IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Marcus Cunningham,	:	
	:	
Petitioner	:	No. 217 C.D. 2012
	:	Submitted July 6, 2012
v.	:	
	:	
Workers' Compensation Appeal Board (Dietz and Watson),	:	
	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: September 18, 2012

Marcus Cunningham (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (WCAB), dated February 2, 2012, which affirmed the decision of a workers' compensation judge (WCJ) granting in part and denying in part Claimant's claim petition and granting the termination petition filed by Dietz and Watson (Employer). We affirm.

The WCJ found in relevant part as follows. Claimant was injured on August 13, 2009, while working for Employer as a warehouse employee. As a result, Employer issued a "medical-only" notice of compensation payable (NCP) providing for a left-shoulder contusion. On September 17, 2009, Claimant filed a claim petition, alleging that he was hit by a door while using a pallet jack and that this incident resulted in injuries to his neck, back, and left knee. Claimant alleged partial disability through September 8, 2009, and ongoing, full disability beginning

September 9, 2009. On January 12, 2010, Employer filed a termination petition, alleging that, as of December 7, 2009, Claimant had fully recovered from his work-related injury. (WCJ's Findings of Fact, Nos. 1-2.)

The WCJ held several hearings. Claimant testified on his own behalf and presented the deposition testimony of Morton Silverman, M.D., Claimant's treating physician and a board-certified internist. Employer presented the deposition testimony of Claimant's supervisor, Paul Slaweski; Employer's human resources manager, Samuel A. Jones, Jr.; Employer's human resources administrator, Jacquie Ogle; and medical expert, Armando Mendez, M.D.

Before the WCJ, Claimant testified regarding the nature of his job duties and the mechanism of his injury. Claimant stated that he had worked for three days when his injury occurred; his pay rate had been $9.00 per hour; and he had expected to work fifty hours per week, with "time-and-a-half" for time worked over forty hours. Claimant also stated that he immediately reported his injury to Employer and that, four days after the injury, he returned to light-duty work for Employer and worked forty hours per week at the rate of $9.00 per hour. Claimant further testified that he continued to perform this light-duty work until September 2009 when Employer terminated his employment for sleeping on the job. Claimant denied that he had been sleeping on the job. (WCJ's Findings of Fact, Nos. 3, 5, 7, 13.)

Slaweski testified that Claimant had fallen asleep in a training class, which was a violation of company policy. Slaweski testified that he let the incident go but, afterwards, he asked Claimant why it was taking him so long to return to his station in the parts room. Claimant and Slaweski then exchanged words, and Slaweski told Claimant to punch out and go home and also told him to go to the

human resources office. According to Slaweski, Claimant's employment was terminated for sleeping in the training class and for the verbal altercation. (WCJ's Findings of Fact, Nos. 18, 19.)

Jones, who made the final decision to terminate Claimant's employment, testified that Claimant was discharged due to a combination of his sleeping on the job and his argument with Slaweski. Jones testified that Claimant's discharge was unrelated to his work injury and that light-duty work would have remained available to Claimant had he not been discharged on September 9, 2009. (WCJ's Findings of Fact, Nos. 30, 33.)

Ogle testified that neither she nor her co-worker, Nicole, informed Claimant that he would always work fifty hours per week. She explained that overtime is not guaranteed and is decided by the supervisor. Ogle testified that Claimant started working at $9.00 per hour and that the workweek is typically forty hours, but, if there is overtime, it is mandatory overtime. Ogle also stated that, with respect to Claimant's first two workdays, he worked seven-and-one-half hours per day, and that his injury must have occurred halfway through his third workday because he worked four-and-three-quarters hours that day. Ogle explained that, when Claimant returned to light-duty work, he was paid the same hourly rate of $9.00 per hour, forty hours per week. (WCJ's Findings of Fact, Nos. 25-27.)

Dr. Silverman testified that he first treated Claimant for his work-related injuries on October 2, 2009. Dr. Silverman's initial diagnoses of Claimant were: (1) post-traumatic cervical spine sprain and strain, with the need to rule out brachial plexopathy; (2) post-traumatic left ulnar neuropathy, post-traumatic thoracic sprain and strain; and (3) post-traumatic lumbar sprain and strain, with the need to rule out

radiculopathy. When Dr. Silverman examined Claimant on March 22, 2010, Claimant's condition was much worse. Claimant told Dr. Silverman that he had moved a doghouse and that his lower back hurt him more after he moved it. (WCJ's Findings of Fact, Nos. 38, 40-42.)

In Dr. Silverman's opinion, Claimant was not capable of doing any kind of work when he began treating him on October 2, 2009. Dr. Silverman was unaware that Claimant testified on October 15, 2009, that he thought he could have continued in his light-duty job had Employer not fired him. Dr. Silverman admitted that he would have released Claimant to light-duty work in February 2010, before Claimant moved the doghouse, but not afterward. Dr. Silverman opined that Claimant has been incapable of performing his pre-injury job for the entire time that the doctor has treated him. Dr. Silverman believed that Claimant exacerbated his work-related injuries when he moved the doghouse, but he related all of Claimant's ongoing disability to the work injury. (WCJ's Findings of Fact, Nos. 44-45.)

Dr. Mendez, a board-certified orthopedic surgeon, examined Claimant on December 7, 2009, at Employer's request. In Dr. Mendez's opinion, Claimant suffered a left-shoulder contusion and a cervical and thoracic spine strain due to his work injury. As of the date of his examination, Dr. Mendez found nothing objectively wrong with Claimant's left shoulder; he found no objective reasons for Claimant's complaints of pain throughout his spine; and he found no objective reasons for Claimant's decreased range of cervical motion. In Dr. Mendez's opinion, Claimant had not only fully recovered from his work injury, but he was able to return to his pre-injury job as a warehouse worker without restrictions; Claimant required no further medical treatment for the work injury. (WCJ's Findings of Fact, Nos. 50-51.)

Dr. Mendez opined that Claimant's ongoing complaints of lower-back pain go "hand-in-hand" with the degenerative changes shown on Claimant's MRI study. Further, Dr. Mendez opined that moving a doghouse is something that can cause a new injury to the lumbar spine. The doctor opined that Claimant's increased complaints in his lumbar spine and lower extremities after moving the doghouse were unrelated to Claimant's work injury. (WCJ's Findings of Fact, Nos. 53-55.)

Claimant offered rebuttal testimony in an April 27, 2010, trial deposition. Claimant testified that he has not resumed work since September 9, 2009, and that he does not feel fully recovered from his work injury or able to return to work without restrictions. Claimant testified that he had no new symptoms after moving the doghouse; rather, the injuries he had already sustained returned with a "little more vengeance." Claimant further testified that he does not feel that he can perform even light-duty work. (WCJ's Findings of Fact, Nos. 58-59, 60, 62.)

The WCJ found Claimant's testimony, both live and by deposition, credible in part. The WCJ credited Claimant's testimony regarding the mechanism of his work injury but discredited Claimant's assertion that he was not sleeping during the September 9, 2009, training session. The WCJ also credited Slaweski's and Jones's testimonies that Claimant was discharged for sleeping on the job as well as for the verbal altercation that Claimant had with Slaweski. The WCJ further credited the testimony of Dr. Mendez over the testimony of Dr. Silverman, finding that Claimant had fully recovered from his work injuries as of December 7, 2009, the date that Dr. Mendez examined Claimant. Finally, the WCJ rejected Claimant's testimony that he reasonably expected to work fifty hours per week. The WCJ instead credited Ogle's testimony that warehouse employees did not always work such hours. (WCJ's Findings of Fact, Nos. 63-64, 66-68, 70.)

Accordingly, the WCJ concluded that Claimant's loss in earnings after September 9, 2009, was not due to his work injury and that, if Claimant had not been discharged, light-duty work with no loss of earnings would have remained available to him. (WCJ's Conclusions of Law, Nos. 1-2.) The WCJ determined that, "[a]s of August 13, 2009, Claimant's average weekly wage [AWW] was $360.00. The credible evidence shows that as of August 13, 2009, Claimant could have reasonably expected to be paid $9 per hour for 40 hours of work per week." (WCJ's Conclusion of Law, No. 3.) Moreover, the WCJ concluded that, although Claimant met his burden of proving he sustained a work-related cervical and thoracic strain as well as the left shoulder contusion set forth on the NCP, Employer proved that, as of December 7, 2009, Claimant had fully recovered from his work-related injuries. (WCJ's Conclusions of Law, Nos. 4-5.) The WCJ thus granted Claimant's claim petition insofar as she amended it to include a cervical and thoracic strain, and she denied the claim petition in all other respects. The WCJ also granted Employer's termination petition as of December 7, 2009. Claimant appealed, and the WCAB affirmed. Claimant's petition for review to this court followed.

On appeal,[1] Claimant first argues that the WCAB erred in affirming the WCJ's denial of Claimant's wage loss claim because Claimant's termination from the light-duty job was directly related to his work injury. Claimant asserts that he "was taking medication for the injury and were it not for his light duty work, he would not have been terminated" from employment. (Claimant's Br. at 9.) We disagree.

[1] Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

Under the Workers' Compensation Act (Act),[2] a claimant seeking disability must prove that he has suffered a disability that was caused by a work-related injury. *BJ's Wholesale Club v. Workers' Compensation Appeal Board (Pearson)*, 43 A.3d 559, 562 (Pa. Cmwlth. 2012). Not only must the claimant show that he sustained a work-related injury but also a loss of earning power. *Id.* "Where the claimant's loss of earnings is a result of a termination for misconduct unrelated to the injury, the requirement of causal connection to the work-related injury cannot be satisfied and claimant is not entitled to disability benefits for that loss." *Id.* at 563.

Here, the WCJ specifically found, based on the credited testimony of Employer's witnesses, that Claimant was discharged not merely for falling asleep in his light-duty position but also for his verbal altercation with Slaweski. Further, the WCJ made no finding that Claimant's medication caused him to fall asleep at work, and Claimant does not refer us to any evidence that the WCJ improperly ignored in neglecting to make such a determination.[3] For these reasons, Claimant's first argument lacks merit.

Claimant next contends that the WCAB erred in affirming the WCJ's denial of Claimant's wage loss claim because the record fails to support the WCJ's determination that Claimant's AWW should exclude overtime hours.[4] As Claimant

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

[3] *See* Pa. R.A.P. 2119(d) (providing that "[w]hen the finding of, or the refusal to find, a fact is argued, the argument must contain a synopsis of all the evidence on the point, with a reference to the place in the record where the evidence may be found").

[4] Because Claimant was terminated from light-duty work, he would have been entitled to the difference between the wages he received for his time-of-injury job and the wages he received for his light-duty job if the time-of-injury job wages were higher. *See Vista International Hotel v.*

(Footnote continued on next page…)

points out, section 309 of the Act, 77 P.S. §582, dictates that Claimant's AWW should be calculated by the number of hours per week he was expected to work. As previously noted, Ogle, whose testimony in this regard the WCJ specifically credited,[5] merely stated that overtime is at the discretion of the supervisor, but, if overtime is needed, it is a mandatory requirement. (N.T., 12/22/09, at 8-9.) She further testified that overtime is not guaranteed, (*id*. at 9), and that, to her knowledge, no representations were made to Claimant that he would be working fifty hours per week, (*id*. at 9, 16). Ogle also credibly testified that Claimant worked seven-and-one-half hours during the first two days before his work incident and that he seemed to be injured midway through his third workday, after having clocked in four-and-three-quarters hours. (*Id.* at 10.) In deciding that Claimant's AWW should be based on a forty-hour workweek, the WCJ clearly considered Ogle's credited testimony to the effect that overtime with Employer was not automatic, as well as that Claimant worked fewer than eight hours his first two full workdays before he was injured. Therefore, Claimant's argument that the WCJ improperly excluded overtime from Claimant's AWW calculation also lacks merit.

(continued…)

Workmen's Compensation Appeal Board (Daniels), 560 Pa. 12, 29, 742 A.2d 649, 658 (1999) (holding "that a claimant who has established a partial disability due to a work-related injury should generally continue to receive partial disability benefits by virtue of his loss in earnings capacity, even though subsequently discharged from employment, because the loss in earnings capacity remains extant").

[5] It is solely the WCJ's role to assess credibility and resolve conflicting evidence; the question of the competency of the evidence, however, is one of law subject to our full review. *Cerro Metal Products Company v. Workers' Compensation Appeal Board (Plewa)*, 855 A.2d 932, 937 (Pa. Cmwlth. 2004).

Claimant further argues that Employer's termination petition should not have been granted as of the date of Dr. Mendez's examination of Claimant because the doctor's testimony is insufficient to support a termination. Claimant asserts that Dr. Mendez's medical testimony, taken as a whole, precludes a termination award because Dr. Mendez: testified to objective signs that Claimant is still injured; mischaracterized Claimant's left ulnar neuropathy and back injury as not being work-related; and acknowledged Claimant's subjective complaints of pain.[6] We disagree with Claimant's assessment of the sufficiency of Dr. Mendez's opinion evidence.

An employer seeking a termination of benefits bears the burden of proving either that the claimant's disability has ceased or that any current disability arises from a cause unrelated to the claimant's work injury. *Campbell v. Workers' Compensation Appeal Board (Antietam Valley Animal Hospital)*, 705 A.2d 503, 506-07 (Pa. Cmwlth. 1998). An employer meets this burden when its medical expert unequivocally testifies that "it is his opinion, within a reasonable degree of medical certainty, that the claimant is fully recovered, can return to work without restrictions and that there are no objective medical findings which either substantiate the claims of pain or connect them to the work injury." *Udvari v. Workmen's Compensation Appeal Board (USAir, Inc.)*, 550 Pa. 319, 327, 705 A.2d 1290, 1293 (1997).

Here, Dr. Mendez testified that, although there were "mild degenerative changes" in Claimant's cervical spine, the doctor did not consider them to be abnormalities or related to Claimant's work injury. (N.T., 5/3/10, at 15-16.) He also testified that, despite Claimant displaying some symptoms suggestive of an ulnar

[6] Claimant also notes that Dr. Mendez signed an affidavit of recovery three days before it was notarized but does not elaborate further. (Claimant's Br. at 10.)

neuropathy when the doctor examined him, such as a positive Tinel's sign and numbness in the fourth and fifth fingers of his left hand, the doctor later determined that a December 11, 2009, EMG report ruled out ulnar neuropathy. (*Id.* at 17-18.) Dr. Mendez stated that, because Claimant did not complain of any trauma to the ulnar nerve at the elbow when he initially suffered his work-related injury, the doctor would not relate any of Claimant's ulnar neuropathy symptoms to the work incident. (*Id.* at 19.) Dr. Mendez also explained that he did not render any diagnosis with respect to Claimant's lower back or lower extremities because Claimant did not complain of injury to these parts at the time of the work incident, and the doctor did not believe Claimant's delayed complaints were "consistent with anyone who has suffered an injury to his lower back." (*Id.* at 21.) Dr. Mendez testified that, if a recently-performed EMG ended up showing evidence of nerve root irritation in Claimant's lower extremities, "that irritation is on the basis of a degenerative process and not on the basis of anything that happened in work back in August of 2009." (*Id.* at 37; *see also id.* at 36.) Further, Dr. Mendez stated that, if Claimant had increased complaints after moving the doghouse, they were the result of a new injury and not related to Claimant's original work incident. (*Id.* at 27.)

In sum, Dr. Mendez testified that Claimant had fully recovered from his left-shoulder contusion and cervical and thoracic spine strain when he examined him on December 7, 2009, (*id.* at 7, 17), and that Claimant could return to his pre-injury job as of that date, (*id.* at 22). The WCJ credited Dr. Mendez's testimony, and Claimant's assertion that the WCJ should not have done so goes only to the weight of the medical evidence and not its competency. For this reason, we reject Claimant's argument in this regard.

Last, Claimant argues that the WCAB erred in affirming the WCJ's conclusion that Employer's contest was reasonable[7] because, among other things, the WCJ made no findings that would support such a determination.[8] We disagree.

This court explained in *Bates v. Workers' Compensation Appeal Board (Titan Construction Staffing, LLC)*, 878 A.2d 160, 163 (Pa. Cmwlth. 2005) (citations omitted), that:

> It is well-settled that whether an employer's contest of liability is reasonable is a question of law subject to this court's plenary review. "This court has often stated that the reasonableness of an employer's contest depends upon whether the contest was prompted to resolve a genuinely disputed issue or merely to harass the claimant." Employer bears the burden of demonstrating that there was a reasonable basis for contesting liability. In reviewing the record to determine whether an employer's contest was reasonable, the court must look at the totality of the circumstances, "since the reasonableness of the contest may not necessarily depend on a conflict in the evidence per se."

Here, a genuine question existed not only as to whether Claimant's AWW should be calculated based on a fifty-hour workweek, but also as to whether Claimant's disability had ceased or was ongoing.[9] Although Claimant sought to

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[7] *See generally* Section 440(a) of the Act, added by the Act of February 8, 1972, P.L. 25, *as amended*, 77 P.S. §996(a) (relating to establishment of a reasonable contest by an employer).

[8] Claimant also takes issue with the time frame in which Employer decided to amend its NCP but does not offer a comprehensible explanation of how this timeframe was problematic. (Claimant's Br. at 11.)

[9] "A genuine dispute can be found where the medical evidence is conflicting or susceptible to contrary inferences." *Costa v. Workers' Compensation Appeal Board (Carlisle Corp.)*, 958 A.2d 596, 602 (Pa. Cmwlth. 2008).

amend his claim petition to include additional injuries, and this portion of his claim was granted, Employer contested Claimant's assertion that his disability related to his work injury continued. The WCJ and the WCAB agreed with Employer's position. There is simply no evidence, based upon the totality of the circumstances involved in this case, that Employer's challenge to Claimant's claim and Employer's filing of its termination petition were anything other than reasonable actions responsibly undertaken in the normal course of litigation. For these reasons, we conclude that Employer's contest was reasonable.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

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O R D E R

AND NOW, this 18th day of September, 2012, the order of the Workers' Compensation Appeal Board, dated February 2, 2012, is hereby affirmed.

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ROCHELLE S. FRIEDMAN, Senior Judge