

[J-45-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

MARIO CASO,	:	No. 28 EAP 2002
	:	
	:	Appeal from the Order of Commonwealth
	:	Court entered on 01/11/2002 at 1416 CD
	:	2001 reversing the decision entered on
v.	:	06/07/2001 by the WCAB at A00-1221
	:	
	:	790 A.2d 1078 (Pa. Cmwlt. 2002)
WORKERS' COMPENSATION APPEAL	:	
BOARD	:	ARGUED: April 9, 2003
(SCHOOL DISTRICT OF	:	
PHILADELPHIA),	:	
	:	
Appeal Of: School District Of Philadelphia	:	
	:	

OPINION

MR. JUSTICE EAKIN

DECIDED: December 30, 2003

This Court granted review to determine whether a claimant receiving Workers' Compensation benefits can be compelled to attend a vocational interview with an individual not previously approved as an expert by the Department of Labor and Industry. In February 1998, claimant suffered a lumbar strain and wrist contusion in the course and scope of his employment with the School District of Philadelphia. After claimant received temporary total disability benefits for 20 months, employer's insurer, CompServices, Inc., referred him, pursuant to 77 P.S. § 512(2), to a vocational counselor for an interview to identify whether his current physical incapacity precluded him from performing his prior job, and to assist him in finding work suitable to his physical capability. Claimant did not submit

to the interview, so employer filed a petition with the Bureau of Workers' Compensation to compel his submission, pursuant to 77 P.S. §651(a). Claimant argued he was not required to attend because the proposed interviewer was not an expert approved by the Department, as required by 77 P.S. §512(2).

In 1996, the Workers' Compensation Act was amended to state, "[i]n order to accurately assess the earning power of the employe, the insurer may require the employe to submit to an interview by an expert approved by the department and selected by the insurer." See Act of June 24, 1996, P.L. 350, adding, 77 P.S. § 512(2). Several weeks later, the Bureau published a notice of its intent to promulgate regulations implementing the legislation, including a list of approved vocational experts for use in determining earning power; the list would be published in the Pennsylvania Bulletin. See 26 Pa. Bull. 3979 (filed Aug. 16, 1996). Subsequent regulatory iterations did not address the "list," but instead focused on the term "expert," used in § 512(2). See 27 Pa. Bull. 1731 (filed Apr. 4, 1997); 27 Pa. Bull. 3141 (filed July 27, 1997); 28 Pa. Bull. 329 (filed Jan. 16, 1998).

In accordance with its interpretation of § 512(2), the Bureau promulgated criteria, including certifications, educational requirements, and experience a person must possess "to be an expert approved by the Department" 34 Pa. Code §§ 123.201-.202. However, the Bureau expressly reserved credibility determinations of vocational experts to the Workers' Compensation Judge (WCJ). Id., § 123.203. Afterwards, confusion arose about whether the Bureau was required to approve a list of vocational experts; the Director of the Bureau issued an advisory letter to the WCJs. See Letter of Richard A. Himler, 3/11/99; R.R., at 7a. The Director informed the WCJs it was ultimately their decision to

accept or reject an expert based on the qualifications established by the Bureau; a rejection based solely on the fact the person was not on the list was not valid. Id.

Here, the WCJ observed the Bureau had not compiled a list of approved vocational experts. He reasoned the intent of § 512(2) was to pre-approve the competency of the interviewers and remove ambiguity for both parties as to whether the expert was qualified to conduct the interview before it occurred. The WCJ also questioned whether the Bureau could delegate the task of approving experts when the General Assembly has expressly directed the Bureau to approve the experts.¹ The WCJ concluded he lacked authority to find the vocational expert qualified, but if he did have such authority, he would have found the expert qualified under 34 Pa. Code § 123.202. The WCJ dismissed the petition to compel claimant's examination. Reversing the WCJ, the WCAB determined § 512(2) does not require the Bureau to establish an approval list; rather, the language only requires an expert be approved by the Department, and this could be accomplished by the WCJ.

A panel majority of the Commonwealth Court held the WCAB's interpretation to be unreasonable on three grounds. First, the language of § 512(2) required vocational experts to be approved by the Department before the interview. Next, the interpretation effectively divested insurers of the authority to require claimants to submit to interviews because, as a precursor to an interview, insurers would have to petition the WCJ to qualify a vocational expert. Finally, the Bureau has not promulgated a regulation authorizing the WCJs to qualify vocational experts. Accordingly, the WCAB's decision was reversed.

¹ Contrary to the WCJ's opinion, § 512(2) make no mention of the Bureau.

Senior Judge Jiuliante dissented, believing nothing in the Workers' Compensation Act requires that vocational experts be pre-approved by the Department. He contended that pursuant to the Administrative Code of 1929, the Bureau operates under the control of the Department. See 71 P.S. §§ 62 (placing WCAB in Department), 72 (authority of departments to establish bureaus to conduct work of departments). Further, the Department has delegated the responsibility of promulgating regulations to the Bureau. Therefore, if a vocational expert met the requirements established by the Bureau's regulations, then he or she is an expert approved by the Department. Caso v. WCAB, 790 A.2d 1078, 1082 (Pa. Cmwlth. 2002) (Jiuliante, S.J., dissenting). Senior Judge Jiuliante believed this conclusion was consistent with the Bureau's interpretation in Director Himler's correspondence. Id., at 1083.

We begin our analysis by considering the plain language of § 512(2). See Ramich v. WCAB, 770 A.2d 318, 322 (Pa. 2001). Upon review, the statute clearly does not require an interviewer to be either pre-approved, certified, or sanctioned by the Department - it only required the interviewer to be "approved." Based on this legislative command to approve experts, the Department, through the Bureau,² promulgated regulations concerning the minimum qualifications necessary "to be an expert approved by the Department." 34 Pa. Code § 123.202. Rather than individually qualify interviewers, the Department set a standard; if a person satisfies the qualification requirements, then this person is deemed "approved" by the Department. There is no language from the General Assembly indicating

² The Department is authorized to establish and promulgate regulations to explain and enforce the Act, 77 P.S. § 991(a)(v), and the Bureau is under the authority of the Department, 71 P.S. §§ 62, 72. Therefore, the Bureau may promulgate regulations where the statute only refers to "Department."

the Department was required to "pre-approve" the interviewers. The interpretation of a statute by those charged with its execution is entitled to great deference, and will not be overturned unless such construction is clearly erroneous. See Alpha Auto Sales, Inc. v. Department of State, Bureau of Professional and Occupational Affairs, 644 A.2d 153, 155 (Pa. 1994).

Next, we consider whether an interviewer can be "approved" by a WCJ. Obviously, a person failing to meet the Department's standard is not approved; such persons are incompetent to perform the interview, and their opinions are not admissible to show the claimant is capable to perform a specific job. See 34 Pa. Code § 123.302 (insurer may demonstrate claimant's earning power by expert opinion relative to claimant's capacity to work). This approach is consistent with the Department's stated purpose of ensuring "the level of expertise and professionalism required to conduct earning power assessment interviews" 27 Pa. Bull. 3141. As with matters of credibility, issues of competency of experts have long been resolved by the WCJ. See 77 P.S. § 834 ("[A]ll findings of fact shall be based upon sufficient competent evidence."); WCAB v. Jones & Laughlin Steel Corp., 349 A.2d 793, 795 (Pa. Cmwlth. 1975) (WCJ assumes discretionary authority to determine competency of expert). Because competency determinations are a function of the adjudicatory process, the WCJ is authorized to consider the qualifications of an interviewer in light of the Bureau's regulations. See 77 P.S. § 710 (hearings to consider petitions shall be conducted by WCJ).

Claimant argues § 512(2) should be read in pari materia with § 651(a), which states in relevant part: "At anytime after an injury the employe, if so requested by his employer, must submit himself at some reasonable time and place for a physical examination or

expert interview by an appropriate health care provider or other expert, who shall be selected and paid for by the employer." 77 P.S. § 651(a) (emphasis added). Claimant asserts the term "appropriate" requires vocational interviewers be "approved," as required in § 512(2). This Court agrees; the qualifying term, "appropriate," in § 651 must be read in pari materia with § 512(2) to require to the health care providers and experts to be "approved." However, "approved" in this context is the equivalent of "competent."

Claimant also raises a number of policy reasons for pre-approval of interviewers. He contends insurers and employers will avoid the time and cost of an interview with an unqualified interviewer, claimants will be assured a qualified vocational counselor will interview them, and the Department will not be inundated with challenges to the qualifications of interviewers. However, if an insurer has engaged in bad faith selection of an unqualified interviewer, claimants may seek the imposition of penalties. See 77 P.S. § 991(d). The availability of redress via § 991(d) is sufficient to assure claimants that interviewers are qualified.

The interpretation of the Department is not so clearly at odds with § 512(2) as to render its interpretation unreasonable. See Alpha Auto, supra. Further, the WCJ has the authority to determine whether the interviewer is qualified in light of the Bureau's regulations. The decision of the Commonwealth Court is reversed and this matter remanded for further proceedings.

Order reversed; case remanded. Jurisdiction relinquished.

Madame Justice Newman files a concurring opinion.