IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Lutz,	:	
Petitioner	:	
	:	
v.	:	No. 408 C.D. 2008
	:	SUBMITTED: June 20, 2008
Workers' Compensation Appeal	:	
Board (TTC, Inc.),	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** August 7, 2008

Claimant Michael Lutz petitions for review of the February 8, 2008 order of the Workers' Compensation Appeal Board (Board) that, in relevant part, affirmed the order of the Workers' Compensation Judge (WCJ) denying claimant's review petition with respect to the issue of the calculation of his Average Weekly Wage (AWW). For the reasons that follow, we affirm.

In January 1999, claimant suffered work-related cervical and lumbar strains and sprains on his second day of employment as a tractor-trailer driver for employer TTC, Inc. when he was involved in an accident with a motor vehicle. The Temporary Notice of Compensation Payable (TNCP) listed claimant's AWW as $372.00, resulting in a weekly temporary total disability rate of $294.00.

In December 2005, employer[1] filed a termination petition, asserting that claimant had fully recovered from a disc herniation at the T8-9 level of the thoracic spine and from the cervical and lumbar strains. In February 2006, claimant filed a review petition therein alleging an incorrect description of injury and an incorrect AWW.

The WCJ denied employer's termination petition and granted, in part, claimant's review petition in order to expand claimant's work injury "to include a protruding cervical disc at C5-6 and a herniated thoracic disc at T8-9." WCJ's Conclusion of Law No. 11. The WCJ denied that portion of the review petition concerning the allegedly incorrect AWW, concluding that claimant's testimony did not credibly support his contentions. The Board affirmed the WCJ's order and claimant's timely petition for review to this court followed.

Claimant raises one issue on appeal: "whether the WCJ capriciously disregarded competent, uncontroverted evidence by rejecting claimant's testimony that he expected to earn $1,140.00 per week pursuant to the terms of employment."[2] Claimant's Brief at 7. Where the WCJ's findings reflect a deliberate disregard of competent evidence that logically could not have been avoided in reaching the decision, the findings represent a capricious disregard of competent evidence. *Higgins v. Workers' Comp. Appeal Bd. (City of Phila.),* 854 A.2d 1002 (Pa. Cmwlth. 2004). In addition, the reasoned decision requirement

[1] When employer's original workers' compensation carrier became insolvent, the Pennsylvania Workers' Compensation Security Fund became responsible for administering claimant's workers' compensation claim. Inservco Insurance Services, Inc. provided the third-party claim adjustment services to the Fund in the present case.

[2] We note that the "capricious disregard" standard is within the proper scope of our review whenever it is preserved below and presented on appeal. *See Leon E. Wintermyer, Inc. v. Workers' Comp. Appeal Bd. (Marlowe)*, 571 Pa. 189, 812 A.2d 478 (2002).

mandates that "[u]ncontroverted evidence may not be rejected for no reason or for an irrational reason: the [WCJ] must identify that evidence and explain adequately the reasons for its rejection." Section 422(a) of the Workers' Compensation Act (Act).[3]

As an initial matter, we note that Section 413(a) of the Act[4] authorizes the WCJ, at any time, to modify the NCP if the party can prove that it is in any material respect incorrect. Here, the WCJ found that claimant failed to sustain that burden with regard to his AWW and made the following fact-finding:

> The WCJ does not credit Claimant's explanation of his expected [AWW] at time of hire. In this regard, the WCJ observes: (1) Claimant could not recall the name of the company representative who said that Claimant would be compensated at a rate of .38 cents per mile and would be driving three thousand miles per week; (2) Claimant produced no documents to confirm that he was paid by the mile, or, to confirm his expectations with regard to wages; (3) Claimant did not challenge the Defendant's calculation of the [AWW] for approximately six years post-injury although he has not worked at any time post-injury, and although he testified that when he accepted the job he expected to be paid an [AWW] of approximately $1,140.00 (3,000 miles per week @ .38 cents per mile) or he "wouldn't be able to afford to live."

WCJ's Finding of Fact No. 64.

Claimant posits numerous reasons why the WCJ erred in rejecting his uncontroverted evidence. Noting the WCJ's statement that he failed to challenge the AWW calculation in the six years following the injury, claimant points out that the WCJ did not address his testimony that he did, in fact, ask a claims adjuster

[3] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 834.
[4] 77 P.S. § 771.

about his compensation rate following the injury but was told that he was receiving the maximum amount. Further, claimant avers that it is not surprising that he could not recall the name of employer's representative who related his expected earnings, given the fact that the conversation occurred over seven years ago and that he worked for employer only two days before the accident occurred. He notes that he was able to provide a description of the individual and an approximate pronunciation of the individual's name. As for any documentation to support a higher AWW, claimant points out that there is no evidence that any written documentation ever existed that would have confirmed his understanding of the wages. Claimant further notes that counsel for employer indicated an intention to depose an employer representative regarding the AWW, but failed to do so. Thus, claimant argues that the WCJ's decision does not satisfy the reasoned decision requirement and that his findings constitute a capricious disregard of competent, uncontroverted evidence such that a remand for further fact-findings regarding the AWW is warranted.

Employer points out that determinations of fact and credibility are solely within the province of the WCJ and that he is free to accept or reject, in whole or in part, the testimony of any witness. *Joy Global, Inc. v. Workers' Comp. Appeal Bd. (Hogue)*, 876 A.2d 1098 (Pa. Cmwlth. 2005). It emphasizes that the WCJ in the present case gave three separate rationales for his credibility determination, which it asserts satisfies the reasoned decision requirement. It maintains that the WCJ's provision of three reasons actually exceeded his responsibility to provide a sufficient rationale for rejecting claimant's AWW testimony, given the fact that he personally observed claimant testify. *Daniels v. Workers' Comp. Appeal Bd. (Tristate Transp.)*, 574 Pa. 61, 828 A.2d 1043 (2003)

(where the WCJ actually hears the discredited testimony, a simple statement as to whether the witness is deemed credible, absent special circumstances, could be adequate to render the decision sufficiently reasoned.) Further, employer points out that the WCJ also rejected other portions of claimant's testimony, e.g. that segment wherein he testified that he was unable to work. *See* WCJ's Finding of Fact No. 63.

As for the WCJ's failure to address claimant's testimony that he asked employer's insurance carrier about his compensation rate, employer notes the Board's holding that the WCJ is not required to address every bit of evidence as long as he makes the crucial findings and gives proper reasons for his decision. *Pistella v. Workers' Comp. Appeal Bd. (Samson Buick Body Shop)*, 633 A.2d 230 (Pa. Cmwlth. 1993). Finally, with regard to employer's failure to present a witness to testify as to claimant's AWW, employer points out that it had no burden of proof in connection with claimant's review petition. *Anderson v. Workers' Comp. Appeal Bd. (Pa. Hosp.)*, 830 A.2d 636 (Pa. Cmwlth. 2003) (party seeking to modify the NCP has burden to establish that a material mistake of fact or law was made at the time the NCP was issued.) Thus, employer maintains that this court should affirm the Board's decision and order.

In requesting that this court remand the matter to the WCJ for further fact-findings, claimant is essentially asking this court to reweigh the evidence and determine that the WCJ came to an incorrect result that should be remedied by further fact-findings presumably in claimant's favor. We reiterate, however, that "determinations as to witness credibility and evidentiary weight are within the exclusive province of the WCJ and are not subject to appellate review." *Joy Global, Inc.*, 876 A.2d at 1103. The WCJ in the present case personally observed

claimant testify as to a variety of issues, weighed that testimony and then proffered specific reasons for either accepting or rejecting it.

Moreover, as for the WCJ's failure to consider claimant's testimony that he consulted with employer's insurer regarding his AWW, we note that the WCJ need not specifically evaluate each and every line of testimony offered. *Acme Mkts., Inc. v. Worker's Comp. Appeal Bd. (Brown)*, 890 A.2d 21, 26 (Pa. Cmwlth. 2006) ("[a] reasoned decision does not require the WCJ to give a line-by-line analysis of each statement by each witness, explaining how a particular statement affected the ultimate decision.") Consequently, we find the WCJ's findings to be in compliance with the reasoned decision requirement and conclude that he did not capriciously disregard competent, uncontroverted evidence.

Accordingly, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 7th day of August, 2008, the order of Workers' Compensation Appeal Board in the above captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge