

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Donald Plonski, :  
Petitioner :  
 :  
v. : No. 311 C.D. 2008  
 : Submitted: August 1, 2008  
Workers' Compensation Appeal Board :  
(Romani Industries, Inc.), :  
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE McCLOSKEY

FILED: September 4, 2008

Donald Plonski (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board), affirming the decision of the Workers' Compensation Judge (WCJ), which denied the Claimant's petition for reinstatement of total disability benefits. We now affirm.

Claimant was employed as a union construction laborer with Union Local No. 603. In August of 1993, he was assigned to and employed by Romani Industries, Inc. (Employer). On August 31, 1993, during the course and scope of his employment, he sustained a low back injury when he was moving a one-hundred pound bag of grout. He finished work that day. The following day, he went to the emergency room at a local hospital. He never returned to work. Pursuant to a compensation agreement,

dated March 7, 1994, Claimant received temporary total disability benefits under the Pennsylvania Workers' Compensation Act (Act).<sup>1</sup>

In late 1994, Employer filed a petition for modification/suspension alleging that Claimant had exhibited bad faith with regard to the job application process. Before that petition was decided, Employer filed another petition for modification/suspension alleging that Claimant had rejected placement efforts by appearing late for at least five medically-suitable jobs. These two petitions were consolidated. Hearings were scheduled and held before the WCJ.

At these hearings, Claimant testified on his own behalf. Employer presented several witnesses including a vocational supervisor who had attempted to find Claimant a suitable position. After the hearings, by order dated September 10, 1997, the WCJ dismissed the petitions for suspension but granted the petitions for modification based on a finding that Claimant had not exhibited a good faith effort in following through on the job referrals, specifically a job referral to Dictograph Alarm Systems. Claimant filed an appeal to the Board, but the Board affirmed the decision and order of the WCJ. Claimant did not appeal the Board's decision.

Claimant then filed a petition for reinstatement contending that his benefits should be reinstated because he would have lost valuable union benefits had he taken the non-union position at Dictograph Alarm Systems.<sup>2</sup> Employer argued that the issue of union benefits and status was related to the availability of jobs that Claimant had been referred to and, therefore, the issue had already been litigated. The WCJ agreed

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<sup>1</sup> Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1-1041.4; 2501-2708.

<sup>2</sup> A pre-trial conference was held at which time the parties agreed that the issue to be decided in the case was a legal issue and one that could be decided on briefs alone.

with Employer and held that Claimant's petition was barred by the doctrines of collateral estoppel and res judicata.<sup>3</sup> Hence, the WCJ issued an order dismissing Claimant's reinstatement petition. Claimant appealed to the Board.

By opinion and order dated September 18, 2001, the Board affirmed the WCJ's decision and order. The Board determined that the WCJ had not erred in holding that Claimant was attempting to re-litigate the merits of whether or not he had made a good faith effort to accept an available position. The Board noted that that issue had been litigated in full and that the elements for collateral estoppel and res judicata had been met. Additionally, the Board concluded that Claimant had waived any issue regarding union benefits as he had not raised that issue in prior litigation before the WCJ. Claimant did not appeal the Board's decision.

On September 5, 2005, Claimant filed a second petition for reinstatement alleging a worsening of his condition as of August 26, 2005.<sup>4</sup> Hearings were scheduled and held. At the hearing on December 5, 2005, Claimant alleged that his back pain had become more severe through the years and that he was currently experiencing pain radiating down his right leg towards his ankle. Claimant asserted that he had not had any surgery related to his injury and was being treated with prescription pain medicine.

Joseph M. Thomas, M.D., testified on behalf of Claimant. Dr. Thomas is a Board-certified anesthesiologist specializing in pain management. He has continually treated Claimant from shortly after the time of the work injury through the present. Dr.

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<sup>3</sup> The WCJ noted that the issue of Claimant's job availability had been previously litigated and that the present issue, although referred to by Claimant as the potential loss of union benefits, was merely an attempt to relitigate the job availability issue.

<sup>4</sup> Claimant's entitlement to benefits (500 weeks of partial disability benefits under Section 306 of the Act, 77 P.S. §512) was exhausted as of September 6, 2005.

Thomas testified that he diagnosed Claimant with lumbar radiculopathy and treated him conservatively with analgesics and muscle relaxers.

Also at these hearings, Employer presented the deposition testimony of Thomas S. Muzzonigro, M.D., on its behalf. Dr. Muzzonigro is a Board-certified orthopedic surgeon. Dr. Muzzonigro conducted an independent medical examination (IME) of Claimant on October 21, 2005. He testified that Claimant told him that he was coaching football and that he was able to drive a car, perform household chores and lift light weights. Dr. Muzzonigro testified that after his examination of Claimant and a review of his medical history, he concluded that Claimant's complaints were related to the work injury which was superimposed on his degenerative disc disease. Nevertheless, Dr. Muzzonigro concluded that Claimant was capable of performing gainful employment, including light to medium duty work, on a full-time basis.

By decision dated October 31, 2006, the WCJ found Claimant's testimony not credible to the extent that he had experienced a worsening of his condition. The WCJ accepted Dr. Muzzonigro's testimony as more credible than Dr. Thomas' testimony. The WCJ also found Dr. Thomas' testimony to be not credible to the extent he opined that Claimant had experienced a worsening of his condition. Thus, the WCJ denied Claimant's petition for reinstatement of benefits. Claimant again filed an appeal to the Board, but the Board again affirmed the decision and order of the WCJ. Claimant then filed the present appeal with this Court.

On appeal,<sup>5</sup> Claimant argues that the Board erred as a matter of law in affirming the decision of the WCJ as the WCJ erred in failing to find that his testimony

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<sup>5</sup> Our scope of review in a workers' compensation appeal is limited to determining whether an error of law was committed, constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704. Further, in Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 (Footnote continued on next page...)

and the testimony of Dr. Thomas was credible and unequivocal with regard to a worsening of his condition. We disagree.

First, Claimant asserts that the WCJ “by the record, was originally the Attorney representing the Commonwealth in matters surrounding claimant’s injury.” (Claimant’s Brief at 3). He asserts that the WCJ in the present matter “grossly ignored the facts of the case and acted as Attorney S.W.I.F.T. in stead [sic] of an impartial jurist.”<sup>6</sup> Id. Claimant fails to cite any evidence in support of these bald assertions; therefore, we reject Claimant’s argument on this issue.

Next, Claimant specifically challenges the WCJ’s credibility determinations with regard to his testimony and the testimony of Dr. Thomas. We reject any such challenges by Claimant.

When reviewing the findings by the WCJ, it is not the function of this Court to reweigh the evidence or review the credibility of the witnesses; rather, it is to determine whether the findings of the WCJ have adequate support in the record. The WCJ is free to accept or reject the testimony of any witness, in whole or in part. Hills Department Store No. 59 v. Workmen’s Compensation Appeal Board (McMullen), 646 A.2d 1272 (Pa. Cmwlth. 1994), petition for allowance of appeal denied, 540 Pa. 587, 655 A.2d 518 (1995). The WCJ has complete authority over questions of credibility, conflicting medical evidence and can accept or reject the testimony of any witness, in

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**(continued...)**

Pa. 189, 812 A.2d 478 (2002), our Supreme Court held that “review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in which such question is properly brought before the court.” Wintermyer, 571 Pa. at 203, 812 A.2d at 487.

<sup>6</sup> Claimant incorrectly refers to the State Workers’ Insurance Fund (SWIF) as “S.W.I.F.T.”

whole or in part. Lombardo v. Workers' Compensation Appeal Board (Topps Company, Inc.), 698 A.2d 1378 (Pa. Cmwlth. 1997), petition for allowance of appeal denied, 553 Pa. 701, 718 A.2d 787 (1998). As this Court has recognized, the fact that one party to a proceeding may view testimony differently than the factfinder is not grounds for reversal if substantial evidence supports the determinations made by the factfinder. Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106 (Pa. Cmwlth. 1994).

In this case, the WCJ accepted the testimony of Employer's medical expert, Dr. Muzzonigro, as credible and persuasive. This testimony constitutes substantial evidence in support of the WCJ's decision.

Accordingly, the order of the Board is affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge

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| Donald Plonski,                    | : |                   |
| Petitioner                         | : |                   |
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| Workers' Compensation Appeal Board | : |                   |
| (Romani Industries, Inc.),         | : |                   |
| Respondent                         | : |                   |

**ORDER**

AND NOW, this 4<sup>th</sup> day of September, 2008, the order of the Workers' Compensation Appeal Board is hereby affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge