IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Roger Moody, Petitioner	:	
v.	:	No. 496 C.D. 2008
	:	Submitted: July 18, 2008
Workers' Compensation Appeal Board (Philadelphia Gas Works), Respondent	:	

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: September 5, 2008

Roger Moody (Claimant) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) denying Claimant's reinstatement petition. The Board affirmed the decision of the Workers' Compensation Judge (WCJ) that Claimant was not entitled to reinstatement of his disability benefits because he had retired and had not applied for any job since his retirement. We affirm.

Claimant was employed as a gas appliance repairman for Philadelphia Gas Works (Employer). On November 2, 1994, Claimant sustained an injury to his right knee in the course of his employment and began receiving workers' compensation benefits. On December 1, 1999, Claimant was released to work in a light-duty position. In April 2000, Claimant returned to such a job, *i.e.*, refueling

Employer's vehicles, without a loss in wages. The job required Claimant to climb in and out of Employer's vehicles, drive the vehicles to a service station and refuel them. As a result, Employer filed a termination/suspension petition alleging, *inter alia*, that Claimant had fully recovered from his work-injury and, in the alternative that, Claimant had returned to work without a loss in wages.

On December 3, 2001, WCJ Susan E. Kelley suspended benefits. The WCJ found, as fact, that Claimant had been released to return to light-duty employment with the following restrictions: no kneeling, crawling, climbing ladders, prolonged standing, prolonged sitting, prolonged walking, or lifting more than 20 pounds. WCJ Kelley Decision, December 3, 2001, at 2-3, Findings of Fact Nos. 5, 6 (F.F. __); Reproduced Record at 4a-5a (R.R. __). The WCJ also found that Claimant had returned to light-duty work with Employer without a loss in wages in April 2000. F.F. 13; R.R. 6a. The WCJ found that although Claimant testified that he intended to retire in December 2000, there was no evidence that he did in fact retire and Claimant stated that he intended to continue working part-time following his retirement. F.F. 18; R.R. 7a. Claimant's disability benefits were suspended as of April 2000.

On January 20, 2006, Claimant filed a reinstatement petition seeking total disability benefits, asserting that his light-duty position was no longer available to him.[1] Employer answered, denying the material allegations.

Hearings were held before WCJ Nancy M. Goodwin. Admitted as evidence of record was the decision of WCJ Kelley, dated December 3, 2001,

[1] In June 2006, Claimant's 500 weeks of partial disability ended, which benefits had continued after his retirement because he still suffered a partial wage loss at the time of his retirement.

granting Employer's suspension petition. Also admitted was Claimant's testimony before WCJ Kelley, dated June 27, 2000.

In support of his reinstatement petition, Claimant introduced his deposition testimony that he continues to suffer from and seek treatment for the work-related injury to his right knee and that he complained to three supervisors about his dissatisfaction with the job of refueling vehicles. Claimant stated that each supervisor informed Claimant that there was no other light-duty work available and that he should do the best he can. Claimant testified that refueling Employer's vehicles was not a light-duty position because he had difficulties climbing in and out of the vehicles.

Claimant also testified that his last day of employment with Employer was February 1, 2001, when his retirement became effective. Claimant stated that he was not sure whether he was working the refueling position for Employer at the time he retired. Claimant testified that he was "forced" into retirement because, according to his supervisors, there was no other light-duty work available. Claimant testified that he would have continued to work for years more if Employer had other light-duty work available. Claimant believed that he was not receiving his full pension and that if he had worked another five years he would have been eligible for 100 percent of his pension. Although Claimant had testified in the suspension proceeding that he would seek other light-duty employment upon retirement, Claimant acknowledged that he had not sought any employment since his retirement.

Claimant also introduced the deposition testimony of Jerry Murphy, M.D., who works in the areas of emergency medicine and traumatic care.[2] Dr. Murphy summarized Claimant's treatment and ongoing symptoms. Dr. Murphy testified that Claimant was capable of working in a light-duty position with the same restrictions he placed on Claimant when he was released to light-duty on December 1, 1999, which include: no kneeling, crawling, climbing ladders, prolonged standing, prolonged sitting, prolonged walking, or lifting more than 20 pounds.

In opposition to Claimant's reinstatement petition, Employer introduced the deposition testimony of William Ambrose, the Director of Administration for Employer. Ambrose testified that he met with Claimant in December 2000, and described Claimant's retirement options, including Employer's "30 and out" plan, which plan was required to be offered under the bargaining agreement between Claimant's union and Employer. The "30 and out" plan pays 100 percent of an employee's pension once an employee reaches 30 years of service, without a reduction for age. Under this plan, pensions are calculated solely on the employee's highest salary for five of the previous ten years of employment. Employees who do not opt for the "30 and out" plan wait until the age of 65 to receive a 100 percent pension, at which point the amount of the pension is calculated on the years of service.

Ambrose testified that on December 13, 2000, Claimant opted for the "30 and out" plan and, as a result, Claimant's benefits were based on his highest

[2] It is unclear from the record whether Dr. Murphy is board-certified in a particular practice area. *See* R.R. 141a (Dr. Murphy agreeing that he has not become board-certified in any speciality).

salary for five of the ten previous years, which were 1992, 1994, 1995, 1996, and 1997. Claimant's benefits were 100 percent vested at the time of retirement. Ambrose stated that, had Claimant waited to retire, his retirement benefits may have been higher or lower, depending upon Claimant's earnings in the succeeding years.

Employer also introduced the deposition testimony of Jane Elizabeth Lamb, the Director of Risk Management for Employer. Lamb described Employer's policy to place all disabled workers in light-duty positions if such positions were available, regardless of whether the disability was work-related. Lamb testified that Claimant did the job of refueling Employer's vehicles from April 2000 through his retirement to accommodate his disability. She would not have made this assignment if Claimant had presented a note from his doctor that Claimant could not do the refueling job. Lamb had no idea whether Claimant's supervisors had told Claimant there were no other light-duty positions but, in any case, these supervisors had no authority to speak on this point. Lamb explained that light-duty assignments were done by a committee.

On May 15, 2007, the WCJ denied Claimant's reinstatement petition. The WCJ found Lamb and Ambrose to be credible and rejected Claimant's testimony as not credible. The WCJ also rejected the testimony of Dr. Murphy regarding Claimant's inability to perform the refueling position with Employer because Dr. Murphy's testimony was inconsistent with the adjudicated facts found in the suspension proceeding. Indeed, Dr. Murphy's testimony was contradicted by Claimant's testimony in the suspension proceeding. Accordingly, the WCJ concluded that Claimant failed to prove that he was entitled to a reinstatement of

benefits. Claimant appealed to the Board, which affirmed. Claimant now petitions for review.[3]

Claimant raises three issues for this Court's review. First, Claimant contends the WCJ did not issue a reasoned decision as required by Section 422(a) of the Workers' Compensation Act (Act).[4] Second, Claimant asserts that the WCJ erred in finding that Claimant was not forced to retire. Third, Claimant contends that the Board erred in holding that Claimant was required to prove that he was disabled from any job in the labor market, as opposed to his pre-injury job.

We begin, first, with Claimant's reasoned decision issue. In construing the reasoned decision requirement set forth in Section 422(a) of the Act, our Supreme Court has explained that:

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[3] This Court's review of an order of the Board is limited to determining whether the necessary findings of fact were supported by substantial evidence, constitutional rights were violated, or errors of law were committed. *Borough of Heidelberg v. Workers' Compensation Appeal Board (Selva)*, 894 A.2d 861, 863 n.3 (Pa. Cmwlth. 2006). The WCJ's determinations as to credibility and evidentiary weight are binding on appeal unless made arbitrarily and capriciously. *PEC Contracting Engineers v. Workers' Compensation Appeal Board (Hutchison)*, 717 A.2d 1086, 1089 (Pa. Cmwlth. 1998).

[4] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §834. Section 422(a) provides in relevant part:

> All parties to an adjudicatory proceeding are entitled to a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached. The [WCJ] shall specify the evidence upon which the [WCJ] relies and state the reasons for accepting it in conformity with this section. When faced with conflicting evidence, the [WCJ] must adequately explain the reasons for rejecting or discrediting competent evidence. Uncontroverted 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. The adjudication shall provide the basis for meaningful appellate review.

77 P.S. §834.

> [A] decision is "reasoned" for purposes of Section 422(a) if it allows for adequate review by the [Board] without further elucidation and if it allows for adequate review by the appellate courts under applicable review standards. A reasoned decision is no more, and no less.

Daniels v. Workers' Compensation Appeal Board (Tristate Transport), 574 Pa. 61, 76, 828 A.2d 1043, 1052 (2003). Unless a credibility assessment is tied to a witness's demeanor before the WCJ, "some articulation of the actual objective basis for the credibility determination must be offered." *Id.* at 78, 828 A.2d at 1053 (footnote omitted). Nevertheless, "the WCJ's prerogative to determine the credibility of witnesses and the weight to be accorded evidence has not been diminished" by the reasoned decision requirements of Section 422(a). *Empire Steel Castings, Inc. v. Workers' Compensation Appeal Board (Cruceta)*, 749 A.2d 1021, 1027 (Pa. Cmwlth. 2000) (quoting *PEC Contracting*, 717 A.2d at 1089).[5]

Here, the WCJ explained her decision to credit the testimony of Ambrose and Lamb as follows:

> 8. The testimony of Mr. Ambrose and Ms. Lamb is more credible and persuasive than that of claimant and Dr. Murphy. [Claimant] testified in 2006 that he does not

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[5] This Court does not second-guess a credibility finding. As we have explained:

> We decline [the] invitation to individually scrutinize each of the WCJ's reasons for his credibility determination. Deciding credibility is the quintessential function of the fact-finder, particularly one who sees and hears the testimony. It is not an exact science, and the ultimate conclusion comprises far more than a tally sheet of its various components. We will not take the statutory mandate that a WCJ explain reasons for discrediting evidence as a license to undermine the exercise of this critical function by second guessing one or more of its constituent parts.

Kasper v. Workers' Compensation Appeal Board (Perloff Brothers, Inc.), 769 A.2d 1243, 1246 (Pa. Cmwlth. 2001) (footnote omitted).

remember what job he was working when he retired. He stated that if there was light duty work available, he would have continued to work. He stated that he believed that he was receiving 50 or 60 percent of his pension, which is inconsistent with the more credible testimony [of Ambrose] that he was receiving 100% of his pension. He believed that he would have been eligible for 100 percent in five years. He was uncertain about all of this. He remembers that he received therapy, but he cannot remember when the therapy started or ended. He did not remember telling [WCJ] Kelley on June 27, 2000 that in June of 2000 he was working gassing trucks. He stated in his testimony on May 17, 2006 that he was unable to do the job gassing trucks during the entire period he held that job. (N.T. May 17, 2006, pp. 23-24). But that is inconsistent with his testimony before [WCJ] Kelley at the time he was performing the job, that he was able to do that job but he just cannot go for a long distance, say 50 miles. (N/T 6/27/00, pp. 9-10 and 20).

9. [WCJ] Kelley found that claimant had not voluntarily retired from the work force in part because he testified in June of 2000 that after his retirement, he intended to look for part-time jobs. He testified on October 5, 2006 that he had not worked or looked for any work since his retirement. Since claimant applied for retirement [on] December 13, 2000 and accepted his retirement [on] February 1, 2001, he has not applied for any position. He stated his intent to retire on a "30 and out" during his testimony in June of 2000. Claimant has voluntarily retired from the work force.

10. Claimant has failed to present any medical evidence that the light duty position gassing trucks in which he was engaged at the time of his retirement was beyond his physical capabilities due to his work injury. Claimant did not testify he was required to perform any physical activities from which he was restricted by Dr. Murphy. Claimant's testimony is not credible that Employer had no light duty job for him which was within his work related

> restrictions when he retired. Dr. Murphy also did not distinguish what restrictions Claimant had for his work related [injury] as opposed to his non-work related [condition]. Dr. Murphy's testimony that Claimant was not able to perform the job of refueler gassing trucks is not credible.

WCJ Goodwin Decision, May 15, 2007, at 5, F.F. 8-10. The above findings fully explain the WCJ's objective bases for finding Ambrose and Lamb to be credible and persuasive and for finding Claimant and Dr. Murphy not credible. There is no merit to Claimant's contention that the above-quoted findings do not meet the reasoned decision requirement of Section 422(a) of the Act.

Nevertheless, Claimant contends that the WCJ was required to give specific reasons for rejecting Claimant's statement that his three supervisors told him that Employer had no other light-duty position. Claimant asserts that it was Employer's burden to call the three supervisors to rebut his hearsay statement, and in the absence of this rebuttal testimony the WCJ could not find against Claimant on this point. We disagree.

First, the WCJ credited the testimony of Lamb, who testified that the supervisors did not have authority to inform employees whether work was available. More importantly, the WCJ found Claimant's testimony not credible.[6]

[6] A WCJ is free to accept, in whole or in part, the testimony of any witness. *Greenwich Collieries v. Workmen's Compensation Appeal Board (Buck)*, 664 A.2d. 703, 706 (Pa. Cmwlth. 1995).

A WCJ cannot rely upon evidence found not to be credible; indeed, to do so would result in findings of fact not supported by substantial evidence.[7]

Second, as stated above, a decision is reasoned if it allows for adequate appellate review under the applicable standards of review. *Daniels*, 574 Pa. at 76, 828 A.2d at 1052. However, this does not mean that a WCJ must provide a line-by-line recitation of every shred of evidence. Indeed, this Court has previously explained:

> 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.

Acme Markets, Inc. v. Workers' Compensation Appeal Board (Brown), 890 A.2d 21, 26 (Pa. Cmwlth. 2006).

In short, Claimant's reasoned decision argument is nothing more than another way to argue that the WCJ should not have rejected Claimant's version of the facts. Claimant disagrees with the WCJ's decision, but this does not mean that the decision is not reasoned.

We next address Claimant's argument that the WCJ erred in concluding that Claimant was not forced to retire. In support, Claimant first argues that he was forced to accept retirement because Employer had no other light-duty positions available and because his pension was being eroded by his disability, resulting in a reduced pension. Claimant's arguments lack merit.

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[7] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Moorehead v. Civil Service Commission of Allegheny County*, 769 A.2d 1233, 1238 (Pa. Cmwlth. 2001).

First, as stated above, the WCJ did not credit Claimant's testimony, including the hearsay statement that his supervisors stated that there was no other light-duty work available. Claimant's argument relies upon his version of the facts, not those found by the WCJ.

Second, even assuming, *arguendo*, that Claimant's pension amount was being decreased during the times he was on disability, this is a matter beyond Claimant's appeal. The "30 and out" pension plan was part of a collective bargaining agreement between Employer and the union that represented Claimant. Claimant opted for the "30 and out" plan under the collective bargaining agreement and five years later became dissatisfied with the calculation of his pension. Claimant's remedy lies in the collective bargaining agreement, not in a workers' compensation proceeding.

Finally, we turn to Claimant's argument that the Board erred in requiring Claimant to prove that he was disabled from any job in the labor market. Claimant contends that he had only to prove that he could not do his pre-injury job.

The Pennsylvania Supreme Court has held that a claimant is not entitled to workers' compensation benefits where the claimant voluntarily leaves the labor market. It explained as follows:

> It is clear that disability benefits must be suspended when a claimant voluntarily leaves the labor market upon retirement. The mere possibility that a retired worker may, at some future time, seek employment does not transform a voluntary retirement from the labor market into a continuing compensable disability. An employer should not be required to show that a claimant has no intention of continuing to work; such a burden of proof would be prohibitive. *For disability compensation to continue following retirement, a claimant must show that he is*

> *seeking employment after retirement or that he was forced into retirement because of his work-related injury.*

Southeastern Pennsylvania Transportation Authority v. Workmen's Compensation Appeal Board (Henderson), 543 Pa. 74, 79, 669 A.2d 911, 913 (1995) (emphasis added). Thus, to prove that he did not voluntarily leave the labor market, Claimant had to prove that (1) he was seeking employment or (2) the work-related injury forced him to retire.[8]

This Court has explained that in order for a claimant to show that the work-related injury forced him to retire, the claimant has to establish that he was incapable of working in any job in the entire labor market, not just that he was incapable of performing his pre-injury position. *County of Allegheny (Department of Public Works) v. Workers' Compensation Appeal Board (Weis)*, 872 A.2d 263, 265 (Pa. Cmwlth. 2005). Our case law is clear on this point.[9] Further, this Court is bound to follow our decisions unless overruled by the Supreme Court or where other compelling reasons can be demonstrated. *Pennsylvania Association of Milk*

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[8] Claimant concedes that he has not sought any employment since the date he retired from his position with Employer.

[9] *See, e.g.*, *Henderson*, 543 Pa. at 79, 669 A.2d at 913 ("It is clear that disability benefits must be suspended when a claimant *voluntarily leaves the labor market* upon retirement.") (emphasis added); *Republic Steel Corp. v. Workmen's Compensation Appeal Board (Petrisek)*, 537 Pa. 32, 37, 640 A.2d 1266, 1269 (1994) ("A disability which forces a claimant *out of the work force* and into retirement is compensable under the Act.") (emphasis added); *Capasso v. Workers' Compensation Appeal Board (RACS Assoc., Inc.)*, 851 A.2d 997, 1001 (Pa. Cmwlth. 2004) ("[A]fter retirement, it is a claimant's burden to demonstrate his absence from *the labor market* is involuntary.") (emphasis added); *Kasper*, 769 A.2d at 1245 ("Thus, workers' compensation benefits must be suspended when a claimant voluntarily leaves *the labor market*.") (emphasis added); *City of Philadelphia v. Workers' Compensation Appeal Board (Rooney)*, 730 A.2d 1051, 1053 (Pa. Cmwlth. 1999) ("A disability which forces a claimant *out of the work force* and into retirement is compensable under the Act.") (emphasis added) (quotation omitted).

Dealers v. Pennsylvania Milk Marketing Board, 685 A.2d 643, 647 (Pa. Cmwlth. 1996). This Court recently affirmed its holding in *Weis* and, moreover, the Pennsylvania Supreme Court denied appellate review on this issue. *See Pries v. Workers' Compensation Appeal Board (Verizon Pennsylvania)*, 903 A.2d 136, 144 (Pa. Cmwlth. 2006), *appeal denied*, 592 Pa. 762, 923 A.2d 412 (2007). Thus, the Board was correct in holding that Claimant had to prove that he was incapable of working at any job in the entire labor market in order for benefits to be reinstated.

For the foregoing reasons, the order of the Board is affirmed.

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MARY HANNAH LEAVITT, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Roger Moody, Petitioner	:	
v.	:	No. 496 C.D. 2008
Workers' Compensation Appeal Board (Philadelphia Gas Works), Respondent	:	

ORDER

AND NOW, this 5th day of September, 2008, the order of the Workers' Compensation Appeal Board dated March 3, 2008, in the above captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge