IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Raymond Waszewski,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 487 C.D. 2008
	:	
Workers' Compensation Appeal Board (Pacifico Airport Valet/Eastern Alliance Insurance Group),	:	Submitted: July 3, 2008
	:	
Respondents	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: October 27, 2008**

Raymond Waszewski (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board), affirming the order of a Workers' Compensation Judge (WCJ), denying Claimant's Claim Petition. Claimant argues that the Board erred in affirming the WCJ's determination that his injuries were the result of personal animosity between Claimant and a coworker and were, therefore, not compensable pursuant to Section 301(c)(1) of the Workers' Compensation Act

(Act);[1] Claimant argues that the WCJ's decision on this issue is not a reasoned decision and capriciously disregards competent evidence.

Claimant worked as a driver for Pacifico Airport Valet (Employer). (WCJ Decision, Finding of Fact (FOF) ¶ 2a.) Richard Brown (Brown) also worked for Employer as a driver. (FOF ¶ 2a.) Employer had hired both Claimant and Brown in June 2003, and the two worked overlapping shifts. (FOF ¶ 2d; WCJ Hr'g Tr. at 11, March 8, 2006.) They did not socialize outside work. (FOF ¶ 2c.) During the year they worked together, Claimant and Brown would exchange comments back and forth. (FOF ¶ 2d.) On May 9, 2004, Claimant was spending his idle time in the valet drivers' lounge. (FOF ¶ 2a.) Brown was present in the lounge. (FOF ¶ 2a.) Claimant and Brown began talking about cuisine and their packed lunches; Claimant noted Brown's lunch was packed in styrofoam. (FOF ¶¶ 2e, 7a, 10; WCJ Hr'g Tr. at 7.) Brown became aggravated, then left the lounge to serve Employer's customers. (FOF ¶ 2e, WCJ Hr'g Tr. at 23, 25.) When Brown returned, the banter continued until Brown made a comment about Claimant's wife packing Brown's lunch, and insinuated that Brown was sleeping with Claimant's wife. (FOF ¶¶ 2d-e, 7a, 10.) Brown then grabbed Claimant from behind, choking him. (FOF ¶ 2a, e.) Claimant stood up and pushed Brown. (FOF ¶ 2a.) Other individuals interceded, and Claimant fell to the ground. (FOF ¶ 2a.) During the incident, Claimant broke five ribs and his right collarbone. (FOF ¶¶ 2a, 3, 5.)

Claimant filed a Claim Petition on January 24, 2006, alleging that he suffered a work injury on May 9, 2004 and listing Brown's assault as the cause of Claimant's

[1] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 411(1).

injuries. Claimant requested full disability benefits from May 10, 2004 to January 10, 2005, as well as payment of medical bills and counsel fees.

The WCJ held hearings in this matter, at which Claimant and Employer both presented evidence. Claimant testified in person at a hearing on March 8, 2006. Claimant also submitted medical evidence, including records from Methodist Hospital and reports by Dr. Honig and Dr. Dean G. Karalis. Employer presented the deposition testimony of Edward Walters (Walters), a coworker of both Claimant and Brown who witnessed the incident, and Sid Shore, Claimant's supervisor. Employer also presented a videotape showing events that occurred on May 9, 2004. The WCJ determined that Employer met its burden of establishing that Claimant was injured as a result of personal animosity between Claimant and Brown. In doing so, the WCJ found:

> the testimony of Claimant credible that prior to the altercation, he and Mr. Brown were engaged in verbal exchanges such as Mr. Brown insinuating he had sex with Claimant's wife, Mr. Brown saying he was going to tell Claimant's wife to stop packing his lunch that way, and other exchanges regarding lunches and styrofoam. The testimony of Edward Walters is found credible that the fight occurred after Richard Brown said something about Claimant's wife cooking for him. There was no evidence presented that the words exchanged between Claimant and Mr. Brown had anything to do with work.

(FOF ¶ 10.)

Claimant appealed to the Board, which affirmed the WCJ's decision. The Board relied on the testimony credited by the WCJ, and determined that the WCJ did not err in concluding that the altercation was a result of personal animosity. The Board also determined that Claimant was not an innocent victim of an attack because

he engaged in banter with Brown that delved into non-work-related issues. Thus, his injury would not be compensable as an "unexpected happening arising in the course of employment" pursuant to Wills Eye Hospital v. Workmen's Compensation Appeal Board (Dewaele), 582 A.2d 39 (Pa. Cmwlth. 1988) and Cleland Simpson Co. v. Workmen's Compensation Appeal Board, 332 A.2d 862 (Pa. Cmwlth. 1975). (Board Op. at 7.) The Board further determined that, since Claimant testified in person before the WCJ, the WCJ did not need to provide an objective basis for her credibility determinations pursuant to Daniels v. Workers' Compensation Appeal Board (Tristate Transport), 574 Pa. 61, 828 A.2d 1043 (2003). Claimant now petitions this Court for review.[2] (Board Op. at 7, 8.)

On appeal, Claimant argues that the WCJ's decision is not a reasoned decision and capriciously disregards competent evidence. "Section 301(c)(1) of the Act excludes from compensation those injuries occurring as a result of acts of third parties for personal reasons." Helms v. Workmen's Compensation Appeal Board (U.S. Gypsum Co.), 654 A.2d 106, 108 (Pa. Cmwlth. 1995). Section 301(c)(1) provides that:

[2] This Court's review of the Board's determination is "limited to determining whether constitutional rights were violated, errors of law were committed or necessary findings of fact were unsupported by substantial evidence." Manners v. Workmen's Compensation Appeal Board (McDonald's Restaurant), 688 A.2d 786, 788 n.1 (Pa. Cmwlth. 1997). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Gibson v. Workers' Compensation Appeal Board (Armco Stainless & Alloy Prods.), 580 Pa. 470, 479, 861 A.2d 938, 943 (2004). Also, "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." Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 203, 812 A.2d 478, 487 (2002).

> [t]he term "injury arising in the course of his employment," as used in this article, shall not include an injury caused by an act of a third person intended to injure the employe because of reasons personal to him, and not directed against him as an employe or because of his employment. . . .

77 P.S. § 411(1). The fact that an assault occurs on an employer's property creates a presumption that a claimant is covered by the Workers' Compensation Act. Wills Eye, 582 A.2d at 40. However, this is a rebuttable presumption, and the employer has a heavy burden to prove that the employee was injured for reasons personal to the assailant. Id. In a personal animus case, the motivation of an assailant is a matter of fact and is, therefore, determined by the WCJ. M & B Inn Partners, Inc. v. Workers' Compensation Appeal Board (Petriga), 940 A.2d 1255, 1259 (Pa. Cmwlth. 2008). Claimant argues that, in making this factual determination, the WCJ capriciously disregarded Claimant's testimony. Claimant argues that his testimony shows that Brown attacked him without provocation or explanation, and that the WCJ ignored this testimony without giving any reason. It is true that, on direct examination, Claimant stated only that Brown became angry after Claimant was asked to work late, and began choking Claimant. However, on cross-examination, Claimant admitted that there had been a history of banter between Claimant and Brown.[3] Claimant also

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[3] Specifically:

> Q. [Employer's counsel]. Mr. Waszewski, I take it you're saying that this was an isolated incident?
> A. [Claimant] I don't follow you.
> Q. Was this the first time you had any interchange or exchange with Mr. Brown?
> A. I thought there was just fooling around sometimes that's all. Just some words here and there. That's all. Nothing too serious.
> Q. When you say "sometimes," on an ongoing basis—
> A. I never initiated it.

(Continued…)

admitted on cross-examination that there had been some back and forth on the day of the attack.[4] We note that an employer can meet its burden by using a claimant's testimony. Kandra v. Workmen's Compensation Appeal Board (Hills Dept. Store), 632 A.2d 1069, 1072 (Pa. Cmwlth. 1993). Taken as a whole, Claimant's testimony

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> Q. That's not my question. Is it a fair statement that during this year that you were working at Pacifico, that you and Mr. Brown had an ongoing exchange of . . .
> . . . .
>
> Q. Of comments back and forth?
> A. Well, yeah, you talk when you're in the same room with each other.

(WCJ Hr'g Tr. at 17, March 8, 2006.)

[4] Claimant testified that:

> Q. [Employer's counsel] Is it also true that you implied that you had had sex with his mother that day?
> A. [Claimant] No.
> Q. He told you to stop or you were going to take it outside, correct?
> A. That he did say, but it wasn't those words.
> Q. What were the words?
> A. He said—he made some insinuation that he had had sex with my wife.
> Q. What was your response to that?
> A. First I didn't say anything for a while. You know you got it in. It's going too far. I let it go and I backed off and then he wouldn't let up. Took that as a weakness.
> Q. When you say he wouldn't let up, what happened? Were you—
> A. Just kept saying, "I'm going to tell your wife to stop making that—packing my lunch that way" and all that stuff like that.

(WCJ Hr'g Tr. at 18-19.) On further questioning about what passed between Claimant and Brown prior to the assault, Claimant stated that "[Brown] said, 'I don't like anything you like.' And I said, 'Oh, what are you a gourmet. I see you carrying food in styrofoam you know.' I would think somebody would say, 'Yeah, but that's good styrofoam.' Just something stupid like that, but he took it to another level." (WCJ Hr'g Tr. at 23.)

supports the factual inference that Brown had personal reasons for attacking Claimant, which were unrelated to Brown's or Claimant's work for Employer.

Claimant's testimony was corroborated by that of his coworker, Walters, who verified that the assault "occurred after [Brown] said something about [Claimant]'s wife cooking for him." (Walters Dep. at 6.) Claimant argues that Walters' testimony was incompetent to show that Brown's confrontation with Claimant was motivated by personal reasons because it was Walters first day, and he did not know Brown or Claimant. We disagree. Walters testified that he did not think the assault was work-related. (Walters Dep. at 6.) However, while the WCJ included this statement in her summary of the witnesses' testimony, she did not include this statement in her credibility determination, stating only that "[t]he testimony of Edward Walters is found credible that the fight occurred after Richard Brown said something about Claimant's wife cooking for him." (FOF ¶ 10.) Moreover, it is entirely conceivable that Walters would have been able to discern from the content of any discussion or argument between Brown and Claimant that the content of such discourse was not work-related, even if he did not know the personal history between the two individuals. Thus, we disagree with Claimant's assertion that Walters' testimony was not competent and that the WCJ improperly relied on it.

Finally, Claimant attempts to analogize the facts of the current case to those of Sysco Food Services of Philadelphia v. Workers' Compensation Appeal Board (Sebastiano), 940 A.2d 1270 (Pa. Cmwlth. 1990), in which this Court approved an award of benefits to a claimant who was grabbed, dragged to the floor and fallen upon by a coworker, on the grounds that the claimant had been the victim of, rather

than a participant in, prohibited horseplay. Such a comparison is unavailing. While the facts in this case are similar to those in Sysco, the legal issues are different. In Sysco, the employer argued that it had a rule against horseplay, the claimant was injured while engaged in horseplay in violation of the employer's rule, and benefits should, therefore, be denied. Id. at 1273. The issue is not, in this case, whether Claimant violated one of Employer's rules. In this case, Employer raised the personal animosity defense. The issue is, therefore, whether Brown assaulted Claimant "because of reasons personal to him, and not directed against [Claimant] as an employe or because of his employment." 77 P.S. § 411(1). The WCJ found that Brown's motivation was personal. Because this finding was not, as Claimant argues, made in capricious disregard of competent evidence, we can not say it was in error.

For these reasons, we affirm the order of the Board.

RENÉE COHN JUBELIRER, Judge

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O R D E R

NOW, October 27, 2008, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED**.

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RENÉE COHN JUBELIRER, Judge

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BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE PELLEGRINI FILED: October 27, 2008

In this case, the Workers' Compensation Judge (WCJ) found that "[t]here is no evidence presented that the words exchanged between Claimant and Mr. Brown had anything to do with work. However, there was evidence because Claimant testified that when he was asked to stay, Brown became very angry and assaulted him." (R. 16a-17a.) If he had not overlooked that evidence, the WCJ could have inferred that Mr. Brown assaulted Claimant because Claimant was given overtime and he was not. If the WCJ made that inference, then Claimant would be entitled to benefits because the assault would have been triggered for a work-related and not a personal reason.

Because the WCJ incorrectly found that there was no evidence that the injury had anything to do with work, I would remand for consideration of that evidence.

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DAN PELLEGRINI, JUDGE