IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Helen Miles,	:	
Petitioner	:	
	:	
v.	:	No. 1855 C.D. 2007
	:	Submitted: March 20, 2008
Workers' Compensation Appeal Board	:	
(School District of Philadelphia),	:	
Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER FILED: June 18, 2008

Helen Miles petitions for review of an order entered by the Workers' Compensation Appeal Board (Board) affirming Workers' Compensation Judge Scott M. Olin's (WCJ) decision following remand that calculated Miles' pre-injury average weekly wage as $135.55 and her corresponding weekly benefit rate as $158.33. Miles also has preserved for review her challenge to an earlier decision of the WCJ that terminated her benefits as of February 2, 1999. Miles questions whether the WCJ and the Board erred in finding that she was not entitled to retroactive pay that she received from the School District of Philadelphia (District); whether the WCJ erred and abused his discretion in finding the testimony of a fact witness credible when she assertedly was not competent to testify regarding District wage and attendance records in violation of the Uniform Business Records as Evidence Act, 42 Pa. C.S. §6108 (Business Records Act); whether the WCJ failed to issue a reasoned decision that clearly and concisely states the rationale; and whether the WCJ erred in granting the termination petition.

Miles was employed by the District as a non-teaching assistant at Benjamin Franklin High School, which was the kind of position that she had held in previous years. She was paid a per diem rate of $32.94 for the first 90 days that she worked each year; after the 90th day her status would change to long-term substitute paid $480.15 per week. The increase would be retroactive to the first day that she worked, and she would receive a lump-sum payment for the increase for the first 90 days. Part of her duties included keeping the hallways free from congestion. On February 11, 1993, as Miles attempted to clear the hallway, a student in a group pulled out a gun, gave it to another student and said "shoot her." The student pointed the gun at Miles, but the Vice-Principal pulled her out of the way. Miles filed an incident report with the District, and she was taken to Hahneman Hospital where she received treatment.

Miles filed a claim petition in June 1993 alleging a psychological injury and an average weekly wage of $480.15. Dr. Timothy Michals, Miles' treating psychiatrist, testified that she suffered post-traumatic stress disorder attributable directly to the school incident and that she was not capable of returning to her pre-injury position. Cheryl LaPotin, the District's workers' compensation manager, testified that Miles had not reached 90 days by the date of injury but that she worked some days after the incident and reached 90 days in March. The District made a retroactive payment of $4370.55. The WCJ based the average weekly wage on $32.94 per day, reasoning that money that Miles received after the injury could not contribute to her pre-injury average weekly wage.

The Board affirmed, but on Miles' petition for review this Court reversed and remanded. In *Miles v. Workers' Compensation Appeal Board (School District of Philadelphia)*, 725 A.2d 851 (Pa. Cmwlth. 1999), the sole issue was

whether a retroactive payment that represented pre-injury and post-injury wages was properly excluded from the calculation of average weekly wage. The Court's decision contains several statements that the parties agreed and the WCJ found that Miles worked 90 days at some point and attained long-term substitute status and became eligible for retroactive pay of $4370.55. The Court concluded that the pay related to the full 90-day period and that it should be allocated over the full period, and it remanded for a computation.

Following remand, the WCJ stated in a decision of October 9, 2002, that the District now alleged that Miles never worked again in 1993 after the incident (as she had always stated) and never achieved 90 days and that she should not be awarded the lump-sum payment and the higher status. He concluded that the doctrine of the law of the case precluded him from reconsidering the findings regarding the 90 days. The WCJ applied the retroactive payment to the 23 weeks from the start of the school year, resulting in $190.02 in addition to the $135.55 already found for a total average weekly wage of $325.57 per week and a benefit rate of $237.50. That decision also adjudicated termination and penalty petitions. The WCJ found credible the testimony of Wolfram Reiger, M.D. that Miles had fully recovered from the effects of the incident at the time of his mental evaluation of her on February 2, 1999, and the WCJ granted termination.

On cross-appeals the Board on May 19, 2004 noted that LaPotin testified that she was mistaken before and that Miles never returned to work after the incident. It stated that the doctrine of law of the case applies only to appellate courts and that the related "coordinate jurisdiction" rule applies as between rulings by common pleas judges but that nothing prevents a judge from reconsidering his or her own ruling, citing *Farber v. Engle*, 525 A.2d 864 (Pa. Cmwlth. 1987)

(holding that where one judge overruled preliminary objections without opinion, a second judge's granting summary judgment for defendants was not improper under the circumstances). The Board noted its broad authority to grant a rehearing where the interests of justice require, citing *Cudo v. Hallstead Foundry, Inc.*, 517 Pa. 553, 539 A.2d 792 (1988), and it remanded for the WCJ to consider the evidence as to Miles' earnings and the time periods to which they were attributable. The Board concluded that substantial evidence supported the WCJ's ruling on termination.

In a September 13, 2006 decision on remand the WCJ noted that the District and Miles agreed that she never worked another day in 1993 after the incident. Stating that erroneous overpayments or unearned windfalls to claimants are disfavored, *Kiebler v. Workers' Compensation Appeal Board (Specialty Tire of America)*, 738 A.2d 510 (Pa. Cmwlth. 1999), and noting the Board's instructions, the WCJ determined that Miles was not entitled to the retroactive payment and that her average weekly wage was $135.55 and her benefit rate was $158.33. The WCJ ordered payment at that rate between February 12, 1993 and February 2, 1999, with a credit for all indemnity payments made. On Miles' appeal the Board stated that the WCJ found the new evidence relating to what Miles was entitled to be paid to be credible. It recognized that an average weekly wage may be calculated incorrectly, citing *Fahringer, McCarty & Grey, Inc. v. Workmens' Compensation Appeal Board (Green)*, 529 A.2d 56 (Pa. Cmwlth. 1987).[1] Stating that it was not necessary to determine whether the District was entitled to recoup any overpayment, the Board determined that it would be error to permit an

[1]In *Fahringer* the Court held that where benefits were paid under an incorrect average weekly wage for six years, the Court would permit modification of the existing supplemental agreement and recoupment of some $5000 under the referee's statutory authority to modify existing agreements, but not the remainder of the total $18,000 mistakenly paid.

overpayment to serve as the basis for average weekly wage. It affirmed on that point and noted that other challenges had been preserved.[2]

The Court turns first to Miles' last issue regarding the WCJ's error in granting the termination petition. She notes that an employer proceeding on a termination petition has the burden of proving that all disability related to the compensable injury has ceased. *Central Pennsylvania Community Action, Inc. v. Workmen's Compensation Appeal Board (Probeck)*, 520 A.2d 112 (Pa. Cmwlth. 1987). If a claimant remains disabled, the employer must show a lack of causal connection between the disability and the work-related injury. *Iacono v. Worker's Compensation Appeal Board (Chester Housing Authority)*, 624 A.2d 814 (Pa. Cmwlth. 1993), *aff'd*, 536 Pa. 535, 640 A.2d 408 (1994). In *Lewis v. Workers' Compensation Appeal Board (Giles & Ransome, Inc.)*, 591 Pa. 490, 919 A.2d 922 (2007), the court explained that an employer seeking to terminate benefits must present medical evidence of a change in physical condition and that it follows that where there have been previous petitions to modify or terminate benefits, the employer must demonstrate a change since the last disability determination.

Miles submits that Dr. Reiger's opinions are not sufficient to meet the first requirement of showing a change in mental condition. It was his opinion that Miles experienced a mild to moderate post-traumatic stress disorder as a result of

[2]The Court's review of the Board's decision is limited to determining whether there was an error of law or a constitutional violation, whether any practice or procedure of the Board was violated and whether the necessary findings of fact are supported by substantial evidence in the record. *Clear Channel Broadcasting v. Workers' Compensation Appeal Board (Perry)*, 938 A.2d 1150 (Pa. Cmwlth. 2007). A WCJ has complete authority over questions of credibility, conflicting medical evidence and evidentiary weight, and the WCJ may accept or reject the testimony of any witness in whole or in part. *Canavan v. Workers' Compensation Appeal Board (B & D Mining Co.)*, 769 A.2d 1250 (Pa. Cmwlth. 2001).

the February 1993 incident, that she suffered a similar disorder two years earlier, that she currently experienced adjustment disorder with mixed emotional features, depression and anxiety as a result of fear of going blind due to complications of diabetes and that she had long since fully recovered from the disorder associated with the 1993 incident. He agreed that she should not return to an environment about which she is phobic, such as working with students. Miles argues that Dr. Reiger's testimony is similar to that of the first employer expert to testify in the claim proceeding. The District does not argue this point separately. The Board determined in its decision of May 19, 2004 that the WCJ's decision was supported by substantial evidence. Dr. Reiger testified that Miles had fully recovered from her psychiatric condition related to the 1993 incident and that her other conditions are not work related. The WCJ credited this testimony, which satisfied the District's burden. The Court agrees that the WCJ acted within his authority in crediting the testimony, which indicates a change in condition and was sufficient.

Miles argues first that the decision that she was not entitled to retroactive pay violates the doctrine of the law of the case. When the matter was heard by this Court before in *Miles*, the Court reversed the decision to compute Miles' average weekly wage based only on the per diem payments and remanded for a determination of average weekly wage. The WCJ followed the Court's instructions and recalculated an average weekly wage and a new benefit rate of $237.50 per week. Miles quotes from a discussion of law of the case in *Burke v. Pittsburgh Limestone Corp.*, 375 Pa. 390, 394 - 395, 100 A.2d 595, 598 (1953) (quoting *Reamer's Estate*, 331 Pa. 117, 122 - 123, 200 A. 35, 37 - 38 (1938)):

> "The doctrine of 'the law of the case' is that, when an appellate court has considered and decided a question submitted to it on appeal, it will not, upon a subsequent appeal on another phase of the same case, reverse its

> previous ruling even though convinced that it was erroneous … It is not, however, inflexible. It does not have the finality of the doctrine of *res judicata*.… The rule of 'the law of the case' is one largely of convenience and public policy, both of which are served by stability in judicial decisions … Thus there is an abundance of authority to the effect that where a prior decision is palpably erroneous, it is competent for the court, not as a matter of right but of grace, to correct it upon a second review where no wrong or injustice will result thereby … and where, following the decision on a former appeal, the court in another case has laid down a different rule either expressly or by necessary implication overruling the previous decision[.]"

Miles asserts that there were no intervening changes in controlling law or substantial changes in facts or evidence and that the prior holding was not clearly erroneous with the exception of the finding that Miles continued to work after the date of her injury. The finding was in error because it was based on LaPotin's testimony, which Miles continues to challenge as uncorroborated hearsay, although she continues to argue also that the retroactive pay that she received was not paid in error.[3] She contends that this Court's remand order is the law of the case.

Miles' second argument is closely related. She maintains that the WCJ erred and abused his discretion in finding the testimony of LaPotin credible because she was not competent to testify with respect to the District's wage and

[3]Miles offers a calculation of the $4370.55 retroactive pay payment that she received from the District as follows: The difference between $96.083 per day (full-time rate of pay for one day) and the per diem rate of $32.94 is $63.143 per day. Miles worked 54 days at the Benjamin Franklin High School during the appropriate time frame, and $3409.72 was allocated to making up that difference. In addition, Miles would have received $960.83 to fully compensate her for the Thanksgiving and Christmas holidays. Adding the two amounts results in the $4370.55 that was paid. Miles further asserts that it is obvious that the entire lump-sum retroactive payment should be allocated to the thirteen weeks prior to February 11, 1993, such that she would have had total earnings of $6161.77 in the last quarter and an average weekly wage not less than $473.98.

attendance records in violation of the Business Records Act. In the original adjudication, LaPotin testified that Miles worked after the date of injury and that she had not attained the status of full-time substitute at that time. On remand, using the same records, LaPotin testified that Miles never returned that year and that the retroactive pay was remitted in error, and the WCJ then again determined average weekly wage to be $135.55. Miles argues that both findings were not supported because they are based on the testimony of LaPotin who testified in reliance upon hearsay documentation generated by the District's payroll system.

Miles acknowledges that she did not object to the utilization of those records during the initial phase of this claim, but she now submits that they are not competent evidence in and of themselves because LaPotin did not provide appropriate testimony to justify their admission as business records under Section 6108(b). She notes the general guidelines concerning the use of hearsay to support findings in administrative proceedings as set forth in *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Cmwlth. 1976): hearsay evidence, properly objected to, is not competent evidence to support a finding of fact, but hearsay evidence admitted without objection will be given its natural probative effect and may support a finding of fact if it is corroborated by any competent evidence in the record, although a finding based solely on hearsay will not stand. Miles states that LaPotin's testimony was based on her understanding of the payroll records and further that the "absence records" attached to her deposition were never corroborated by any competent evidence. LaPotin admitted that she did not know who was responsible for preparing payroll records at Benjamin Franklin High School or if the District had absence records reflecting that employees were working when they were not.

For information to be admissible under the Business Records Act, it is essential that there be no lack of trustworthiness with regard to its source or the method of its preparation. Miles cites *Ganster v. Western Pennsylvania Water Co.*, 504 A.2d 186 (Pa. Super. 1985), for factors to be weighed, including whether there is motive or opportunity to prepare inaccurate records, the period of delay prior to preparation, the nature of the information recorded and whether there is systematic checking. She contends that LaPotin's testimony is not more trustworthy than that condemned in *Pertile v. Workmen's Compensation Appeal Board (Constr. Eng'g Consultants, Inc.)*, 546 Pa. 569, 687 A.2d 367 (1997). There a vocational expert had been permitted to testify that a representative of a particular employer said that there was not an employment application on file for the claimant, although on the second contact it was said that applications had been discarded, and the Supreme Court rejected the testimony as classic hearsay. Miles regards LaPotin's testimony as being analogous because it was based on "absence records" derived from reporting of absences to a supervisor or designee then to the District payroll department. Even if the requirements of the Business Records Act are met, it merely permits introduction of the records, not testimony concerning the contents. *See In re Sanders Children*, 454 Pa. 350, 312 A.2d 414 (1973).

The District first notes in response that whether a document should be admitted under the business records exception to the hearsay rule is within the discretion of the trier of fact provided that the discretion is exercised within the Business Records Act. *Toth v. Workers' Compensation Appeal Board (USX Corp.)*, 737 A.2d 838 (Pa. Cmwlth. 1999). Under the Business Records Act, a record is competent evidence "if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course

of business at or near the time of the act" and if, in the opinion of the tribunal, "the sources of information, method and time of preparation were such as to justify its admission." Section 6108(b). LaPotin was the District's workers' compensation manager for fifteen years; she identified the records as payroll records and described how such records are prepared. Further, it is undisputed that Miles never objected to the admission of these records. Even assuming *arguendo* that the records were improper hearsay, Miles has already waived her right to object by failing to preserve any such objection from a deposition in writing as required by 34 Pa. Code §131.66 on pain of waiver. Under *Walker*, the WCJ found LaPotin's testimony competent to corroborate the records.

The Court agrees with the District that there is no error in the admission of the records. First, the failure of Miles to preserve in writing any challenge to these records introduced at deposition constitutes waiver. 34 Pa. Code §131.66(b); *Yezovich v. Workmen's Compensation Appeal Board (USX Corp.)*, 601 A.2d 1341 (Pa. Cmwlth. 1992). Both sides' reliance on *Walker* is misplaced. The Business Records Act as a statutory exception concerns records that by their nature are hearsay and provides for their admissibility if certain specified conditions are met. If records meet the conditions, they are not properly subject to a hearsay objection nor are they considered to be hearsay admitted without objection under *Walker* that require other corroboration in the record. Here the WCJ's discretion in accepting that LaPotin had sufficient knowledge of the manner of preparation of payroll and absence records will not be disturbed.

The Court determines that the Board plainly erred in concluding that the law of the case doctrine did not apply. In *Commonwealth v. Starr*, 541 Pa. 564, 574, 664 A.2d 1326, 1331 (1995), the Supreme Court explained that among the

related but distinct rules that make up the law of the case doctrine are that: "(1) upon remand for further proceedings, a trial court may not alter the resolution of a legal question previously decided by the appellate court in the matter…." The WCJ was correct on the first remand that he was bound by the law of the case to the determinations made by this Court on the first appeal in *Miles*.

In this case there is no dispute that the District paid Miles $4370.55 as a retroactive payment. Although the District has asserted from the time of LaPotin's redirect examination on remand that Miles was not entitled to this payment, that conclusion is not foregone. In *Hannaberry HVAC v. Workers' Compensation Appeal Board (Snyder)*, 575 Pa. 66, 834 A.2d 524 (2003), a young man worked part-time while in school, then started full-time at much higher wages but suffered a devastating injury after completing only one quarter. The Supreme Court held that the statutory average weekly wage provisions did not address this paradigm and permitted "fair ascertainment" of his average weekly wage at the higher rate. In the present case, the District may well have chosen deliberately to treat Miles, who had completed 90 days in previous years but who was prevented from completing 90 days by the work injury, as if she were entitled to retroactive payment. In any event, the District made a lump-sum retroactive payment, and it did not raise a claim until years later that there may have been an error. The Court does not perceive a compelling reason for deviating from its previous holding in this matter in contravention of the doctrine of the law of the case.

Finally, Miles argues that the WCJ did not issue a reasoned decision because it was based largely upon the testimony of LaPotin, which Miles regards as inherently contradictory and insufficiently informed as to many details of the case. The Court does not regard the WCJ's decision as insufficiently reasoned.

Treating this matter as an appeal from the WCJ's first decision on remand, the Court must reverse and remand in one regard. The Court's order in *Miles* was to allocate the $4370.55 paid as applicable to the full 90 days. The Court remands for a final determination of average weekly wage treating the retroactive payment in this manner, with termination as of February 2, 1999 and with credit to the District for all indemnity payments made. Accordingly, the order of the Board is reversed in part, and this matter is remanded to the WCJ for a new calculation.

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DORIS A. SMITH-RIBNER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Helen Miles, Petitioner	:	
v.	:	No. 1855 C.D. 2007
Workers' Compensation Appeal Board (School District of Philadelphia), Respondent	:	

O R D E R

AND NOW, this 18th day of June, 2008, the order of the Workers' Compensation Appeal Board is affirmed to the extent that it affirmed the WCJ's decision to grant the petition for termination, and the order otherwise is reversed. This matter is remanded to the Board for remand to the Workers' Compensation Judge for a calculation of average weekly wage based upon an allocation of the $4370.55 retroactive payment made by the School District of Philadelphia to Helen Miles in accordance with the foregoing opinion.

Jurisdiction is relinquished.

DORIS A. SMITH-RIBNER, Judge