IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tommy McCombs, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Anchor Hocking and Specialty Risk Services), Respondents	:	No. 268 C.D. 2008
	:	Submitted: May 9, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: July 3, 2008

Tommy McCombs (Claimant) petitions for review of the order of the Workers' Compensation Appeal Board (Board) which affirmed the decision of the Workers' Compensation Judge (WCJ) that denied Claimant benefits.

Claimant worked as a mold operator for Anchor Hocking (Employer). On June 19, 2006, the temperature was approximately ninety degrees Fahrenheit outside and warmer in the plant. When hot molten glass lands in the collert basin, the water steams and creates more heat and humidity. Claimant was polishing molds. He placed a fan near him, but a co-worker redirected the fan. Claimant got another fan. When he reached over to adjust the direction of the fan, his right "small" finger went through an opening in the fan guard. Claimant sat in front of the fan in a chair with his finger bleeding. Claimant fainted and fell off the side of the chair. In his fall, Claimant lost a tooth and suffered cuts to his face and lips.

Claimant was transported to Aliquippa Hospital, where he tested positive for marijuana. Claimant received stitches to his finger, lower lip, and forehead. He also had to have the root of the lost tooth removed. Claimant missed work on June 20, 2006, to go to the dentist. He reported for work on June 21, 2006, and worked a full day. On June 22, 2006, approximately one and one-half hours into his shift, he was sent home due to the positive drug test. Claimant was terminated with the termination to be converted into a suspension if Claimant completed a rehabilitation program. Claimant did so, and returned to work on August 10, 2006.

On August 3, 2006, Claimant petitioned for benefits and alleged that he suffered a cut on the small finger of his right hand, facial scars, and the loss of a tooth in the course and scope of his employment with Employer. Claimant's initial request for full disability benefits from June 22, 2006, forward was orally amended to benefits for a closed period.

Claimant testified regarding his job duties and explained when he was injured, he:

> fell . . . sideways out of the chair. There was an I-beam sitting there that is basically a little bit better than a 12 inch I-beam. Apparently my head had gone in between the I itself and hit the floor because that's where the blood was and my safety glasses and everything. So that's how I got my facial scarring and lost my tooth.

Notes of Testimony, September 26, 2006, (N.T.) at 13; Reproduced Record (R.R.) at R.19a. On cross-examination, Claimant admitted that he was taking the medications Horaxatine (a generic for Paxil) and Lisinopril, a blood pressure medication. N.T. at 19; R.R. at R.25a. He also admitted to not having eaten that

day and that he tested positive for marijuana at the hospital. N.T. at 20; R.R. at R.26a.

John Glaab (Glaab), the lead employee in the mold cleaning department for Employer, testified that he spoke with Claimant before the start of Claimant's shift on June 19, 2006, and Claimant told him that he was not feeling well. Notes of Testimony, December 19, 2006, (N.T. 12/19/06) at 8; R.R. at R.43a. Glaab also reported that Claimant "might have been a little dizzy." N.T. 12/19/06 at 9; R.R. at R.44a. On cross-examination, Glaab was asked how he started his conversation with Claimant on June 19, 2006. Glaab answered, "I believe when he came in I told him that he looked like hell." N.T. 12/19/06 at 10; R.R. at R.45a. Glaab also explained that Claimant was on the "steady nasty off shift" of 3:00 p.m. to 11:00 p.m. in which, "[i]t's very hard to get any rest. You get home from work at 11:30 at night. You can't go to sleep. You are up until three or four in the morning. Then you sleep until one or two in the afternoon. Then you have to get up and rush right back to work." N.T. 12/19/06 at 13; R.R. at R.48a.[1]

Claimant also submitted the emergency room records from Aliquippa Hospital. Employer submitted reports of its plant physician, Bryan P. Negrini, M.D. (Dr. Negrini), which indicated that Claimant would make a complete recovery and did not mention marijuana.

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[1] Bob Whittingham (Whittingham), human resources representative with Employer, explained Employer's drug and alcohol policy. He also testified that work would have been available for Claimant had he not entered drug rehabilitation. N.T. 12/19/06 at 16; R.R. at R.51a.

The WCJ denied and dismissed Claimant's petition for benefits. The WCJ made the following findings of fact:

> 1. The claimant did not sustain a work related injury on June 19, 2006 and is not entitled to wage loss benefits or benefits related to any disfigurement.
>
> In making this finding, I have relied on the undisputed fact that the claimant had smoked marijuana prior to reporting to work for his 3:30 shift, had not eaten and in the very credible words of Mr. Glaab, 'looked like hell'. I note that Mr. Glaab's testimony was given reluctantly and that he had a recollection of the claimant complaining of dizziness and reporting to him that he had not eaten. Mr. Glaab presented to me as a very credible witness. On the other hand, I did not find that the claimant offered credible testimony regarding his condition prior to arriving at work. He had only been at his work station for one-half hour when this injury occurred, convincing me that his condition was not the best when he arrived at work and was the cause of his injury.
>
> Under the facts of this case, the claimant is not entitled to any indemnity benefits for lost time. Modified duty was made available to the claimant within a day of his injury and he returned to work until he was suspended because of violation of company policy regarding drug use reflected in his positive test for marijuana. The only benefits to which the claimant could be entitled would be related to his facial disfigurement.
>
> The claimant's facial disfigurement occurred when he fell from a seated position in his chair and struck his forehead and chin. The evidence of record convinces me that the claimant's fall was the result of his having reported to work without having eaten and because of inhaling marijuana on June 19, 2006, prior to arriving at work. Credible evidence reflects he was dizzy prior to the beginning of his work shift. The claimant did not testify that pain in his finger from the cut by the fan blade

> had caused him to faint. The claimant's disfigurement was caused by the claimant's own activities, not in the course of his employment, and was not a work injury.
>
> 2. In viewing the faint scar that was the result of his fall, I did not find it to be disfiguring. The missing tooth is certainly disfiguring and if the claimant's injury had been compensable would have led to an award of ten weeks of benefits or the payment for a dental implant.

WCJ's Decision, May 1, 2007, (Decision), Findings of Fact Nos. 1-2 at 4; R.R. at R.105a. Claimant appealed to the Board which affirmed.

Claimant contends that the WCJ failed to apply the proper burden of proof, that the WCJ's decision was unsupported by substantial evidence, that the case must be remanded for the Board to consider and award disfigurement benefits, and that Employer did not make a reasonable contest.[2]

I. Work-Related Injury.

Initially, Claimant contends that the WCJ erred when he determined that Claimant did not meet his burden of proof and did not require Employer to prove that Claimant's injury was caused by his intake of marijuana.

In a claim petition, the claimant bears the burden of proving all elements necessary to support an award. Innovative Spaces v. Workmen's Compensation Appeal Board (DeAngelis), 646 A.2d 51 (Pa. Cmwlth. 1994). To

[2] This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

sustain an award, the claimant has the burden of establishing a work-related injury which resulted in disability.[3]

Here, the WCJ determined that Claimant cut his finger on the fan blade and then suffered facial disfigurement when he fell from a seated position in his chair and struck his forehead and chin. It is undisputed that all of this occurred in the workplace. Claimant met his initial burden of proving a work-related injury, if believed. Employer put forth the argument that Claimant was ineligible for benefits because he violated the law by using marijuana and would not have been injured had it not been for his marijuana consumption.

Section 301(a) of the Workers' Compensation Act (Act)[4] provides in pertinent part:

> Every employer shall be liable for compensation for personal injury to, or for the death of each employe, by an injury in the course of his employment, and such compensation shall be paid in all cases by the employer, without regard to negligence, according to the schedule contained in sections three hundred and six and three hundred and seven of this article: Provided, That no compensation shall be paid when the injury or death is intentionally self-inflicted, or is caused by the employe's violation of law, including, but not limited to, the use of drugs, but the burden of proof of such fact shall be upon the employer. . . . In cases where the injury or death is caused by intoxication, no compensation shall be paid if the injury or death would not have occurred but for the

[3] For workers' compensation purposes, disability is equated with loss of earning power. Inglis House v. Workmen's Compensation Appeal Board (Reedy), 535 Pa. 135, 634 A.2d 592 (1993).

[4] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §431.

> employe's intoxication, but the burden of proof of such fact shall be upon the employer.

In City of Philadelphia v. Workers' Compensation Appeal Board, 706 A.2d 377 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 555 Pa. 734, 725 A.2d 183 (1998), this Court addressed a controversy involving Section 301(a). Thomas Cronin (Cronin) worked as a firefighter for the City of Philadelphia (City) for sixteen years. For fifteen of those years, he was exposed to heat, smoke, fumes, and gases under emergency conditions. Cronin had occupational exposure pursuant to Section 301(c)(2) of the Act, 77 P.S. §411(2). After a back injury in 1988, Cronin either worked on light duty or was paid injured on duty benefits until his death on October 7, 1990. Following his death, Cronin's widow, Maryann Cronin (Mrs. Cronin) filed a fatal claim petition on behalf of herself and her three minor children. Mrs. Cronin's medical witness, Harry Shubin, M.D, opined that Cronin's exposure as a firefighter caused the early development of atherosclerosis, that Cronin had blockage in three coronary blood vessels, and that his death was causally related to his exposure. The City's medical witness, Norman Makous, M.D. (Dr. Makous), testified that Cronin died from an underlying advanced problem of arteriosclerosis with cocaine intoxication as a contributing cause. The workers' compensation judge credited Dr. Makous regarding the cause of death. The workers' compensation judge found the evidence from both sides supported a determination that Cronin's occupational cardiovascular arteriosclerosis was a substantial contributing factor to his death and that cocaine intoxication was a contributing factor. The workers' compensation judge granted the fatal claim petition. The Board affirmed. Cronin, 706 A.2d at 377-378.

The City petitioned for review with this Court and asserted that the workers' compensation judge's finding that cocaine intoxication was a contributing factor to Cronin's death precluded an award of benefits under Section 301(a) of the Act, 77 P.S. §431. This Court disagreed and affirmed:

> In essence Employer [The City] contends that, under Section 301(a), if an illegal activity played any role at all in an injury or death, then recovery is barred and the WCJ therefore erred in considering whether a compensable cause was a substantial contributing factor. This position, however, is contrary to the established interpretation of Section 301(a). In Kovalchick Salvage Co. v. Workmen's Compensation Appeal Board (St. Clair) . . . 519 A.2d 543 ([Pa. Cmwlth.] 1986), a crew foreman driving home for the weekend in a company vehicle was killed in a head-on collision. His blood alcohol content was 0.26 percent. Although the Court acknowledged that the decedent's driving in that condition constituted a violation of law, the employer's medical witness stated that he could not say what significance the blood alcohol level had on his death, and the Court concluded that the employer had not met its burden to prove that the illegal activity caused the death.
> . . . .
> In the present case Employer [the City] established, and the WCJ found, that Decedent's [Cronin] cocaine use was a contributing factor in his death. Employer [the City] did not, however, establish that the illegal activity was the cause of death. . . . The Court agrees that Employer [the City] failed to meet its burden to show that a violation of law caused Decedent's [Cronin] death, and because of Employer's [the City] failure, the Court is compelled to affirm the order of the Board.

Cronin, 706 A.2d at 380-381.

An employer must establish the violation of law through clear and convincing evidence. A workers' compensation judge must find the employer's

witnesses credible, that they distinctly remembered the facts to which they testified, that they narrated the details exactly, and that the statements were true. Ogden v. Workmen's Compensation Appeal Board (Carolina Freight Carriers Corporation), 561 A.2d 837 (Pa. Cmwlth. 1989), *petition for allowance of appeal denied*, 524 Pa. 635, 574 A.2d 75 (1990). More recently, this Court determined that an employer who asserts an employee's intoxication as an affirmative defense must establish that the intoxication was the cause in fact rather than the proximate cause or a substantial factor of the injury. Clear Channel Broadcasting v. Workers' Compensation Appeal Board (Perry), 938 A.2d 1150 (Pa. Cmwlth. 2007).

Here, Employer used the positive drug test for marijuana, Claimant's admission that he inhaled marijuana that day, Glaab's testimony that Claimant "looked like hell" before the start of his shift, and that Claimant stated he was a "little dizzy" and "had not eaten that day" in an attempt to establish that Claimant's injury was not work-related.

This Court must conclude that Employer did not meet its burden. While it is undisputed that Claimant tested positive for marijuana, Employer did not establish how the presence of marijuana in his system caused Claimant to faint and fall off his chair. Employer neither presented testimony regarding the amount of marijuana in Claimant's system nor the effect of that marijuana, if any, at the time Claimant fell. The only testimony regarding whether Claimant was under the influence of an illegal drug was Claimant's opinion that he was not under the influence of any illegal drugs "at that time." N.T. at 20; R.R. at R.26a. Although the WCJ found that Claimant smoked marijuana prior to reporting to work,

Claimant only answered "Yes" to the question "Had you inhaled any marijuana on the morning of this accident?" N.T. at 24; R.R. at R.30a. Employer presented no medical testimony to the effect that the level of marijuana in Claimant's system at the time of the injury caused Claimant to become so disoriented that he passed out and fell. Indeed, the only medical evidence submitted by Employer, the notes of Dr. Negrini, did not mention marijuana. Further, Glaab's credible testimony that Claimant "looked like hell" does not establish that Claimant was under the influence of marijuana at the time of the injury or that the presence of marijuana in Claimant's system caused the injury.

In Kovalchick Salvage Co. v. Workmen's Compensation Appeal Board (St. Clair), 519 A.2d 543 (Pa. Cmwlth. 1986), the case cited in Cronin, a blood alcohol content of .26% alone did not establish that an employee's death in a car accident was caused by his alcohol consumption absent medical evidence that explained the effect of the alcohol on the employee's death. Similarly, in Cronin, the City's medical evidence that cocaine use was a contributing factor in Cronin's death was insufficient to meet the City's burden that cocaine ingestion caused Cronin's death.

The evidence here is less compelling than in Kovalchick and Cronin. In both cases, the employer presented medical evidence which attempted to show that the drug or alcohol consumption caused the employee's death. Here, no such evidence was produced. This Court agrees with Claimant that Employer failed to establish that either Claimant's violation of the law by ingesting marijuana or that Claimant's intoxication as a result of that consumption caused his injury.

II. Wage Loss Benefits.

Assuming the WCJ erred, Employer argues that Claimant is not eligible to receive disability benefits because he was not disabled for at least seven days. Under Section 306(e) of the Act, 77 P.S. §514, a claimant is not eligible to receive compensation for the first seven days of disability unless the disability lasts for fourteen days or more. Here, Claimant was injured on June 19, 2006. Claimant testified that he called off work on June 20, 2006, for a dentist to attend to his injured tooth. He further testified that he returned to work on June 21st and worked a full day. He then worked for one and one-half hours on June 22nd before he was sent home because of the positive drug test. Claimant did not return to work until August 10, 2006, following his return from drug rehabilitation. Claimant admitted that there was work available to him within his restrictions during that time. N.T. at 21-22; R.R. at R.27a-R.28a. Similarly, Whittingham testified that work was available to him had he not been in rehabilitation. N.T. 12/19/06 at 16; R.R. at R.51a. Claimant does not contest the WCJ's finding that modified duty was made available to Claimant within a day of his injury and that he returned to work until he was suspended because of his violation of company policy with respect to the positive drug test. As a result, Claimant missed only June 20, 2006, because of the work injury. Even with the work injury, he returned to work on June 21, 2006, and would not have missed any more time but for his suspension and participation in rehabilitation. Under Section 306(e) of the Act, Claimant was not eligible for disability benefits.

III. Scarring.

Claimant next contends that this Court must remand this case to the Board for the assessment of his facial disfigurement. The WCJ found that Claimant's scar was not disfiguring and that, if the injury were compensable, the WCJ would have awarded Claimant "ten weeks of benefits or the payment for a dental implant." Decision, Finding of Fact No. 2 at 4; R.R. at 105a. Claimant asserts that the ten weeks of benefits is not within the range that most WCJs would select for a loss of this type. Claimant also asserts that the WCJ's determination that his scars were not disfiguring was against the law, the weight of the evidence, and was arbitrary and capricious.

With respect to the compensation for the scar, Section 306(6)(c)(22) of the Act, 77 P.S. §513(22), a claimant must establish that the scarring is 1) serious and permanent; 2) of such character as to produce an unsightly appearance; and 3) not usually incidental to the claimant's employment. Kelley v. Workers' Compensation Appeal Board (Standard Steel), 919 A.2d 321 (Pa. Cmwlth. 2007).

Here, the WCJ found that while Claimant suffered scarring as a result of the fall, the WCJ did not find the scar "to be disfiguring." Decision, Finding of Fact No. 2 at 4; R.R. at R.105a. Claimant appealed this decision to the Board. The Board did not address this issue because it affirmed the WCJ's determination that Claimant was not entitled to benefits. As a result, this Court must remand to the Board for the Board to consider Claimant's appeal of this issue.

IV. Loss of Tooth.

With respect to the lost tooth, the WCJ found that in the event Claimant did suffer a work-related injury, Claimant was entitled to ten weeks of benefits. Claimant argues that the ten weeks of benefits is not within the range that most judges would select for a loss of this type. In Hastings Industries v. Workmen's Compensation Appeal Board (Hyatt), 531 Pa. 186, 611 A.2d 1187 (1992), our Pennsylvania Supreme Court determined that a WCJ's compensation award is not purely a question of fact. If the Board concludes, upon a viewing of the claimant's disfigurement, that the WCJ capriciously disregarded competent evidence by entering an award significantly outside the range most WCJs would select, the Board may modify the award.

Again, the Board did not address this issue because it concluded that Claimant did not suffer a compensable injury. As this Court has determined that Claimant did suffer a work-related injury, the Board now has the responsibility to determine if an award of ten weeks compensation is significantly outside the range most WCJs would select. Accordingly, this Court must remand to the Board to make that determination.

V. Reasonable Contest.

Claimant next contends that the WCJ's conclusion that Employer presented a reasonable contest is incorrect as a matter of law, and, consequently, Claimant is entitled to attorney fees.

Section 440(a) of the Act, 77 P.S. §996(a)[5], provides:

[5] This Section was added by the Act of February 8, 1972, P.L. 25.

> In any contested case where the insurer has contested liability in whole or in part, including contested cases involving petitions to terminate, reinstate, increase, reduce or otherwise modify compensation awards, agreements or other payment arrangements or to set aside final receipts, the employe . . . 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: Provided, that cost for attorney fees may be excluded when a reasonable basis for the contest has been established by the employer or the insurer.

An employer's contest is reasonable if the contest was brought to resolve a genuinely disputed issue, not merely to harass the claimant. Dworek v. Workmen's Compensation Appeal Board (Ragnar Benson, Inc.), 646 A.2d 713 (Pa. Cmwlth. 1994). The imposition of attorney fees is a question of law reviewable by the Board and this Court. McGoldrick v. Workmen's Compensation Appeal Board (Acme Markets, Inc.), 597 A.2d 1254 (Pa. Cmwlth. 1991).

This Court does not agree with the Board that Employer's contest was reasonable. Employer mounted a defense premised on the supposition that Claimant's positive test for marijuana and Glaab's testimony that Claimant "looked like hell" meant that Claimant fell at work because of his marijuana consumption. Employer's evidence was woefully inadequate. Employer did not submit any evidence as to the level of marijuana in Claimant's system. Further, it did not present any medical evidence to establish that the marijuana contributed to Claimant's fall. Employer did not meet the burden of proof necessary to establish that Claimant's petition was barred under Section 301(a) of the Act, 77 P.S. §431.

Therefore, this Court must remand to the Board with instructions to remand to the WCJ for an award of attorney's fees.

Accordingly, this Court affirms in part, reverses and remands in part, and vacates and remands in part. This Court affirms the denial of disability benefits. This Court reverses the denial of benefits for the lost tooth and remands to the Board for a determination of whether the award of ten weeks of benefits for the loss of the tooth or the cost of an implant is significantly outside the range most WCJs would award for an injury of this type. This Court also reverses the determination that Employer's contest was reasonable and remands to the Board with instructions to remand to the WCJ for a determination of Claimant's attorney's fees. This Court vacates the Board's affirmance that Claimant did not have a compensable scar and remands to the Board for its determination of this issue.

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BERNARD L. McGINLEY, Judge

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O R D E R

AND NOW, this 3rd day of July, 2008, the order of the Workers' Compensation Appeal Board is affirmed in part, reversed in part, and vacated in part. This case is remanded to the Board for proceedings consistent with this opinion. Jurisdiction relinquished.

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BERNARD L. McGINLEY, Judge