IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Julian Devereaux, Petitioner	:	
v.	:	No. 1902 C.D. 2011
Workers' Compensation Appeal Board (Waste Management of Bristol), Respondent	:	Submitted: February 17, 2012

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: April 13, 2012**

Julian Devereaux (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) affirming a decision of a Workers' Compensation Judge (WCJ) that denied his claim and penalty petitions. Specifically, he argues the WCJ capriciously disregarded competent evidence and did not issue a reasoned decision. Upon review, we affirm.

I. Background

In June 2008, Claimant began working for Waste Management of Bristol (Employer) as a residential trash collector. In late January 2009, following a multi-day absence, Claimant reported suffering a work injury on November 6, 2008. According to Claimant, he injured his back several months earlier while working with Kevin Wooden (Co-Worker). After a brief meeting, Employer sent

Claimant to a physician for examination. Thereafter, at the physician's direction, Employer placed Claimant on light duty work.

A few weeks later, Employer informed Claimant it would not accept liability for his injury. Furthermore, Employer told Claimant light duty work was no longer available, and he should return to his pre-injury job. Believing he was physically unable to perform his pre-injury work duties, Claimant terminated his employment with Employer.

Within a few days, Claimant filed a claim petition and a penalty petition. In his penalty petition, Claimant alleged he informed Employer about his injury shortly after it occurred, but Employer failed to act as required. Employer denied Claimant's allegations, and a hearing ensued before the WCJ.

During the WCJ's proceedings, Claimant submitted the deposition testimony of Dr. William T. Ingram, D.O. (Claimant's Physician), and testified on his own behalf. In opposition, Employer presented the deposition testimony of Timothy Andorn, Employer's general manager for the division (General Manager), Co-Worker, and Dr. Scott A. Rushton, M.D. (Employer's Physician).

Claimant testified his job with Employer required him to climb in and out of a garbage truck, and empty trash cans along a residential route for approximately 10 hours per day, six days a week. He further testified that he experienced job-related back pain beginning in late October and that he suffered a distinct injury on November 6. According to Claimant, after his injury he went to

his family physician for "aches and pains" in his lower back and left leg. Reproduced Record (R.R.) at 20a. At that time, Claimant began taking narcotic medication to treat the pain, but he was not placed on any work restrictions.

Claimant testified that following his doctor visit he informed General Manager that he suffered from severe back pain and that he was treating it with prescribed narcotic medication. In part, Claimant spoke to General Manager to avoid potential trouble from testing positive for narcotics on future drug screenings. Claimant further stated he informed General Manager the pain was a result of his job.

From November 2008 through January 2009, Claimant continued to perform his regular job and seek treatment on his own. During that time, Claimant visited three different doctors, and received numerous treatments and diagnostic tests. At no time did any of the physicians suggest placing Claimant on work restrictions.

Then, in late January 2009, Claimant missed several days of work. Claimant testified that during his absence he was in extreme pain, he was without medication, and he was physically unable to work. Upon his return, Claimant reported suffering a work injury to General Manager. Employer initially gave him light duty work, but Claimant terminated his employment when that ended. According to Claimant, he still suffers back pain, and is unable to return to work.

Claimant's Physician testified he began treating Claimant in early February 2009. Furthermore, he testified that after approximately 15 visits, and various treatments and tests, he diagnosed a multi-level disc herniation in the lumbar spine, a left radiculopathy at L5, and musculoskeletal and ligamentous strain and sprain of the lumbar spine. Additionally, Claimant's Physician opined that at the time of his injury Claimant had a degenerative spinal condition.

Based on the history he received from Claimant, Claimant's Physician believed Claimant's injury occurred in the course and scope of his employment in November 2008. Furthermore, he testified Claimant's injury was not the result of his degenerative spinal condition, but resulted from an isolated traumatic event. Additionally, Claimant's Physician conceded that Claimant conceivably suffered the herniated discs prior to working for Employer, and that it was possible the injury only became symptomatic because of the job's physical demands.

By deposition, General Manager testified about his two meetings with Claimant. According to General Manager, at the first meeting Claimant advised that he intended to use prescription narcotics to treat his lower back pain. He also testified that he asked Claimant directly if he had a work injury to report, and that Claimant told him he did not have a work injury.

General Manager stated he next spoke to Claimant in late January 2009 after Claimant missed several days of work. At the second meeting, Claimant reported being injured while working with Co-Worker in November 2008. General Manager further testified Claimant alleged he reported his injury at

the first meeting. According to General Manager, Claimant denied ever being asked whether his pain was from a work injury. Contrary to Claimant's account, General Manager testified that Co-Worker denied witnessing an injury to Claimant. Additionally, General Manager checked Claimant's truck's route log for November 6, and verified that no injuries were reported on that day.

Additionally, Employer presented the testimony of Co-Worker. In pertinent part, Co-Worker testified he worked side-by-side with Claimant on a residential garbage truck route on November 6, 2008. Furthermore, Co-Worker testified he did not see Claimant get injured. Moreover, according to Co-Worker, Claimant never told him an injury occurred. As such, he testified he was "dumbfounded" by Claimant's assertion at the January meeting that he witnessed Claimant get hurt on the job. R.R. at 138a.

Employer also presented the medical opinion of Employer's Physician. This testimony is significant in Claimant's appeal. Employer's Physician testified Claimant's injury was consistent with an acute lumbar sprain and strain. Based on Claimant's reported medical history and available records, he opined Claimant likely experienced recurring pain from the preexisting degeneration of his spine, but he ultimately suffered an isolated injury. Furthermore, Employer's Physician opined Claimant's job responsibilities could cause an acute lumbar sprain and strain, but Claimant did not describe to him the specific event at which it occurred.

The WCJ found Claimant's testimony about whether his injury was work related not credible. WCJ Op., 5/28/10, Finding of Fact (F.F.) No. 20. To the contrary, the WCJ credited the testimony of General Manager and Co-Worker on the injury-at-work issue and on the issue of what transpired at the two meetings. F.F. Nos. 23-24. Also, the WCJ found Employer's Physician's opinions credible and persuasive, and accepted them over Claimant's Physician's testimony where they conflicted. F.F. Nos. 21-22.

As a result, the WCJ determined Claimant did not establish he suffered an injury in the course and scope of his employment with Employer. Thus, the WCJ denied Claimant's claim and penalty petitions. Claimant appealed.

On appeal, the Board affirmed. The Board concluded that the WCJ's findings were supported by substantial evidence, and that her credibility determinations were not arbitrary or capricious. Furthermore, the Board reasoned, because the WCJ denied Claimant's claim petition, she did not err in denying his penalty petition or his request for attorney fees. Claimant petitions for review.

II. Issues

Claimant argues the WCJ arbitrarily and capriciously disregarded the testimony of Co-Worker and Employer's Physician, which if either is considered, establishes Claimant sustained a work injury. Moreover, Claimant contends the WCJ did not render a reasoned decision because she failed to reconcile the credited testimony of Co-Worker and Employer's Physician, which supported granting his claim petition, with the decision to deny benefits.

III. Discussion

In workers' compensation proceedings, the WCJ is the ultimate finder of fact. Williams v. Workers' Comp. Appeal Bd. (USX Corp.-Fairless Works), 862 A.2d 137 (Pa. Cmwlth. 2004). As fact-finder, matters of credibility and evidentiary weight are within his exclusive province. Id. Moreover, the WCJ is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part. Id.

This Court's review of a Board determination is limited to considering whether there was a violation of constitutional rights, an error of law was committed, or a violation of Board procedures occurred, and whether the necessary findings of fact were supported by substantial evidence. Lehigh Cnty. Vo-Tech Sch. v. Workmen's Comp. Appeal Bd. (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995). Furthermore, where the issue is properly raised, this Court will review whether the WCJ capriciously disregarded material, competent evidence. Leon E. Wintermyer, Inc. v. Workers' Comp. Appeal Bd. (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002). A capricious disregard occurs when a WCJ deliberately ignores competent evidence. Capasso v. Workers' Comp. Appeal Bd. (RACS Assocs., Inc.), 851 A.2d 997 (Pa. Cmwlth. 2004). Thus, this standard generally assumes a more visible role in our review of "negative findings and conclusions." Diehl v. Unemployment Comp. Bd. of Review, 4 A.3d 816, 824 (Pa. Cmwlth. 2010), appeal granted in part, __ Pa. __, 20 A.3d 1192 (2011).

Claimant argues Co-Worker's testimony corroborated his testimony and provided credible evidence that he suffered a work injury. Specifically,

Claimant contends his Co-Worker's testimony regarding Claimant's complaints of muscle soreness supported his account of his injury. See R.R. at 140a. Claimant therefore asserts the WCJ capriciously disregarded portions of Co-Worker's otherwise credited testimony. See R.R. at 153a.

Before considering Co-Worker's testimony, we note both Claimant's Physician and Employer's Physician testified Claimant's injury was not consistent with a recurring trauma; rather, it was consistent with a superimposed acute trauma. See R.R. at 65a, 86a. Furthermore, while both physicians acknowledged Claimant had a degenerative spinal condition, neither opined such condition, or a repetitive aggravation of such condition, caused his alleged work injury. See R.R. at 72a, 86a. Therefore, the WCJ considered Co-Worker's testimony to determine whether he observed Claimant suffer an acute trauma while working.

On that issue, Co-Worker testified that Claimant complained of muscle soreness in the fall of 2008, and he took medication for his pain. R.R. at 138a. Co-Worker further testified he attributed Claimant's soreness to the physical nature of the job, rather than to a discrete injury. R.R. at 137a-38a. In part, Co-Worker reached this conclusion because Claimant never told him he was injured at work. R.R. at 140a-141a. Moreover, despite working side-by-side with him from October through January, including on November 6, Co-Worker testified he was "dumbfounded" to learn Claimant alleged suffering a work injury. R.R. at 138a. Therefore, although Co-Worker testified the physical demands of Claimant's job could cause some soreness and pain, he consistently testified he did not witness Claimant suffer an acute injury at work. R.R. at 140a. Thus, the WCJ did not

capriciously disregard Co-Worker's testimony. Instead, the WCJ considered each of Co-Worker's statements within its context. As such, Claimant's argument is meritless.

Additionally, Claimant asserts the WCJ did not render a reasoned decision as required by Section 422(a) of the Workers' Compensation Act (Act).[1] First, Claimant contends the WCJ erred in not explaining why Employer's Physician was credible. Next, accepting that Employer's Physician testified credibly, Claimant asserts the WCJ erred by denying Claimant benefits after Employer's Physician testified Claimant suffered a work injury. Claimant argues this irreconcilable reasoning cannot support a reasoned decision.

First, we address whether the WCJ provided a proper explanation for why she credited Employer's Physician's medical opinion. Section 422(a) of the Act, requires a WCJ, when faced with conflicting testimony, to state her reasons for rejecting competent evidence. Daniels v. Workers' Comp. Appeal Bd. (Tristate Transp.), 574 Pa. 61, 828 A.2d 1043 (2003). Such reasoning shall "provide the basis for meaningful appellate review." 77 P.S. §834. Where a WCJ accepts a witness's testimony by deposition, the WCJ must articulate an objective basis for his credibility determination. Daniels.

Here, Employer Physician testified by deposition. The WCJ stated she found Employer's Physician credible because his opinion was based on a more complete review of Claimant's medical records than Claimant's Physician's

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

opinion. F.F. No. 21-22. As such, the WCJ provided a sufficient objective reason for crediting Employer's Physician's testimony; therefore, she rendered a reasoned decision as to this issue. See Daniels.

Next, we consider whether the WCJ erred in reaching a conclusion on the work-relatedness of Claimant's injury that was contrary to Employer's Physician's credited medical opinion. Where the work-relatedness of an injury is not obvious, a Claimant must establish causation by unequivocal medical testimony. Albert Einstein Healthcare v. Workers' Comp. Appeal Bd. (Stanford), 955 A.2d 478 (Pa. Cmwlth. 2008). "[M]edical causation testimony is not rendered equivocal because it is based on the medical expert's assumption of the truthfulness of the information provided; however, the supposed facts forming the basis of that determination must be proven by competent evidence and accepted as true by the [WCJ]." Somerset Welding & Steel v. Workmen's Comp. Appeal Bd. (Lee), 650 A.2d 114, 118 (Pa. Cmwlth. 1994); see also Newcomer v. Workmen's Comp. Appeal Bd. (Ward Trucking Corp.), 547 Pa. 639, 692 A.2d 1062 (1997).

Here, Employer's Physician opined Claimant suffered an acute lumbar strain and sprain, which he believed to be work-related based solely on Claimant's account of the injury. R.R. at 88a. However, the WCJ rejected Claimant's explanation of how his injury occurred. F.F. No. 20. Therefore, although the WCJ credited Employer's Physician's opinion as to Claimant's diagnosis, his opinion on causation was based on a rejected factual predicate. See Pa.SSJI (Civ) 4.80 (4th ed.). In such a circumstance, the WCJ was not compelled to base a finding on that part of the testimony. See Newcomer. As such, the WCJ

findings are consistent and provide a reasoned decision. Thus, we reject Claimant's argument.

Furthermore, the Board properly denied Claimant's penalty petition and unreasonable contest claim. Pursuant to Section 435(d)(i) of the Act, 77 P.S. §991(d)(i), a claimant may not be awarded penalties for an employer's violation of the Act where the claimant is not first awarded benefits upon which penalties can be assessed. Cozzone v. Workers' Comp. Appeal Bd. (PA Mun./E. Goshen Twp.), __ A.3d __ (Pa. Cmwlth., No. 664 C.D. 2011, filed January 5, 2012). Likewise, a claimant can only recover attorney fees for an unreasonable contest under Section 440(a) of the Act, 77 P.S. §996(a), if the claimant is first successful in establishing a right to benefits. Gumm v. Workers' Comp. Appeal Bd. (J. Allan Steel), 942 A.2d 222 (Pa. Cmwlth. 2008). As Claimant was not successful in litigating his claim petition, Claimant is likewise not entitled to a penalty award or attorney fees. Thus, his argument is meritless.

Accordingly, we affirm.

ROBERT SIMPSON, Judge

Judge McCullough did not participate in the decision in this case.

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O R D E R

AND NOW, this 13th day of April, 2012, the order of the Workers' Compensation Appeal Board is **AFFIRMED**.

ROBERT SIMPSON, Judge