating any actual objective basis for this finding, the decision is not reasoned. We disagree.

The WCJ indicated in Finding of Fact 8 that Mr. Burkhardt's testimony regarding the telephone conversation leading up to Claimant's termination was corroborated by an e-mail he received from Supervisor Williams and a subsequent conversation the two had regarding the incident. He also indicated in Finding of Fact 10 that Manager Weeks, who was in charge of the laundry room, testified that the position was indeed a light-duty position and did not require Claimant to kneel, crawl, or climb. The WCJ stated that he found the testimony of Mr. Burkhardt and Manager Weeks to be credible specifically in contrast to that of Claimant's, given her "long history of poor productivity, poor attendance, previous suspensions and insubordination." Mr. Burkhardt testified to numerous unsatisfactory performance notices incurred by Claimant, including failure to properly clean rooms, confrontations with co-workers, carelessness, and excessive absenteeism. Claimant denied ever receiving any notices until she was confronted on cross-examination. These reasons provide an actual objective basis for the WCJ's credibility determination.

As to whether the WCJ erred in finding Employer's witnesses credible, as we have stated over and over and over again, the WCJ, as the finder of fact, maintains complete authority over questions of credibility, conflicting evidence and evidentiary weight, and he or she may accept or reject the testimony of a witness, in whole or in part. *See Reyes v. Workers' Compensation Appeal Board (AMTEC)*, 967 A.2d 1071 (Pa. Cmwlth. 2009) (citing *Davis v. Workers'*

Compensation Appeal Board (City of Philadelphia), 753 A.2d 905 (Pa. Cmwlth. 2000)). We will not disturb those findings on appeal. Moreover, having explained the reason he found Employer's witnesses credible and Claimant not credible, the WCJ did not act arbitrarily or capriciously disregard the evidence in this case when he made his credibility determinations; therefore, we may not overturn them. *Leon E. Wintermyer, Inc. v. WCAB (Marlowe)*, 571 Pa. 189, 812 A.2d 478 (2002).

Finally, Claimant argues the Board erred in determining that she was not successful in her litigation in any substantial way and was not entitled to litigation costs. However, Section 440(a) of the Act allows a claimant to recover litigation costs only where he or she prevails on the matter at issue in part or in whole.[7] In *Reyes*, we addressed whether a claimant was entitled to litigation costs where the WCJ granted the claim petition and ordered Employer to pay Claimant reasonable and necessary medical expenses related to the work injury but denied indemnity benefits because any loss of earning power was due to the claimant's misconduct, not to the work-related injury. Taking the term "contested case" to mean "contested issue," we held that because that employer conceded that the

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[7] Section 440(a) provides, in relevant part, as follows:

> In any *contested case* where the insurer has contested liability in whole or in part, the employe or his dependent, as the case may be, in whose favor the matter at issue has been finally determined in whole or in part shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred for attorney's fee, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend the proceedings.

77 P.S. §996(a). (Emphasis added.)

claimant was injured but failed on the contested issue of whether he was entitled to indemnity benefits, the claimant was not entitled to counsel fees. In this case, even though Claimant prevailed on the Claim Petition, because, like in *Reyes*, Claimant failed to prevail on the contested issue of whether her misconduct caused the loss of her earning power, the Board correctly determined she was not entitled to litigation costs under the Act.

Accordingly, the order of the Board is affirmed.

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DAN PELLEGRINI, Judge

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O R D E R

AND NOW, this 1st day of February, 2010, the August 14, 2009 order of the Workers' Compensation Appeal Board at No. A09—0158 is affirmed.

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DAN PELLEGRINI, Judge