

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Harry Wilhelm, :
Petitioner :
 :
v. : No. 390 C.D. 2008
 : Submitted: May 23, 2008
Workers' Compensation Appeal Board :
(Butler Auto Auction), :
Respondent :

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER

FILED: July 28, 2008

Harry Wilhelm seeks review of the order entered by the Workers' Compensation Appeal Board (Board) affirming a Workers' Compensation Judge's (WCJ) decision to grant the termination petition filed by Butler Auto Auction (Butler Auto). The issues presented are: 1) whether the Board was correct in dismissing Wilhelm's appeal for failure to timely file the appeal; 2) whether the WCJ's findings that Wilhelm is fully recovered from his work injuries and that his continued impairment is due to prior knee problems are supported by substantial evidence; and 3) whether the WCJ violated Wilhelm's due process rights by conducting hearings in Butler County when Wilhelm resided in Allegheny County.

Wilhelm worked as a driver for Butler Auto, suffering injury during the course of his employment when he was hit by a car on December 15, 2004. Wilhelm sustained a left knee ACL sprain and injured his hip and elbow. Butler Auto issued a temporary notice of compensation payable (TNCP) on January 20, 2005. Benefits commenced on January 4, 2005 and continued through April 15,

2005 when the TNCP converted to a notice of compensation payable. On May 18, 2005, Butler Auto filed a termination petition based upon an April 14, 2005 physician's affidavit of recovery from Dr. Michael W. Weiss. The WCJ subsequently entered an order granting supersedeas as of June 27, 2005.

Butler Auto submitted deposition testimony from Dr. Weiss, board certified in orthopedic surgery. Dr. Weiss testified that as a result of Wilhelm's accident, he sustained a left hand and left knee sprain and contusion. Dr. Weiss reviewed Wilhelm's medical history before and after the accident, determining that he had recovered fully as of April 14, 2005. Wilhelm submitted the deposition testimony of Dr. Frederick M. Florian, board certified in family medicine.¹ Dr. Florian was Wilhelm's family physician, but he had not seen Wilhelm following his work injury until May 5, 2005. The doctor opined that Wilhelm's injury caused a medial meniscus tear in his left knee, which required surgery. Dr. Florian also testified that Wilhelm's knee was clearly injured in the work accident and that he was rendered disabled from his position with Butler Auto. Dr. Florian admitted, however, that he had seen Wilhelm on December 3, 2004 and that he diagnosed him as having arthritis or degenerative joint disease due to complaints of left knee pain. Dr. Florian referred Wilhelm to a Dr. Failla for further review, but Wilhelm's injury occurred prior to his scheduled appointment on December 15, 2004.

The WCJ found that Wilhelm tried to downplay his prior knee injury and thus credited Dr. Weiss over Wilhelm and Dr. Florian. The WCJ entered a decision accordingly, granting Butler Auto's termination petition on October 27,

¹Wilhelm also submitted medical reports from Dr. Thomas B. Hughes and Dr. Dennis J. Phillips, which were accepted by the WCJ only for any corroborative value with respect to other medical evidence of record.

2006. Some five months and twenty-one days later, on April 17, 2007, Wilhelm appealed this matter to the Board, which held that Wilhelm failed to file a timely appeal and granted Butler Auto's motion to dismiss. The Board noted that Section 423(a) of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §853, provides for a twenty-day period within which a litigant may appeal WCJ decisions to the Board. The last day on which Wilhelm could have timely filed his appeal was November 17, 2006.

Now on appeal to this Court, Wilhelm makes no attempt to justify or to excuse his failure to timely appeal to the Board. In fact, Wilhelm makes no mention of his untimeliness at all in his brief to this Court. Instead, Wilhelm's arguments focus exclusively on the substantive issues of his case. On the issue of whether the WCJ's finding that Wilhelm is recovered fully from his work injury is supported by substantial evidence, Wilhelm argues 1) that substantial evidence demonstrates that he suffered a torn meniscus after the December 15, 2004 work incident; 2) that the finding that he is recovered fully from his work injury is in fact not supported by substantial evidence; and 3) that there is no substantial evidence to prove that he had any serious knee problems prior to his work accident on December 15, 2004.

The Board determined that it was within the WCJ's discretion to reject Dr. Florian's testimony that Wilhelm had a medial meniscus tear, which required surgery, because Dr. Weiss reviewed x-ray and MRI films of Wilhelm's knee and concluded that his meniscus was not torn. In addition, the Board concluded that the WCJ was acting within his discretion when he accepted Dr. Weiss' testimony that Wilhelm had recovered fully from his left knee sprain and was acting within his discretion when he discredited Wilhelm's testimony where he attempted to

downplay his prior knee problems. Wilhelm testified that he has a mild case of arthritis in his left knee, and Dr. Florian acknowledged that he had treated Wilhelm for left knee problems prior to his work injury. The Board recognized that a WCJ has full authority over questions of credibility, conflicting medical evidence and evidentiary weight. *See Sherrod v. Workmen's Compensation Appeal Board (Thoroughgood, Inc.)*, 666 A.2d 383 (Pa. Cmwlth. 1995). Regarding due process, it held that the WCJ did not err in hearing the case in Butler County when Wilhelm and his counsel were offered an opportunity to object and neither one did.

The Court ordinarily will review appeals from the Board to determine whether constitutional rights have been violated, whether an error of law has been committed and whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; *Visteon Sys. v. Workers' Compensation Appeal Board (Steglik)*, 938 A.2d 547 (Pa. Cmwlth. 2007). In *Fritz v. Workmen's Compensation Appeal Board (Kim Mfg. Co., Inc.)*, 527 A.2d 636, 637 (Pa. Cmwlth. 1987), however, the Court explained:

Although the claimant raises a number of issues with respect to the [WCJ's] decision, we need not address them. The record reveals that claimant did not appeal the [WCJ's] decision until ... a point far beyond the twenty-day limit.... That twenty-day limit, codified in Section 423 of the Act, 77 P.S. § 853, has long been held jurisdictional, and once the time limit expired the [WCJ's] decision became final. Consequently, that decision was beyond the review of the Board.

The same analysis applies here. Because Wilhelm's appeal from the WCJ's order was filed with the Board beyond the twenty-day appeal period, the Board acted properly when it dismissed Wilhelm's appeal as untimely filed. Accordingly, the Court affirms the Board's order on that basis.

With respect to the substantive issues that Wilhelm attempts to raise, the Court notes that if it were to review those issues it would be inclined to affirm the Board based on *Sherrod, Peterson v. Workers' Compensation Appeal Board (Wal Mart)*, 938 A.2d 512 (Pa. Cmwlth. 2007) (stating that the WCJ has exclusive province over questions of evidentiary weight and witness credibility); *Forbes Health System v. Workmen's Compensation Appeal Board (Washington)*, 463 A.2d 83 (Pa. Cmwlth. 1983) (stating that the WCJ has exclusive province over resolution of conflicts in medical testimony); and Pa. R.A.P. 302(a) (providing that issues and objections not raised in the lower court, such as party's failure to raise an objection to venue, are waived and cannot be raised for the first time on appeal).

DORIS A. SMITH-RIBNER, Judge

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ORDER

AND NOW, this 28th day of July, 2008, the order of the Workers' Compensation Appeal Board is affirmed.

DORIS A. SMITH-RIBNER, Judge