IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Reed, deceased, Donna Palladino, Executor of the Estates of Joseph Reed and Alice Reed deceased,	:	
Petitioners	:	
v.	:	No. 879 C.D. 2014
	:	Submitted: November 26, 2014
Workers' Compensation Appeal Board (Allied Signal, Inc. and it's successor in interest Honeywell, Inc. and Travelers Insurance Co.),	:	
Respondents	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION BY
SENIOR JUDGE COLINS **FILED: April 21, 2015**

Donna Palladino (Claimant), Executrix of the Estates of Joseph Reed and Alice Reed, deceased, petitions for review of the May 2, 2014 order of the Workers' Compensation Appeal Board (Board) that affirmed the decision and order of the Workers' Compensation Judge (WCJ). The WCJ dismissed Claimant's Review, Modification and Reinstatement Petitions under the Pennsylvania Workers' Compensation Act (Act),[1] because Claimant failed to disclose to Allied Signal, Inc., and its successor in interest Honeywell, Inc., and Travelers Insurance

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§ 1-1041.4, 2501-2708.

Company (Employer) the monetary amount received in a third-party settlement.[2] For the reasons that follow, we affirm the order of the Board.

By way of background, this Court previously issued an unpublished decision *Reed v. Workers' Compensation Appeal Board (Allied Corporation and Travelers Insurance Co.*, (Pa. Cmwlth., No. 688 C.D. 2006, filed April 4, 2007) (*Reed I*), which held, *inter alia*, that WCJ Seelig did not err in suspending partial benefits for the closed period of June 27, 1985 through November 29, 1990, until Claimant disclosed the amount of monies recovered in the third-party tort action. (*See also* February 25, 2004 WCJ Decision, Finding of Fact (F.F.) ¶28, Conclusion of Law (C.L.) ¶6.) Claimant petitioned for allowance of appeal of *Reed I*, which our Supreme Court denied. *Reed v. Workers' Compensation Appeal Board (Allied Corporation and Travelers Insurance Co.*, 944 A.2d 759 (Pa. 2007) (order denying petition for allowance of appeal)). *Reed I* thoroughly reviewed the history and background of this case and we will not do so again beyond the following quotation from *Reed I*:

> On or about July 31, 1985, [Joseph Reed] filed a Claim Petition alleging he sustained a work-related occupational disease in the nature of lung disease, shortness of breath, including, but not limited to, asbestosis on June 27, 1985, while in the course and scope of his employment as a pipe fitter for [Employer]. Employer filed a late answer denying the allegations. In a Decision and Order circulated February 18, 2004, the WCJ granted [Joseph Reed's] Claim Petition after finding Employer failed to file a timely answer. However, the WCJ suspended benefits as of November 29, 1990 after finding [Joseph Reed] failed to follow through on work that was available to him within his restrictions as of that date.

[2] Counsel for Claimant was counsel in the prior workers' compensation proceedings and in the Third Party Tort Action discussed in this opinion.

Reed I, (Pa. Cmwlth., No. 688 C.D. 2006, filed April 4, 2007) slip op. at 2-3. Not long after the conclusion of *Reed I*, Claimant filed the petitions at issue in the instant matter. Following a series of hearings, the WCJ issued a decision and order on January 27, 2012 dismissing Claimant's petitions. (January 27, 2012 WCJ Decision and Order (2012 WCJ Decision).)

In the January 27, 2012 decision, the WCJ found that Claimant "has consistently denied that any recovery was obtained." (2012 WCJ Decision, F.F. ¶5.) The WCJ did not find Claimant credible. (*Id*. F.F. ¶6.) The WCJ found that Claimant's testimony that her parents Joseph and Alice Reed had resided together until Joseph Reed was admitted to a nursing home in 2004 was in direct conflict with Alice Reed's will, which stated that she and Joseph Reed had been separated for over thirty (30) years. (*Id*.) Due to this conflict, the WCJ found that Claimant's entire testimony was called into question, "particularly her responses to questions concerning the Third Party Recovery," including her testimony that she had no knowledge of any recoveries and that she had shredded all records for her mother's estate and assumed her mother had done the same for her father's estate. (*Id*.)

The WCJ also found that the Joint Tort Release executed by Joseph and Alice Reed releasing Owens, Illinois Corporation, and others from liability "for the sole consideration of $1.00, and other valuable considerations to them in hand paid," established that the 1985 Court of Common Pleas case was settled, but failed to establish the amount of the settlement or Third Party Recovery. (*Id*. F.F. ¶7.) The WCJ found the testimony of Claimant's counsel's former and current secretaries credible, but only to the extent that neither secretary had any

information to offer, stating that their testimony was credible as with "any good secretary she sees nothing and hears nothing." (*Id*. F.F. ¶¶8-9.)

Employer presented the testimony of Eric Kadish, Esquire, an employee of Maron, Marvel, Bradley and Anderson, the law firm representing the defendants in the Third Party Tort Action. (*Id*. F.F. ¶10.) Mr. Kadish was not personally involved in the Third Party Tort action. (*Id*. F.F. ¶10, C.L. ¶4.) The WCJ summarized Mr. Kadish's testimony as follows:

> He testified that there was a group settlement involving six [c]laimants in 1992. He testified that on behalf of Owens Illinois, the Reed File indicated that there was a settlement with [Claimant's counsel] on behalf of Mr. Reed, and a number of other [of Claimant's counsel's] clients. The witness further went on to present a Release signed by Mr. Reed for the amount of $1.00, and testified that it was common practice in asbestos litigation for all releases to be in the amount of $1.00 "and or other consideration" and frequently more than a $1.00 was involved, with each individual plaintiff getting different amounts. The common practice was in group settlements; the division of the funds was left to the discretion of [c]laimant's attorney with the understanding that all clients consented. In this group, there were six plaintiffs.

(*Id*. F.F. ¶10.) The WCJ found Mr. Kadish's testimony credible and stated "I overrule all objections to this testimony, and find as a fact that Mr. Reed received something as part of a group settlement." (*Id.* F.F. ¶ 10, C.L. ¶4.) In addition to Mr. Kadish's testimony, Employer submitted the docket entries of the Third Party tort action, which demonstrated that the action was settled after five (5) days of trial, but which the WCJ found "unfortunately are of no help in determining the amount of settlement." (*Id*. F.F. ¶11.) Employer also submitted a letter addressed to Claimant's counsel that sought the amount of the Third Party Recovery so that

the workers' compensation benefits owed to Claimant could be calculated. (*Id*. ¶12.)

As a result of the evidence submitted by both parties, and based on the findings of fact, the WCJ concluded that WCJ Seelig's February 25, 2004, decision and order placed the burden on Claimant to establish the amount of the Third Party Recovery, that Claimant could not shift the burden of proof onto Employer by filing the Petitions at issue, and that Claimant had failed to carry the burden by accounting for the monies received as a result of settling the Third Party Tort Action. (*Id*. C.L. ¶¶2-5.) Claimant appealed the WCJ's decision and order to the Board and the Board affirmed the WCJ in a May 2, 2014 decision and order. Claimant petitioned this Court for review of the Board's order. [3]

Claimant raises a number of issues on appeal, which can be summarized as follows: (i) the WCJ's findings of fact are not supported by substantial evidence; (ii) the WCJ demonstrated a capricious disregard of competent evidence; (iii) the WCJ failed to issue a reasoned decision; and (iv) the WCJ erred by placing the burden of proof on Claimant to demonstrate that no third-party monies were recovered for purposes of subrogation under Section 319

[3] This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, board procedures violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704; *ICT Group v. Workers' Compensation Appeal Board (Churchray-Woytunick)*, 995 A.2d 927, 930 n.4 (Pa. Cmwlth. 1995). Substantial evidence is "such relevant evidence as a reasonable mind might accept to support a conclusion." *Ryan v. Workmen's Compensation Appeal Board (Community Health Services)*, 707 A.2d 1130, 1134 (Pa. 1998). In addition, where raised, we review for capricious disregard of evidence. *Leon E. Wintermyer, Inc., v. Workers' Compensation Appeal Board (Marlowe)*, 812 A.2d 478, 487 (Pa. 2002).

of the Act.[4] 77 P.S. § 671. Although raised separately, Claimant's individual issues present variations on a single argument: the evidence supported the conclusion that Claimant received a nominal $1.00 for settling the Third Party Tort Action and the WCJ erred by concluding otherwise.

Employer contends that the Modification, Reinstatement and Review Petitions that Claimant filed were nothing more than, "a conspicuously contrived effort to overturn an earlier February 18, 2004 suspension order by WCJ Seelig, which had been affirmed by every available appellate body including the [Pennsylvania] Supreme Court." (Employer's Brief at 9.) Simply put, Employer argues that the issues raised by Claimant are without merit and the Board should be affirmed.

Initially, we address Claimant's argument that the WCJ erred by placing the burden on Claimant to establish the amount of the Third Party Recovery. Claimant argues that under Section 319 of the Act, Employer has the burden to establish that the automatic subrogation provision has been triggered. Claimant misconstrues WCJ Seelig's initial ruling. WCJ Seelig concluded that Employer satisfied its burden under Section 319, thereby triggering the automatic subrogation provision; this Court affirmed and our Supreme Court declined to review that decision. The only question remaining is the amount of the recovery.

[4] Claimant also argues that the WCJ was biased and that the WCJ failed to order mandatory mediation. Claimant contends that the WCJ was biased because he based his decision, in part, on non-record evidence and that Claimant became aware of this fact only after the WCJ issued the decision and order, rendering Claimant unable to challenge the WCJ's alleged bias before the WCJ in the first instance. Claimant's arguments are without merit. The hearing transcripts in the instant matter clearly demonstrate that the evidence was properly before the WCJ and that Claimant had an opportunity to address the evidence or any alleged bias before the WCJ, as well as the fact that the WCJ encouraged the parties to mediate and adhered to the requirements under the Act. (*See* March 31, 2009, February 2, 2010, and July 13, 2010 Hearing Transcripts.)

Section 319 of the Act provides, in pertinent part:

> Where the compensable injury is caused in whole or in part by the act or omission of a third party, the **employer shall be subrogated** to the right of the employe, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer…

77 P.S. § 671. Our Supreme Court has held that this "statute is clear and unambiguous. It is written in mandatory terms and, by its terms, admits of no express exceptions, equitable or otherwise. Furthermore, it does more than confer a 'right' of subrogation upon the employer; rather, subrogation is automatic." *Thompson v. Workers' Compensation Appeal Board (USF&G Co.)*, 781 A.2d 1146, 1151 (Pa. 2001).

The text of the statute clearly and unequivocally establishes the contour of the employer's burden. *See, e.g., Dale Manufacturing Company v. Bressi*, 421 A.2d 643, 654 (Pa. 1980). An employer must demonstrate that it is compelled to make payments for a claimant's work-related injury by reason of the negligence of a third party and that the funds the employer is seeking to recover were paid to the claimant for the same compensable injury for which the employer is liable under the Act. *Id*; *Kennedy v. Workers' Compensation Appeal Board (Henry Modell & Co., Inc.)*, 74 A.3d 343, 348 (Pa. Cmwlth. 2013). Once an employer's burden has been satisfied, subrogation is automatic. The statute does not make subrogation contingent upon an employer demonstrating the amount of recovery. Moreover, the statute would be wholly undermined if a condition was read into the text to make subrogation dependent upon an employer proving the amount of recovery. Such a condition would require an absurd reading of the text and in practice would be unworkable as, for example, a nonparty to a settlement

cannot reasonably be expected to carry the burden of demonstrating the terms of a settlement. WCJ Seelig concluded that Employer met its burden under Section 319 of the Act, triggering automatic subrogation, and his order is final. WCJ Seelig placed the burden on Claimant to establish the amount of the recovery. In the January 27, 2012 decision and order, the WCJ reached and applied the same conclusion of law. The Board affirmed. We discern no error.

Next, we address Claimant's argument that the WCJ failed to issue a reasoned decision supported by substantial evidence and disregarded competent evidence of record. Section 422(a) of the Act aids meaningful appellate review by requiring the WCJ to issue a reasoned decision containing findings of fact and conclusions of law based upon the record as a whole and clearly stating the rationale for the decision. 77 P.S. § 834. When the WCJ is faced with conflicting evidence, section 422(a) of the Act requires the WCJ to state the reasons for rejecting or discrediting competent evidence. *Id.*; *Daniels v. Workers' Compensation Appeal Board (Tristate Transport)*, 828 A.2d 1043, 1051 (Pa. 2003). The reasoned decision requirement does not permit a party to challenge or second-guess the WCJ's reasons for credibility determinations; determining the credibility of witnesses remains the quintessential function of the WCJ as the finder of fact. *Dorsey v. Workers' Compensation Appeal Board (Crossing Construction Co.)*, 893 A.2d 191, 195 (Pa. Cmwlth. 2006). The WCJ is free to accept, in whole or in part, the testimony of any witness. *Remaley v. Workers' Compensation Appeal Board (Turner Dairy Farms, Inc.)*, 861 A.2d 405, 409 (Pa. Cmwlth. 2004). However, the WCJ may not capriciously disregard evidence. A "capricious disregard" of evidence is a "deliberate disregard of competent evidence which one of ordinary intelligence could not possibly have avoided in reaching a

result." *Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe)*, 812 A.2d 478, 487 n.12 (Pa. 2002).

Claimant argues that the WCJ disregarded the testimony of Elena Rocca, Claimant's counsel's former secretary, and Andrea Nasto, Claimant's counsel's present secretary, and improperly relied upon the incompetent testimony of Employer's witness Mr. Kadish, as well as Claimant's deposition and a letter sent by Employer to Claimant's counsel requesting disclosure of the Third Party Recovery.

The WCJ's January 27, 2012 decision identified and reviewed the evidence and discussed the rationale for each finding of fact and conclusion of law. Regarding the present and former secretaries of Claimant's counsel, the WCJ discussed their testimony individually and found each credible but found that the testimony lacked any probative value. For example, regarding Claimant's counsel's former secretary, the WCJ found she "had not seen any of the documents concerning this case. She does not know where Claimant's counsel keeps the Reed file, and was unaware of where the litigation bank accounts might have been located." (2012 WCJ Decision, F.F. ¶8.) Similarly, regarding Claimant's counsel's current secretary, the WCJ found that "she did not see any records pertaining to the Reed's Third Party Tort Action, and that Claimant's counsel decides when to close files, and which files to destroy. She is unaware of the location of counsel's bank accounts as she makes no deposits." (*Id*. F.F. ¶9.) The WCJ did not capriciously disregard the testimony offered by Ms. Rocca and Ms. Nasto, he simply found it unhelpful, and he explained why sufficiently to satisfy the reasoned decision requirement.

Regarding the testimony of Mr. Kadish, who testified live before the WCJ, Claimant argues that this testimony was uncorroborated hearsay.[5] Mr. Kadish testified as an employee of the law firm that represented the Third Party defendant. (*Id*. F.F. ¶10.) Although not personally involved in the action, Mr. Kadish testified regarding the records maintained by his firm, which indicated that his firm's client entered into a group settlement with Claimant and five other clients of Claimant's counsel. (*Id*.) Mr. Kadish testified that it was common practice for releases in asbestos litigation to be for $1.00 "and or other consideration" regardless of the amount involved and that it was left to the discretion of the plaintiffs' counsel to divide the recovery between his or her clients in group settlements with their consent. (*Id*.) Mr. Kadish had no personal knowledge of the settlement in the instant matter and offered no testimony concerning those negotiations or the funds involved. The WCJ found "as a fact that [Claimant] received something as part of a group settlement." (*Id*.)

The WCJ concluded that Mr. Kadish's testimony was supported by the settlement releases executed on December 2, 1992, which were signed by Mr. and Mrs. Reed, as well as their counsel, and notarized. (*Id*. C.L. ¶5.) Even if the release in the Third Party Tort Action did not corroborate Mr. Kadish's testimony, the testimony was not hearsay. The WCJ would not allow Mr. Kadish to testify to the sum involved in the group settlement and restricted his testimony to the law firm's business records and common practices in asbestos litigation. Pa. R.E.

[5] The "*Walker* rule" established by *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Cmwlth. 1976), provides the following guidelines for the use of hearsay evidence in administrative proceedings: "(1) Hearsay evidence, Properly objected to, is not competent evidence to support a finding of the Board…(2) Hearsay evidence, Admitted without objection, will be given its natural probative effect and may support a finding of the Board, If it is corroborated by any competent evidence in the record, but a finding of fact based Solely on hearsay will not stand." *Id*. at 370 (internal citations omitted.)

803(6) (business record exception to the rule against hearsay); *Department of Labor and Industry v. Unemployment Compensation Board of Review*, 2 A.3d 1292, 1294-1295 & n.6 (Pa. Cmwlth. 2010). As a result, although the WCJ based his finding on Mr. Kadish's testimony as corroborated by other evidence in the record, Mr. Kadish's testimony alone was competent to support a finding of fact.

Next, the WCJ discussed the testimony from Claimant's deposition and rejected Claimant's testimony as lacking credibility because her characterization of her parents' relationship conflicted with the probate documents from her mother's estate. (2012 WCJ Decision, F.F. ¶6.) Credibility determinations are within the sole province of the WCJ and will not be disturbed on appeal. The WCJ discussed Claimant's testimony and clearly articulated why he rejected that testimony; the WCJ did not deliberately disregard Claimant's testimony. Likewise, the WCJ did not rely on incompetent evidence in his use of the letter sent by Employer to Claimant's counsel. The WCJ merely noted the fact that Employer had asked for the amount of Claimant's Third Party Recovery and that Claimant's counsel had not responded. (*Id*. F.F. ¶5, C.L. ¶3.)

The WCJ did not capriciously disregard evidence and Claimant's arguments to the contrary amount to little more than an argument that the WCJ should have viewed the evidence as Claimant did. The WCJ issued a reasoned decision that contained findings of fact and conclusions of law based upon the record as a whole and that lucidly explained the rationale for each credibility determination, finding, and conclusion. Moreover, Claimant's arguments on appeal are almost entirely concerned with the quality of the evidence produced by Employer. However, the burden is on Claimant and not Employer. Claimant has

failed to produce evidence to substantiate the claim that the Third Party Recovery was $1.00. The WCJ concluded:

> The failure of Claimant's counsel to account for the monies he received from Defendants in the Common Pleas matter is fatal to the within Petitions. As a result, Defendant's obligation to pay the compensation awarded by Judge Seelig remains awaiting satisfactory documentation concerning the settlement of the Third Party Action in the Court of Common Pleas of Philadelphia, #8511-02148. The Decision and Order of the Honorable Todd B. Seelig circulated February 18, 2004 (B-3) shall remain undisturbed by this tribunal, and all Petitions filed in this matter are therefore dismissed.

(*Id*. C.L. ¶5.) This conclusion was not in error and is supported by substantial evidence.[6]

Accordingly, the order of the Board is affirmed.

JAMES GARDNER COLINS, Senior Judge

[6] This Court continues to be disturbed by the conduct of Claimant's counsel both before this Court and as evidenced by the record from the proceedings below. *See, e.g. Wilson v. Workers' Compensation Appeal Board (Allied Corp. Honeywell Corp.)*, (Pa. Cmwlth. Nos. 893 C.D. 2007, 989 C.D. 2007, 2297 C.D. 2007, and 2298 C.D. 2007, filed July 8, 2008) 2008 WL 9406439 *5, 10 n.26 (unpublished). While we are aware that counsel has been engaged in long-running litigation with Employer on the behalf of various claimants, counsel's initial failure to secure a fee agreement with Donna Palladino once she became the Executrix of the Estates of Joseph Reed and Alice Reed, ignorance of the rules of appellate procedure, and allegedly deplorable record keeping is without excuse. As we have previously stated, we direct counsel's attention to the Rules of Professional Conduct, specifically Rule 1.3 (Diligence); Rule 3.1(Meritorious Claims and Contentions); Rule 3.2 (Expediting Litigation); Rule 3.3 (Candor Toward the Tribunal); and Rule 8.4 (Misconduct). In addition, we direct counsel's particular attention to Rule 1.15 (Safekeeping Property) both as originally enacted and as it stands today.

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O R D E R

AND NOW, this 21st day of April, 2015, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby AFFIRMED.

JAMES GARDNER COLINS, Senior Judge