IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
|---|---|---|
| Wawa, Petitioner | : | |
| v. | : | No. 659 C.D. 2011 |
| | : | Submitted: August 12, 2011 |
| Workers' Compensation Appeal Board (Rodgers), Respondent | : | |

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: September 28, 2011

Wawa (Employer) petitions for review of the order of the Workers' Compensation Appeal Board (Board) affirming, as amended, the decision of a workers' compensation judge (WCJ) granting the claim petition for benefits filed by Wilbur Rodgers (Claimant) pursuant to the provisions of the Pennsylvania Workers' Compensation Act (Act).[1] We affirm.

On February 26, 2007, Claimant was employed as a facility manager at Employer's Bridgeport store. As he was walking to the store on a public sidewalk, he

[1] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1 – 1041.4, 2501 – 2708.

slipped and fell on ice and sustained an injury to his left knee. Claimant has not returned to work since the injury to his knee.

On March 8, 2007, Employer issued a notice of Workers' Compensation Denial which denied compensation benefits stating, in pertinent part: (1) Claimant did not suffer a work-related injury; (2) Claimant's injury was not within the scope of employment; (3) Claimant was not employed by Employer; (4) although an injury took place, Claimant is not disabled as a result of the injury; and (5) Claimant did not give notice to Employer within 120 days of the injury.

On June 21, 2007, Claimant filed a claim petition in which he alleged, inter alia, that he sustained an injury to his left knee while in the course and scope of his employment. On June 25, 2007, Employer filed an answer to the petition denying all of the material allegations raised therein. Hearings before a WCJ ensued.

In support of the petition, Claimant testified and presented the deposition testimony of Pekka Mooar, M.D., a physician board certified in orthopedic surgery. In opposition to the petition, Employer presented: the deposition testimony of the store's general manager, James Hunte; the deposition testimony of the store's customer service manager, Jason Bochanski; and the deposition testimony of Herbert Stein, M.D., a physician board certified in orthopedic surgery.

Claimant testified that he had worked for Employer for four years, but he had started working at Employer's Bridgeport store two weeks prior to his injury. The duties of his position required that he be on his feet for eight hours per day, and that he lift up to 75 pounds. He was paid $10.00 per hour, and was paid time and a half for overtime. He typically worked 50 to 60 hours per week.

When he had started working at the Bridgeport store, he parked in the store's parking lot. But Employer's general manager told him not to park in the

store's parking lot, and to park in the parking lot owned by an out-of-business event hall located behind the store, so that customers could use the store's parking lot. However, Claimant did not park in the event hall's lot because the lot had signs which stated that anyone parking in the lot would be towed. As a result, on the day he was injured, Claimant parked around the corner from the store on a side street.

On his way in to the store, Claimant slipped and fell on ice on his way into work. He reported the accident to his supervisor, Employer's assistant manager. The assistant manager assigned Claimant to work the cash register, but he stopped working after a few hours due to pain in his left knee. He went home, and then to the hospital later that night. He later sought treatment with his primary physician. Claimant had no injury to his left knee prior to his fall.

Because his left knee was still swollen and painful, Claimant sought further treatment with his primary physician who referred him to Dr. Palmaccio. On June 4, 2007, Dr. Palmaccio performed surgery on his left knee involving thermal shrinkage of the anterior cruciate ligament and synovectomy.

Dr. Mooar testified that he first saw Claimant on August 6, 2007. Due to continued pain and instability, Dr. Mooar performed another surgical intervention which revealed a delaminating injury of the trochlea, and incipient loose body formation within the sulcus of Claimant's knee. Dr. Mooar debrided this and was able to bring Claimant's knee into full extension after that. On his most recent visit of February 20, 2008, Claimant was just starting into his rehabilitation program.

Dr. Mooar diagnosed that Claimant had sustained a chondral sheer injury to the patellar femoral joint, particularly to the trochlea, which gave Claimant persistent symptoms. He stated that Claimant had not been able to perform the duties of his position due to the condition of Claimant's left knee and the narcotic

medications taken for the pain. More specifically, Claimant could not perform the duties of the position due to the prolonged standing, squatting, and lifting required, and the narcotic medications that Claimant was taking for pain.

Mr. Bochanski, the store's assistant manager, testified that he had asked Claimant to show him where the fall had occurred after Claimant had reported the incident. He stated that Claimant showed him that he had fallen on the last block of the sidewalk before it runs into the driveway of the parking lot.

Mr. Hunte testified that he had instructed the first-shift workers not to park in the store's parking lot but, rather, to park in the nearby lot owned by an out-of-business restaurant. Mr. Hunte also testified that Claimant had told him that he fell on the sidewalk next to the store's parking lot, that the sidewalk is the property of the Borough of Bridgeport, and that Employer does not ever maintain, clean, or perform upkeep on the sidewalk.

On June 12, 2009, the WCJ issued a decision in which she found the foregoing portions of the testimony of these witnesses to be credible. See WCJ Decision at 6-9. More specifically, the WCJ found that, as a result of his slip and fall injury of February 26, 2007, Claimant sustained a chondral sheer injury to the patellar femoral joint, particularly to the trochlea, and that he was disabled from the duties of his position from February 26, 2007, onward as a result of this injury. Id. at 8. In addition, on the issue of course and scope of employment, the WCJ found that Claimant's injury did not occur on Employer's premises but, rather, on the Borough's sidewalk. Id. Moreover, the WCJ found that by parking on the side street, Claimant was acting consistently with his supervisor's instructions and was thus acting in furtherance of Employer's interests by not taking up a spot in the parking lot that would then be available to Employer's customers. Id. at 9.

Based on the foregoing, the WCJ concluded: (1) Claimant had met his burden of proving by credible and competent evidence that he sustained a work-related injury to the left knee while in the course and scope of his employment; and (2) Claimant was disabled from performing the duties of his position as a result of the work-related injury from February 26, 2007, onward. WCJ Decision at 10. Accordingly, the WCJ issued an order granting Claimant's claim petition, and awarding total disability benefits at the rate of $466.62 per week from February 26, 2007. Id.

On July 1, 2009, Employer appealed the WCJ's decision to the Board. On March 28, 2011, the Board issued an opinion and order disposing of the appeal. In the opinion, the Board determined that because Employer's need to accommodate its customers prompted Claimant to park on the side street and walk on the snowy sidewalk to the store, the WCJ did not err in concluding that Claimant was furthering Employer's business interests and was, therefore, in the course of his employment when he was injured. Board Opinion at 8.[2] The Board also rejected Employer's contention that Dr. Mooar's testimony was equivocal because his testimony, taken as a whole, expressed his belief that there was a causal connection between Claimant's

[2] The Board also noted that a common or public area may be considered to be part of an employer's premises when it is integral to the employer's business because it is the usual or only reasonable means of ingress or egress for the workplace, even if the employer does not own, control, or maintain the area. Id. at 9. The Board stated that the sidewalk where Claimant fell, as well as the store's parking lot, was part of the means of ingress and egress for Claimant as he was instructed not to use the store's parking lot, which prompted him to park on the side street and walk on the sidewalk to report to work. Id. As a result, the Board determined that Claimant was on Employer's premises when he fell, that his presence was required on the premises because he was reporting for his shift, and it was uncontested that the icy condition of the premises caused his fall. Id. Accordingly, the Board concluded that Claimant was entitled to benefits as the work-related injury occurred on Employer's premises while Claimant was in the course and scope of his employment. Id.

fall and his knee injury. Id. at 13. However, the Board agreed with Employer that because Dr. Mooar did not identify the date upon which Claimant became disabled, the date of his first examination of Claimant on August 6, 2007, rather than the date of injury of February 26, 2007, was the proper date of disability. Id. at 14.

As a result, the Board issued an order amending the WCJ's decision to reflect a disability date of August 6, 2007, and affirming, as amended, the WCJ's decision. Board Opinion at 15. Employer then filed the instant petition for review of the Board's order.[3]

In this appeal, Employer claims that the Board erred in affirming, as amended, the WCJ's decision because: (1) Claimant's injury was not in the course and scope of his employment and did not occur on Employer's premises; (2) Dr. Mooar did not unequivocally testify as to causation; and (3) the evidence does not support the dates of disability.

[3] This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of appeal board procedures, and whether necessary findings of fact are supported by substantial evidence. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995). It is well settled that where, as here, the Board has not taken additional evidence, the WCJ is the ultimate finder of fact. Hayden v. Workmen's Compensation Appeal Board (Wheeling Pittsburgh Steel Corp.), 479 A.2d 631 (Pa. Cmwlth. 1984). As the fact finder, the WCJ is entitled to accept or reject the testimony of any witness, including a medical witness, in whole or in part. General Electric Co. v. Workmen's Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), petition for allowance of appeal denied, 529 Pa. 626, 600 A.2d 541 (1991). Thus, questions of credibility and the resolution of conflicting testimony are within the exclusive province of the fact finder. American Refrigerator Equipment Company v. Workmen's Compensation Appeal Board (Jakel), 377 A.2d 1007 (Pa. Cmwlth. 1977). As a result, determinations as to witness credibility and evidentiary weight are within the exclusive province of the WCJ and are not subject to appellate review. Hayden.

Employer first claims that the Board erred in affirming, as amended, the WCJ's decision because Claimant's injury was not in the course and scope of his employment and did not occur on Employer's premises. We do not agree.

With respect to a claim petition, the claimant bears the burden of proving that his injury arose in the course of employment and was related thereto. Inglis House v. Workmen's Compensation Appeal Board (Reedy), 535 Pa. 135, 634 A.2d 592 (1993). Generally, if there is no obvious relationship between the disability and the work-related cause, unequivocal medical testimony is required to meet this burden of proof. Lewis v. Commonwealth, 508 Pa. 360, 498 A.2d 800 (1985).

Section 301(c)(1) of the Act provides, in pertinent part:

> The terms "injury" and "personal injury", as used in this act shall be construed to mean an injury to an employe, regardless of his previous physical condition, arising in the course of his employment and related thereto…. The term "arising in the course of his employment", as used in this article, … shall include all other injuries sustained while the employe is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or elsewhere, and shall include all injuries caused by the condition of the premises or by the operation of the employer's business or affairs thereon, sustained by the employe, who, though not so engaged, is injured upon the premises occupied by or under the control of the employer, or upon which the employer's business or affairs are being carried on, the employe's presence thereon being required by the nature of his employment.

77 P.S. § 411(1).

As this Court has previously stated:

> [W]e note that an employee's injury is compensable under Section 301(c)(1) of the [Act], if the injury (1) arises in the course of employment and (2) is causally related thereto. An injury may be sustained "in the course of employment" under Section 301(c)(1) of the Act in two distinct

> situations: (1) where the employee is injured on or off the employer's premises, while actually engaged in the furtherance of the employer's business or affairs; or (2) where the employee, although not actually engaged in the furtherance of the employer's business or affairs, (a) is on the premises occupied or under control of the employer, or upon which the employer's business or affairs are being carried on, (b) is required by the nature of his employment to be present on employer's premises, and (c) sustains injuries caused by the condition of the premises or by operation of the employer's business affairs thereon. Furthermore, we emphasize that the Act is remedial in nature and intended to benefit workers; therefore, the phrase "actually engaged in the furtherance of the business or affairs of the employer" under Section 301(c)(1) of the Act must be given a liberal construction to effectuate the humanitarian objective of the Act.

Montgomery Hospital v. Workers' Compensation Appeal Board (Armstrong), 793 A.2d 182, 187 (Pa. Cmwlth. 2002) (citations omitted). The determination of whether an employee is within the course of his employment is a question of law to be determined on the basis of the findings of fact. Newhouse v. Workmen's Compensation Appeal Board (Harris Cleaning Service, Inc.), 530 A.2d 545 (Pa. Cmwlth. 1987), petition for allowance of appeal denied, 517 Pa. 627, 538 A.2d 879 (1988).

For a stationary employee, the general rule is that an injury sustained while he is going to or coming from work does not occur in the course of employment. Mackey v. Workers' Compensation Appeal Board (Maxim Healthcare Serv.), 989 A.2d 404 (Pa. Cmwlth.), petition for allowance of appeal denied, 606 Pa. 689, 997 A.2d 1180 (2010). However, the courts have created exceptions to the "coming and going" rule. Id., 989 A.2d at 407. An injury sustained while traveling to and from work will be compensable if one of the following exceptions is established: (1) the claimant's employment contract includes transportation to and

from work; (2) the claimant has no fixed place of work; (3) the claimant is on a special mission for employer; or (4) special circumstances are such that the claimant was furthering the business of the employer. Id.

"[W]ith regard to the fourth exception, … [i]t has long been held that the special circumstances entitling an employee to benefits for injuries sustained during a commute must involve an act 'in which the employe was engaged … by order of the employer, express or implied, and not simply for the convenience of the employe.'" Mackey, 989 A.2d at 410 (citations omitted). Thus, "[t]hese 'special circumstances' involve some effort on the part of the employe, requested by the employer, which is involved in either going to or coming from work." Pines Plaza Lanes v. Workmen's Compensation Appeal Board (Young), 433 A.2d 165, 167-168 (Pa. Cmwlth. 1981) (citation omitted).

As noted above, in this case, the WCJ found as fact:

> [H]ere, Claimant was specifically requested by his supervisor to not park in Employer's store parking lot, but rather to park in a different lot previously used by an out of business restaurant. Had Claimant not [been] so instructed he would have still been parking in Employer's lot as he did for the first week of his employment at the store. Had he done that there is every chance that the injury would never have occurred.
>
> [B]ased upon the credible evidence, the [WCJ] finds that Claimant by parking in a location other than the Employer's store parking lot was acting consistently with his supervisor's instructions and was thus acting in furtherance of Employer's interests by not taking up a spot in the parking lot that would then be available to Employer's customers.

WCJ Decision at 8-9.

Thus, at the time that he sustained the instant injury, Claimant was involved in some effort on his part, as requested by Employer, which was involved in his going to work, Pines Plaza Lanes, 433 A.2d at 167-168, and which was by Employer's express order and not simply for his own convenience. Mackey, 989 A.2d at 410. As a result, the WCJ properly concluded that Claimant was in the course of his employment at the time of injury, and it was therefore immaterial whether or not he was on Employer's premises at that time in order for the injury to be compensable under Section 301(c)(1) of the Act. See, e.g., William F. Rittner Co. v. Workmen's Compensation Appeal Board (Rittner), 464 A.2d 675, 679 (Pa. Cmwlth. 1983) ("[O]ur conclusion is based on two factors: first, the [WCJ]'s well-substantiated finding that the Decedent was headed home at the time of the accident; and second, the undisputable fact that it was necessary for the Decedent to drive the van back and forth to work each day in order to comply with the Employer's requirement that he be prepared to respond to emergencies at any time of the day or night. In light of these facts, the conclusion is inescapable that the Decedent, at the time of the accident, was engaged in furtherance of his employer's business.").[4] In short, Employer's allegations of error in this regard are patently without merit.

---

[4] See also Pines Plaza Lanes, 433 A.2d at 168 ("[T]he [WCJ] found that, after the claimant closed the employer's lanes, he would on occasion drive to a bank to deposit the employer's daily proceeds. The [WCJ] also specifically found that the assailants' purpose in attacking the claimant as he left the bowling alley was to steal those proceeds. Thus, although the claimant was not in possession of the proceeds when he was attacked, that work duty made him a continuous target for such an attack as he left work. By assigning the claimant a potentially hazardous work duty, the employer enlarged the claimant's 'course of employment' to those times when that work duty created the risk of injury and the claimant was clearly exposed to such an increased risk as he left the lanes and walked the short distance to his car, which was parked in a lot adjacent to the lanes.[1] … **1.** The [WCJ] did not make a finding concerning whether or not the claimant was on the employer's premises when he was attacked…. The testimony before the [WCJ] in the present case indicates that the claimant's car was parked just a few feet from the entrance of the employer's

*(Continued....)*

Employer next claims that the Board erred in affirming, as amended, the WCJ's decision because Dr. Mooar did not unequivocally testify as to causation. As a result, Employer asserts that Claimant did not prove the requisite causation supporting the award of benefits.

The equivocality of a medical opinion is a question of law and fully reviewable by this court. Carpenter Technology Corp. v. Workmen's Compensation Appeal Board (Wisniewski), 600 A.2d 694 (Pa. Cmwlth. 1991). Equivocality is judged upon a review of the entire testimony. Id. In conducting this review, we are mindful of our admonition in Philadelphia College of Osteopathic Medicine v. Workmen's Compensation Appeal Board (Lucas), 465 A.2d 132 (Pa. Cmwlth. 1983), that to be unequivocal, every word of medical testimony does not have to be certain, positive, and without reservation or semblance of doubt. An expression of medical opinion will satisfy the standard of unequivocal medical testimony if the expert testifies that in the expert's professional opinion there is a relationship, or that the expert believes that there is a relationship, between the work-related injury and the medical condition. Haney v. Workers' Compensation Appeal Board (Patterson-Kelley Company), 442 A.2d 1223 (Pa. Cmwlth. 1982).

A review of Dr. Mooar's entire deposition testimony reveals that he rendered an unequivocal opinion as to the relationship between Claimant's work-related injury and the medical condition from which he suffers, see N.T. 4/3/08[5] at 14-15, 20, 35-36, and as to the relationship between that condition and the resultant

---

lanes in a lot owned by the shopping center of which the employer was a tenant. Having concluded that the [WCJ] properly found the claimant to be within his course of employment at the time of the injury, a finding that he was also on the employer's premises is unnecessary for our decision here, although that may well have been the case.").

[5] "N.T. 4/3/08" refers to the transcript of Dr. Mooar's deposition testimony.

disability, see id. at 15-18, 20, 27-30, that was clear, certain, and positive. Thus, the argument advanced by Employer, with respect to the equivocality of Dr. Mooar's testimony regarding causation, is without merit.

Finally, Employer claims that the Board erred in affirming, as amended, the WCJ's decision because the evidence does not support the dates of disability. More specifically, Employer contends that Dr. Mooar's testimony does not provide substantial evidence to support a finding that Claimant suffers any ongoing disability beyond the date of his last examination.

As noted above, with respect to a claim petition, the claimant bears the burden of proving that his injury arose in the course of employment and was related thereto. Inglis House. This includes a claimant's burden of establishing the duration of disability, including a loss of earning power. Id. Thus, a claimant has the burden of proving disability throughout the pendency of the claim petition. Id.; Ricks v. Workers' Compensation Appeal Board (Parkway Corp.), 704 A.2d 716 (Pa. Cmwlth. 1997). In deciding a claim petition, the WCJ is free to determine the chronological length of the disability. Id.

A review of Claimant's testimony before the WCJ, see N.T. 8/27/07[6] at 15, 17-21, 23, and Dr. Mooar's deposition testimony, see N.T. 4/3/08 at 15-18, 20, 27-30, reveals ample substantial evidence demonstrating that Claimant sustained his burden of proving that he was disabled throughout the pendency of the claim petition. As a result, the argument advanced by Employer, with respect to the sufficiency of the evidence in this regard, is likewise patently without merit.[7]

---

[6] "N.T. 8/27/07" refers to the transcript of Claimant's testimony before the WCJ.

[7] Employer also claims that the evidence does not support the finding of Claimant's average weekly wage and rate of compensation. However, the entire argument in support of this assertion in

*(Continued....)*

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

Petitioner's Brief is comprised of two conclusive sentences without any meaningful analysis or citation to any relevant authority. As a result, any allegation of error in this regard has been waived for purposes of appeal. Pa.R.A.P. 2119; Boniella v. Commonwealth, 958 A.2d 1069 (Pa. Cmwlth. 2008), petition for allowance of appeal denied sub nom. In re Handgun, 600 Pa. 376, 966 A.2d 551 (2009); Commonwealth v. Spontarelli, 791 A.2d 1254 (Pa. Cmwlth. 2002); Rapid Pallet v. Unemployment Compensation Board of Review, 707 A.2d 636 (Pa. Cmwlth. 1998).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
|---|---|---|
| Wawa, Petitioner | : | |
| v. | : | No. 659 C.D. 2011 |
| Workers' Compensation Appeal Board (Rodgers), Respondent | : | |

**O R D E R**

AND NOW, this 28th day of September, 2011, the order of the Workers' Compensation Appeal Board, dated March 28, 2011 at No. A09-1168, is AFFIRMED.

JAMES R. KELLEY, Senior Judge