

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Penn Township,	:	
	:	
Appellant	:	
	:	No. 905 C.D. 2007
v.	:	
	:	Argued: February 11, 2008
Penn Township Police	:	
Association	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON¹**

FILED: May 13, 2008

In this appeal from grievance arbitration, we are again asked to consider the proper forum for proceedings under the act commonly known as the Pennsylvania Heart and Lung Act,² which contains no express provisions for resolving disputes.

¹ Currently, there is a vacancy among the commissioned judges of this Court. While the panel of judges that heard the case voted 2 to 1 to affirm, pursuant to our opinion circulation rules all commissioned judges voted on the opinion and a tie vote resulted. Therefore, this opinion is filed pursuant to Section 256(b) of the Internal Operating Procedures of the Commonwealth Court, 210 Pa. Code §67.29(b)).

² Act of June 28, 1935, P.L. 477, as amended, 53 P.S. §§637-638. Section 1(a) of the Act, 53 P.S. §637(a) provides, in relevant part:

Any policeman ... of any ... township ... who is injured in the performance of his duties ... shall be paid by the ... township or municipality, by which he is employed, his full rate of salary, as fixed by ordinance or resolution, until the disability arising therefrom has ceased.

In particular, Penn Township (Township) appeals an order of the Westmoreland County Court of Common Pleas (trial court) affirming an Arbitrator's decision that Lewis Lock's Heart and Lung Act claim is subject to Act 111³ grievance arbitration. Township argues the Arbitrator lacked jurisdiction to entertain Lock's claim in the absence of explicit language providing for Act 111 arbitration in the applicable collective bargaining agreement (CBA). Township also argues this Court should conduct plenary review and afford the Arbitrator's decision no deference.

The parties stipulate to the following facts. Township employs Lock as a full-time patrol officer. Lock is a member of the Penn Township Police Association (Association). Township and Association are parties to a CBA that generally provides for Act 111 grievance procedures regarding terms of the contract, working conditions, and related problems.

In September 2005, Lock submitted a written request to Township for Heart and Lung benefits for a period of disability commencing September 9, 2005, when Lock underwent back surgery for injuries allegedly sustained while making an arrest. Township denied the request for benefits, and Lock filed a grievance under the CBA. The CBA provides, in relevant part:

Article VIII
Health and Welfare Benefits

Section 5. The Township shall provide a Short and Long Term Disability benefit as follows:

³ Act of June 24, 1968, P.L. 234, as amended, 43 P.S. §§217.1-217.10.

1. Short Term Disability- in the event that a police officer becomes disabled, by reason of a non-work-related disability, so that he is unable to perform the duties of his employment and, has exhausted all sick leave and vacation time to which he/she might be entitled, and, is not eligible for salary continuation under the Heart and Lung Act, he shall be [placed] on Short Term Disability Leave for the duration of the disability up to a maximum of twenty-six (26) weeks. ...

Article XVIII
Grievance Procedure

Section 1. The parties hereto have agreed and have adopted the Grievance Procedure that is attached hereto and marked Exhibit “B.”

Exhibit “B”
Grievance Procedure

Should a dispute arise between the Township and a Policeman, there shall be no suspension of work on account of such dispute but a grievance shall be filed and settled in accordance with the grievance procedures hereinafter set forth. No orders shall be disobeyed prior to completion of the within grievance procedure.

The scope of the matter cognizable through the above grievance procedure shall include all matters pertaining to the terms of the contract, working conditions and/or any related problems that might arise.

Reproduced Record (R.R.) at 9a, 17a, 23a (emphasis added).

At the outset, Township challenged the arbitrability of the Heart and Lung claim. The arbitrability issue was submitted first to the Arbitrator. See Twp. of Sugarloaf v. Bowling, 563 Pa. 237, 759 A.2d 913 (2000).

In July 2006, the Arbitrator determined he had jurisdiction to entertain Lock's Heart and Lung claim under Act 111. He concluded, at length (with emphasis added):

There is no dispute that the within [CBA] does not expressly provide that the grievance arbitration mechanism can be utilized to determine issues of entitlement to Heart and Lung Act benefits. However, the [Association] cites several Articles of the [CBA] which it asserts when read together infer that the parties bargained over this issue and ultimately agreed that Heart and Lung Act claims shall be decided under the internal grievance arbitration procedures.

The [Association] places considerable emphasis on the grievance procedure set forth [in the CBA]. The last line of that procedure provides, in pertinent part, as follows:

“The scope of the matter cognizable through the above grievance procedure shall include all matters pertaining to the terms of the contract, working conditions, and/or any related problems that might arise”

This is an extremely broad based grievance arbitration procedure and encompasses many more subjects of dispute than just those arising out of expressed terms and conditions of employment set forth in the [CBA]. The term “working conditions” is not specifically defined in the [CBA]. However, we do know that the referenced “working conditions” must necessarily pertain to matters other than subjects expressly contained in the terms of the [CBA] otherwise this phrase would be redundant and unnecessary to be set forth in the definition in the grievance procedure. Therefore, “working conditions” concern a variety of matters beyond subjects specifically set forth in the [CBA].

Article VIII, Section 5 directly brings into play eligibility for salary continuation under the Heart and Lung Act because it is only if an officer is not eligible for Heart and Lung Act benefits that he may avail himself of that short-term disability benefit. One can, therefore reasonably argue that the issue of eligibility for Heart and Lung benefits is a “term of the contract.” Ineligibility for Heart and Lung Act benefits is a condition precedent to the ability to obtain short-term disability benefits.

However, assuming *arguendo* that is not the case we must then determine whether the issue of eligibility for Heart and Lung Act benefits can reasonably be considered a “working condition, and/or a related problem that might arise thereunder.” An Officer’s entitlement to benefits under the Heart and Lung Act, which would provide him/her with full salary during any period of temporary disability resulting from the performance of his job duties, can reasonably be characterized as a “working condition” for a bargaining unit member.

Furthermore, any doubt as to whether this is a “working condition” subject to the grievance procedure should be allayed because I believe the same subject could even be more readily be considered “a related problem that might arise under” either a term of the contract or a working condition. Heart and Lung Act benefits arise out of an injury occurring while an Officer is working. This is a very important benefit which provides full salary during the ensuing period of temporary disability. Therefore, this issue of whether the injury occurred while an Officer was on-duty or off-duty can certainly be considered a related problem arising under a “working condition.”

Finally, it is important to note what this Arbitrator is not deciding. This Arbitrator is not concluding that Heart and Lung Act entitlement claims are presumptively within the jurisdiction of Act 111 grievance arbitration procedures. Rather, I am merely concluding that based upon the extremely broad and all encompassing language of the within grievance procedure that the issue of

whether [Lock] is entitled to Heart and Lung Act benefits constitutes if not a term of the contract, then at the very least a “working condition, and/or a related problem,” the resolution of which has been incorporated into the grievance procedures.

Based upon all of the above I find the within matter to be substantively arbitrable.

R.R. at 63a-65a. Following a subsequent evidentiary hearing, Arbitrator rendered a separate decision on the merits, finding Lock’s injury did not occur in the performance of his duties. As a result, he denied Lock’s grievance. Lock did not appeal.

Nevertheless, Township appealed the Arbitrator’s decision regarding jurisdiction. Concluding this case is similar to our recent decision in Shaw v. Township of Aston, 919 A.2d 303 (Pa. Cmwlth. 2007), the trial court determined:

[Lock] was employed pursuant to and bound by the terms and conditions of the CBA. His rate of salary and benefits were defined in the CBA. Our courts have held that heart and lung benefits are based on an employee’s rate of salary and benefits. Because heart and lung benefits are based on [Lock’s] rate of salary, which was set forth in the CBA, the heart and lung benefits were a term and condition of his employment pursuant to the CBA. The [Association], therefore, appropriately challenged the denial of heart and lung benefits to [Lock] through the grievance procedure contained in the CBA.

Trial Ct. Slip Op., 3/12/2007, at 2 (citations omitted). Township now appeals the lower decisions on arbitrarily.

Initially, despite a favorable decision on the merits below, Township maintains it is an aggrieved party in regard to the Arbitrator's decision on jurisdiction. We agree.

More specifically, Pa. R.A.P. 501 provides that "any party who is aggrieved by an appealable order ... may appeal therefrom." The note to Pa. R.A.P. 501 provides that "[w]hether or not a party is aggrieved by the action below is a substantive question determined by the effect of the action on the party" A party is aggrieved when he is adversely, directly, immediately and substantially affected by a judgment, decree or order. Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). An interest is substantial if there is "some discernable adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law." Id. at 195, 346 A.2d at 282. A party's interest is direct if his interest is harmed by the matter of which he complains, and an interest is immediate if there is a sufficient causal connection between the challenged action and the asserted injury. Id.

Arbitrator here undeniably rendered an adverse decision to Township regarding arbitrability during a bifurcated proceeding. This decision could not be appealed until after Arbitrator rendered his opinion on the merits. See Montgomery County Intermediate Unit v. Montgomery County Intermediate Unit Educ. Assoc., 797 A.2d 432 (Pa. Cmwlth. 2002). Our review here is of the decision on jurisdiction, and not on the merits; therefore; Township had a direct, immediate, and substantial interest in the jurisdictional determination. Simply stated, Township is an aggrieved party for purposes of this appeal.

With the standing issue resolved, the parties hotly debate this Court's standard of review.⁴ In Town of McCandless v. McCandless Police Officers Association, 587 Pa. 525, 901 A.2d 991 (2006), our Supreme Court reviewed this Court's ultimate holding that a "dual standard" of review should be applied when a court reviews an arbitrator's decision on jurisdiction. It reasoned as follows:

Generally speaking, a plenary standard of review should govern the preliminary determination of whether the issue involved implicates one of the four areas of inquiry encompassed by narrow certiorari, thus allowing for non-deferential review-unless, of course, that preliminary determination itself depended to some extent upon arbitral fact-finding or a construction of the relevant CBA.... In other words, in the absence of the noted caveat, there is no reason in law or logic why a court should defer to the arbitrator on questions of whether jurisdiction existed, whether the proceedings were regular, whether there was an excess in the exercise of

⁴ '[S]cope of review' and 'standard of review' are two distinct legal concepts. 'Scope of review' refers to "the confines within which an appellate court must conduct its examination." In other words, it refers to the matters (or 'what') the appellate court is permitted to examine. 'Standard of review,' on the other hand, 'refers to the manner in which (or "how") that examination is conducted.' As narrow certiorari sets the confines in which an appellate court may conduct its examination, it sets a scope of review, and not a standard of review.

Town of McCandless v. McCandless Police Officers Ass'n, 587 Pa. 525, 534, 901 A.2d 991, 997 (2006) (citations omitted).

It is undisputed our scope of review here is narrow certiorari. We are therefore limited to reviewing (1) the jurisdiction of the arbitrator; (2) the regularity of the arbitration proceeding; (3) whether the arbitrator exceeded his authority; and (4) whether the arbitrator deprived one of the parties of constitutional rights. Borough of Jenkintown v. Hall, 930 A.2d 618 (Pa. Cmwlth. 2007).

the arbitrator's powers, or whether constitutional rights were deprived.

Id. at 540-541, 901 A.2d at 1000-1001 (emphasis added) (footnote and citations omitted). Stated otherwise, our standard of review here depends on whether the Arbitrator acted as a fact-finder by interpreting an ambiguous term of the CBA and discerned the parties' intent to conclude Heart and Lung benefit claims are arbitrable. Unambiguous contracts are interpreted as a matter of law, and ambiguous writings are interpreted by the finder of fact. Kripp v. Kripp, 578 Pa. 82, 849 A.2d 1159 (2004).⁵

Here, the Arbitrator acted as a fact-finder by interpreting the CBA, and, therefore, the deference standard applies. More specifically, the Arbitrator interpreted the broad language of the CBA, namely the ambiguous language "terms of the contract," "working conditions," and "any problems that might arise," to include Heart and Lung claims. See R.R. at 62a-65a. As a result, this Court is thereby "bound by the arbitrator's determination [regarding his jurisdiction], even though we may find [it] to be incorrect." Pa. State Police v. Pa. State Troopers Assoc., 840 A.2d 1059, 1062 (Pa. Cmwlth. 2004).

⁵ "[W]hen determining whether a term [in a contract] is ambiguous, a court must not rely upon a strained contrivance to establish one; scarcely an agreement could be conceived that might not be unreasonably contrived into the appearance of ambiguity. Thus, the meaning of language cannot be distorted to establish the ambiguity." City of Phila. v. Del. County Bd. of Assessment Appeals, 691 A.2d 992, 995 (Pa. Cmwlth. 1997) (citations and quotations omitted). A contract contains an ambiguity "if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." Hutchison v. Sunbeam Coal Corp., 513 Pa. 192, 201, 519 A.2d 385, 390 (1996). This question, however, is not resolved in a vacuum. Rather, "contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts." Madison Constr. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 606, 735 A.2d 100, 106 (1999).

In addition, we recognize the Arbitrator's interpretation to include Heart and Lung benefits as a term of employment under the CBA is not manifestly unreasonable. To this end, we concur with the trial court's determination that our recent decision in Shaw applies here.

More specifically, in Shaw, this Court recently reached the same result. Speaking through Judge McGinley, the Court provided the following analysis regarding an arbitrator's jurisdiction to entertain a Heart and Lung claim:

Shaw was employed pursuant to and bound by the terms and conditions of the CBA. In addition, Shaw's rate of salary and benefits were defined in the CBA. Because heart and lung benefits are based on Shaw's rate of salary which was set forth in the CBA it follows that the common pleas court did not err when it found that the heart and lung benefits were a term and condition of his employment

919 A.2d at 305 (emphasis added).

Like Shaw, the CBA here sets Lock's salary. R.R. at 4a-5a. It follows that Heart and Lung benefits are a term and condition of Lock's employment and, therefore, subject to Act 111 arbitration under the CBA's grievance procedure. The trial court's and Arbitrator's ultimate determination that Heart and Lung benefits constitute a term of employment under the CBA is consistent with this Court's precedent. Shaw.

Finally, we recognize a very reasonable argument can be made that Heart and Lung Act proceedings are presumptively controlled by the Local Agency

Law, 2 Pa. C.S. §§551-54, under which jurisdiction would lie with the local agency rather than with an arbitrator. Indeed, some members of the Court embrace that position. See Sidlow v. Twp. of Nether Providence, 621 A.2d 1105, 1107 (Pa. Cmwlth. 1993) (Pelligrini, J., concurring).⁶ We need not resolve that dispute here, given our decision regarding the standard of review. It is sufficient for current purposes to note the symmetry of that approach must be purchased by overruling our recent decision in Shaw, with the consequent loss of predictability and diminution of the importance of CBA language.

As discussed, no error is apparent; accordingly, we affirm.

ROBERT SIMPSON, Judge

⁶ In Sidlow, the panel majority referenced several cases in which Heart and Lung Act issues were properly reviewed by arbitrators. The majority noted, however, that there was no language in the controlling CBA that vested jurisdiction with an arbitrator.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Penn Township,	:
	:
Appellant	:
	:
	No. 905 C.D. 2007
v.	:
	:
	:
Penn Township Police	:
Association	:

ORDER

AND NOW, this 13th day of May, 2008, the order of the Westmoreland County Court of Common Pleas is **AFFIRMED**.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Penn Township, :
Appellant :
v. : No. 905 C.D. 2007
: Argued: February 11, 2008
Penn Township Police Association :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE LEAVITT

FILED: May 13, 2008

Respectfully, I dissent. The majority holds that a dispute about Heart and Lung benefits can be resolved in a grievance arbitration. I believe, however, that all controversies arising under the act commonly known as the Heart and Lung Act¹ must be resolved in accordance with the statutory procedure prescribed by the legislature that is set forth in the Local Agency Law, 2 Pa. C.S. §§551-555, 751-754.

In reaching its contrary holding, the majority applied a deferential standard of review to the arbitrator's jurisdictional determination, but I believe our review is plenary. In *Town of McCandless v. McCandless Police Officers Association*, 587 Pa. 525, 540, 901 A.2d 991, 1001 (2006), our Supreme Court held that a court's review of an arbitrator's jurisdiction is plenary because

¹ Act of June 28, 1935, P.L. 477, as amended, 53 P.S. §§637-638.

there is no reason in law or logic why a court should defer to the arbitrator on questions of whether jurisdiction existed.

There is a “noted caveat” to this general rule but only where the question of jurisdiction “*depend[s]* to some extent upon arbitral fact-finding or a construction of the relevant CBA.” *Id.* at 540, 901 A.2d at 1000-1001 (emphasis added). Mere invocation of a CBA, as was done here by the arbitrator, is not enough to avoid the plenary standard of review; rather, jurisdiction must *depend* on the CBA. Here, jurisdiction over claims arising from the Heart and Lung Act is a matter of statutory law, not the CBA, and the arbitrator’s invocation of the CBA was simply beside the point.

This Court has already decided the jurisdictional issues presented by a dispute over Heart and Lung Act benefits. In *Sidlow v. Township of Nether Providence*, 621 A.2d 1105, 1108 (Pa. Cmwlth. 1993), we held that a dispute about Heart and Lung Act benefits should be presented to the municipality for a “hearing in accordance with Sections 551-555 of the Local Agency Law.” On the other hand, disputes about what constitutes a “full salary” for the purpose of computing Heart and Lung Act benefits can be decided by an arbitrator. We explained as follows:

an arbitration panel ha[s] jurisdiction to determine what constituted “full salary” under the Heart and Lung Act by reference to the term “salary” in the collective bargaining agreement.

Id. at 1107 (citation omitted). However, eligibility for Heart and Lung Act benefits is decided in an administrative hearing before the municipality.

In *Shaw v. Township of Aston*, 919 A.2d 303 (Pa. Cmwlth. 2007), this Court, without any reference to our holding in *Sidlow*, held that a termination of

Heart and Lung Act benefits is a matter for grievance arbitration. The CBA in question specifically provided that “disputes relating to or arising out of all state and local statutes ... relating to police officers” shall be grieved. *Id.* at 305.² This Court reasoned that because the Heart and Lung Act itself was silent on dispute resolution, then the dispute could be grieved. *Shaw* misapprehends the significance of this silence.

First, a statutory procedure has been established for all disputes arising out of the Heart and Lung Act, which is that provided in the Local Agency Law, as this Court held in *Sidlow*. It is not necessary for the legislature to specify a procedure for each statutory benefit program or regulatory regime, whether state or local, because it would be redundant to do so. The Local Agency Law guarantees every citizen aggrieved by an adjudication of a local agency a formal hearing and a right of appeal to a court. 2 Pa. C.S. §553.³ Indeed, the Local Agency Law applies “to all local agencies *regardless of the fact that a statute expressly provides that there shall be no appeal* from an adjudication of an agency” 2 Pa. C.S. §751(a) (emphasis added). In short, even if the Heart and Lung Act had stated that there

² By contrast, the CBA in question here contains at most a passing reference to the Heart and Lung Act. It does not expressly subject all “disputes ... arising out of state and local statutes” to grievance, as in *Shaw*. Even so, as explained below, arbitration cannot be used to establish eligibility for a statutory benefit unless expressly authorized by the legislature.

³ It states in relevant part:

No adjudication of a local agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard.

2 Pa. C.S. §553. An “adjudication” is defined as follows:

Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made.

2 Pa. C.S. §101.

was no hearing right, the Local Agency Law would provide both a right to a hearing and the procedure for its conduct.

Second, the Heart and Lung Act does not expressly authorize police officers to grieve a dispute about benefit eligibility, and without such authorization they may not do so. By contrast, the legislature has granted this authorization in the case of another statutory benefit program affecting employment, *i.e.*, workers' compensation. Section 450 of the Workers' Compensation Act⁴ provides, in relevant part, as follows:

- (a) Any employer and the recognized or certified and exclusive representative of its employe may agree by collective bargaining to establish certain binding obligations and procedures relating to workers' compensation: Provided, however, That the scope of the agreement shall be limited to:
 - (1) benefits supplemental to those provided in sections 306 and 307;
 - (2) an alternative dispute resolution system which may include, but is not limited to, *arbitration*, mediation and conciliation;

* * *

77 P.S. §1000.6 (emphasis added). In the absence of a comparable provision in the Heart and Lung Act, it must be concluded that the legislature intended that eligibility disputes be decided in accordance with the Local Agency Law, and not by grievance arbitration.

⁴ Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §1000.6, as added by the Act of June 24, 1996, P.L. 350.

It has long been established that “[w]here a remedy is provided by an act of assembly, the directions of the legislation must be strictly pursued and such remedy is exclusive.” *Lurie v. Republican Alliance*, 412 Pa. 61, 63, 192 A.2d 367, 369 (1963).⁵ This Court explained that “where a statutory remedy exists, *it is exclusive* unless the jurisdiction of the courts is preserved thereby.” *Lashe v. Northern York County School District*, 417 A.2d 260, 264 (Pa. Cmwlth. 1980) (emphasis added) (holding that a litigant could not avoid the procedure prescribed by statute in favor of a class action in equity). With respect to the Local Agency Law, this Court specifically held in *Consumer Investment Fund v. Supervisors of Smithfield Township*, 532 A.2d 543, 546 (Pa. Cmwlth. 1987), that its procedures “must be strictly pursued.”

In sum, the existence of a statutory remedy excludes any other remedy. A police officer cannot invoke arbitration to resolve a dispute about eligibility for Heart and Lung Act benefits because a grievance arbitration is not a remedy specifically authorized by the legislature, as it has been for workers’ compensation benefits.

On the merits, the majority followed the logic in *Shaw* that because Lock’s claim for Heart and Lung Act benefits related to his salary, it was a term of employment subject to Act 111 grievance arbitration. By this logic, a claim of employment discrimination under the Pennsylvania Human Relations Act or a claim for unemployment compensation benefits under the Unemployment Compensation Law could also be decided by an arbitrator rather than by the

⁵ This concept has been embodied in Section 1504 of the Statutory Construction Act of 1972, which also provides that “where a remedy is provided ... the directions of the statute shall be strictly pursued ...” 1 Pa. C.S. §1504.

tribunal designated by the legislature for the resolution of such claims. Parties cannot, however, even by agreement, confer subject matter jurisdiction upon a tribunal that lacks it. As our Supreme Court has explained,

[a]s with any issue going to the subject matter jurisdiction of a court or administrative tribunal to act in a matter, this is an issue that cannot be waived by the parties nor can the parties confer subject matter on a court or tribunal by agreement or stipulation.

Blackwell v. State Ethics Commission, 523 Pa. 347, 358, 567 A.2d 630, 636 (1989). Likewise, a municipality and union cannot agree to confer jurisdiction upon an arbitrator to hear any or all disputes about statutory benefits.

In this case, Lock applied for Heart and Lung Act benefits, but they were denied by the Township Manager. The letter denying benefits advised Lock of his “right to appeal this determination and request a Local Agency Law hearing before the Penn Township Board of Commissioners....” Reproduced Record at 39a. In spite of this directive, Lock filed a grievance. Lock was required to strictly pursue his statutory remedy of a hearing before the Township commissioners, which was the exclusive way to litigate his entitlement to Heart and Lung Act benefits.

Because entitlement to Heart and Lung Act benefits must be litigated in accordance with the Local Agency Law, the arbitrator lacked jurisdiction over Lock’s grievance. Accordingly, I would reverse the trial court.

MARY HANNAH LEAVITT, Judge