IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sergio Alvarez Corona, Petitioner	:	
v.	:	No. 1018 C.D. 2014
	:	Submitted: October 24, 2014
Workers' Compensation Appeal Board (Ragland Corporation), Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: January 9, 2015

Sergio Alvarez Corona (Claimant) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) that terminated his compensation benefits. In doing so, the Board affirmed the decision of the Workers' Compensation Judge (WCJ). Claimant contends the WCJ did not issue a reasoned decision because he did not explain his adverse credibility determination with respect to Claimant beyond basing it on witness demeanor. Claimant argues that because he testified through an interpreter, the WCJ could not make a credibility determination on the basis of demeanor. Discerning no merit to these contentions, we affirm.

On January 30, 2008, while employed by Ragland Corporation (Employer), Claimant slipped and fell, hitting his left side while he was installing drywall at a construction site. On June 2, 2008, Claimant filed a claim petition

seeking full disability compensation pursuant to the Pennsylvania Workers' Compensation Act (Act).[1] The claim petition described his work injury as an "INJURY TO LEFT SIDE, RIBS." Reproduced Record at 1a (R.R. __). Employer denied the allegations in the claim petition. Employer also filed a termination petition, asserting that even if Claimant had sustained a work injury, he was fully recovered as of August 21, 2008, the date of Claimant's independent medical examination (IME). The petitions were consolidated, and a hearing conducted by a WCJ.

Claimant testified with the aid of a Spanish-speaking interpreter. He stated that he worked full-time for Employer as a drywall installer in commercial construction sites and as a supervisor. He earned approximately $20 per hour.[2] On January 30, 2008, he was standing on a wooden scaffold, about nine or ten feet from the ground, when he slipped. He did not fall to the ground, but hit his chest on the scaffolding board. He reported the injury to his supervisor, and a friend drove him to a medical center.

Claimant was treated and released by a doctor at the medical center. The doctor did not limit his work duties. The next day, because of pain, Claimant did not work. Several days later, he returned to the medical center and an x-ray was taken, which showed a rib fracture. The doctor again told him he could return to work.

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

[2] Employer later submitted a statement of wages indicating that Claimant's average weekly wage was $643.72, which Claimant accepted as accurate.

Claimant returned to work on February 6, 2008, but the pain prevented him from doing physical labor. However, he was able to supervise workers and to translate the foreman's instructions from English to Spanish. He worked in this capacity for approximately two weeks. At that time, his boss, James Ragland, told him that there was no more work because "something was wrong with the insurance." R.R. 109a. Claimant has been out of work since that time.

Claimant stated that he is in continuous pain and unable to work. He treats with Norman Stempler, D.O., who gives Claimant "electrical shocks" three times a week. Dr. Stempler has advised him "that the nerves here are destroyed, and [the doctor] has to pull them little by little." R.R. 110a. Claimant stated that he has not been prescribed medication for his pain.

After hearing Claimant's testimony, the WCJ directed him to secure his medical evidence. Claimant deposed Dr. Stempler on October 8, 2008. On January 6, 2009, the scheduled final day of the hearing, Claimant had not submitted Dr. Stempler's deposition transcript to the WCJ. Claimant's counsel requested permission to mail it to the WCJ, and the WCJ gave him until February 5, 2009, to do so. Claimant did not meet that deadline. On February 6, 2009, the WCJ closed the record and informed the parties that no other evidence would be accepted other than Claimant's litigation costs and a *quantum meruit* application. On May 12, 2009, the WCJ received Claimant's proposed findings of fact, conclusions of law, a litigation costs exhibit and the deposition transcript of Dr. Stempler. Claimant did not submit a *quantum meruit* application or offer an explanation for his failure to submit the deposition transcript in a timely manner.

Employer presented the testimony of Clifford Hull, a foreman. On January 30, 2008, Claimant told Hull that he slipped and hit his ribs on a board, and Claimant sought medical treatment that day. Claimant informed Hull that the doctor said "he was okay to return to work but that he was feeling a little sore, he asked me if I could give him something light duty to do, which I did." R.R. 139a. Hull explained that many of Employer's workers only spoke Spanish and that Claimant was "his right hand man" because he was able to translate the work instructions from English to Spanish. Hull stated that Claimant was on light-duty for one day. Claimant then reported that he was "okay" and resumed his regular duties.[3] R.R. 140a. However, because of bad weather, Claimant did not appear at work for three days.

Hull then learned from Employer that the Social Security number that Claimant had provided the insurer when he sought treatment for his injury was not valid. Hull informed Claimant that he had to produce valid identification in order to keep working for Employer. Claimant responded that his sister, who lived in North Carolina, had his identification card and that he would attempt to get it from her. Hull went on sick leave on February 18, 2008, and did not return until April, by which point Claimant was no longer working for Employer.

David Ross, also a foreman, testified for Employer. When he worked with Claimant in February of 2008, Claimant did his regular job duties without modification. When Hull went on sick leave, Ross became Claimant's direct

[3] Employer's safety coordinator, Scott Wallace, testified that Claimant did not report any work restrictions to him.

supervisor. On or about February 21, 2008, Ross received a telephone "call from the office stating that if [Claimant] came to the jobsite I was to tell him to go to the office before he worked." R.R. 149a. Ross did not work with Claimant again.

Jim Ragland, part owner of the company, also testified. He stated that following Claimant's injury, the workers' compensation insurer discovered that Claimant's Social Security number was not valid. Specifically, "it was someone else's." R.R. 155a. Ragland stated that he asked Claimant on at least three occasions to provide documentation of his legal eligibility to work. Claimant did "produce what appeared to be more or less a homemade North Carolina driver's license," but this was inadequate.[4] R.R. 157a. Ragland explained that about three weeks after he stopped working, Claimant contacted him and asked if he could come back to work as a subcontractor, for which proof of eligibility to work was not as strict. Ragland declined this request.

Employer also presented medical evidence. Richard J. Weinstein, M.D., testified that he treated Claimant on January 30, 2008, at the Reading Hospital and Medical Center. Claimant reported falling and striking the left side of his torso on a board. On a pain scale of 1 to 10, Claimant reported his pain as 3 to 4. Dr. Weinstein recorded an abrasion with no discoloration or swelling. He

[4] Jacqueline Fakette, who worked in the payroll department, testified that Claimant presented the driver's license to her. She described it as not having "a backing to it, where a normal license has a scan or barcode, it looked like it was self[-]laminated, the edges were all very rough cut." R.R. 162a. She explained that regardless of its validity, a driver's license is not sufficient to establish eligibility to work. The United States Citizen and Immigration Services (USCIS) Form I-9 requires documentation of employment authorization and identity. A driver's license may be used to establish identity, but it is not sufficient to establish employment authorization. *See* USCIS Form I-9 at 9 (listing the documents that establish identity and employment authorization. A state driver's license is contained in "List B" and establishes only identity.).

assessed Claimant with a contusion to the chest wall and abdomen and released him to return to work without restrictions. However, he advised Claimant to contact the medical center should his pain increase.

On February 5, 2008, Claimant returned to the medical center, reporting persistent pain on his left side at a pain level of 2. An x-ray showed a non-displaced fracture of the anterior eighth rib, which, according to Dr. Weinstein, would fully heal within 4-6 weeks. According to Dr. Weinstein, a rib will "heal better if the body is up and moving" and, thus, he authorized Claimant to return to work without restrictions. R.R. 255a. In fact, Claimant reported to Dr. Weinstein that he had been working "his regular job" and "thought he could continue doing it." R.R. 242a-43a. Dr. Weinstein gave Claimant a "rib belt" for support and advised him to contact the medical center should problems develop. R.R. 254a. Claimant did not return.

Dr. Weinstein concluded that Claimant had sustained a work injury in the nature of a contusion and fracture of the eighth rib. Claimant was not disabled by this injury and did not need work restrictions to recover.

Employer also presented the testimony of S. Ross Noble, M.D., who is board certified in internal medicine. Dr. Noble conducted an IME of Claimant on August 21, 2008. Claimant complained that he experienced pain with any type of movement; the pain affected his left shoulder, left index finger, neck, left knee and back. Dr. Noble concluded that there was no medical basis for these complaints. He explained that a non-displaced rib fracture would not produce residual symptoms after a "couple of months." R.R. 283a. In his examination, Dr. Noble found no abnormalities. With respect to the neurological examination, he

explained that Claimant had no altered sensation to temperature, touch and vibration. Dr. Noble concluded that Claimant had suffered a rib fracture, which had healed. At the time of the IME, Claimant had fully recovered, had no need for further medical treatment and had no restrictions on his ability to work.

The WCJ found that Claimant had sustained a work injury. However, he also found that the incident did not cause Claimant to be disabled in any way. The WCJ credited the testimony of Hull, Ross and Wallace and did not credit Claimant's testimony. The WCJ explained that he based his credibility determinations upon his personal observation of the witnesses. The WCJ found the testimony of Ragland and Fakette about Claimant's documentation problems irrelevant because Claimant did not prove that his work injury caused a loss of earning power. The WCJ refused to admit the deposition transcript of Dr. Stempler because it was submitted three months late. Even so, the WCJ explained that Dr. Stempler's testimony would not have been found credible because Dr. Stempler relied upon Claimant's statements about his injury, which was rejected as not credible. Dr. Stempler diagnosed Claimant with chronic intercostal neuralgia based upon Claimant's complaints of pain; however, Dr. Stempler conceded that the rib fracture had healed. In sum, the WCJ denied the claim petition and ruled that the termination petition was moot.

Claimant appealed to the Board. It affirmed the WCJ's decision to exclude Dr. Stempler's deposition testimony, but it reversed the WCJ's denial of the claim petition. The Board explained that the uncontroverted evidence of record established that Claimant had sustained a work-related rib fracture and that this work injury resulted in a disability. The Board remanded the matter to the WCJ to

rule on the termination petition. Further, it instructed the WCJ "to make a determination as to the award of costs, if any, other than the deposition fee of Dr. Stempler as this document is not in the record." Board Decision, October 20, 2011, at 8.

On remand, the WCJ reiterated his prior credibility determinations and made new ones. The WCJ credited the testimony of Employer's medical witnesses, *i.e.*, Drs. Noble and Weinstein, and found that Claimant had fully recovered from his rib fracture. The WCJ granted Employer's termination petition as of August 21, 2008, the date of the IME. The WCJ awarded Claimant costs, but the award did not cover the cost of Dr. Stempler's deposition.

Claimant appealed to the Board. Claimant again argued that the WCJ erred by failing to admit Dr. Stempler's deposition into evidence, but the Board declined to revisit this argument and rejected Claimant's argument that he should be reimbursed for the cost of Dr. Stempler's deposition. Claimant also requested attorney's fees for Employer's unreasonable contest. The Board concluded that Employer successfully presented evidence that Claimant did not suffer a disability as a result of his work injury. Therefore, Claimant was not entitled to an award of unreasonable contest fees.

In his petition for review, Claimant presents three issues.[5] First, Claimant argues that the WCJ abused his discretion by refusing to admit Dr.

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[5] Our review of an order of the Board determines whether the necessary findings of fact are supported by substantial evidence, whether constitutional rights or Board procedures were violated or an error of law was committed. *City of Philadelphia v. Workers' Compensation Appeal Board (Brown)*, 830 A.2d 649, 653 n.2 (Pa. Cmwlth. 2003). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Mrs.*

(Footnote continued on the next page . . .)

Stempler's deposition into evidence. Second, Claimant argues that the WCJ did not provide a reasoned decision because he did not give an adequate reason for rejecting Claimant's testimony.[6] Third, Claimant argues that Employer failed to present a reasonable contest.

In his first issue, Claimant argues that the WCJ abused his discretion by refusing to consider Dr. Stempler's testimony; the WCJ has discretion to permit a late submission. Because the Act is to be construed liberally to effectuate its humanitarian objectives, a late submission of evidence should not be barred. Employer counters that the Act and the Special Rules of Administrative Practice and Procedure Before Workers' Compensation Judges, 34 Pa. Code §131.101, require parties to adhere to evidentiary deadlines, and the WCJ acted within his discretion.

The Act addresses the procedures for a contested workers' compensation proceeding, including the establishment of a schedule. Section 401.1 states, in relevant part, as follows:

> Each workers' compensation judge assigned to conduct hearings shall set forth a mandatory trial schedule at the first hearing. This trial schedule shall include specific deadlines for the presentation of evidence by the parties and dates for future hearings. Judges shall strictly enforce their schedules, and no party will be excused from honoring the schedule absent good cause shown. Every trial schedule shall include a specific date and time for a mediation conference.

(continued . . .)

Smith's Frozen Foods Company v. Workmen's Compensation Appeal Board (Clouser), 539 A.2d 11, 14 (Pa. Cmwlth. 1988).

[6] This issue was raised in Claimant's first appeal to the Board of the WCJ's June 16, 2009, decision, but the Board did not address it.

77 P.S. §710, added by the Act of February 8, 1972, P.L. 25. The applicable regulation in Title 34 of the Pennsylvania Code sets forth standards for closing a record. Section 131.101 states, in relevant part, as follows:

> (c) The evidentiary record is closed when the parties have submitted all of their evidence and rested or when the judge has closed the evidentiary record on a party's motion or the judge's own motion. If the judge determines that additional hearings are necessary, or that additional evidence needs to be submitted, or if the judge schedules additional written or oral argument, the evidentiary record may be held open by the judge. When the judge determines that the evidentiary record is closed, the judge will notify the parties that the evidentiary record is closed on the record or in writing.
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> (e) A judge may close the evidentiary record on the judge's own motion even if all parties have not rested when the judge determines that the parties have had reasonable opportunity to present their case, provided that reasonable notice of the closing of the evidentiary record has been given to all parties.
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> (f) All parties shall provide a certification of the contents of the evidentiary record before the judge, including hearing dates, a list of witnesses testifying and a list of offered exhibits. The certification of the evidentiary record shall be provided to the judge after the close of the evidentiary record and at or before the filing of proposed findings of fact, conclusions of law or brief. The judge will specify the contents of the evidentiary record in the decision.
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> (g) Proposed findings of fact, proposed conclusions of law, briefs and certification of the evidentiary record not timely filed with the judge may not be considered unless, in advance of the date specified in this section, a request for an extension of time has been made to, and granted by, the judge for good cause shown.

Special Rules of Administrative Practice and Procedure Before Workers' Compensation Judges, 34 Pa. Code §131.101(c), (e)-(g). In sum, the WCJ has the authority to close the record on "his own motion" as long as "reasonable notice of the closing" was given to the parties. 34 Pa. Code §131.101(e). The WCJ's refusal to reopen the record will not be reversed absent an abuse of discretion. *Sherrill v. Workmen's Compensation Appeal Board (School District of Philadelphia)*, 624 A.2d 240, 244 (Pa. Cmwlth. 1993).

Claimant does not assert that he was not given notice of the deadline to submit the deposition transcript. Instead, Claimant contends that the "WCJ refused to accept the testimony of Claimant's medical expert without good cause." Claimant's Brief at 13. Claimant was obligated to show good cause for the untimely submission of Dr. Stempler's deposition transcript, but he did not offer one to the WCJ. Nor did he offer an explanation to the Board. In both appeals to the Board, Claimant contended that the WCJ abused his discretion in rejecting the deposition transcript but did not claim there was good cause for the delay in its submission. In the absence of any explanation, the WCJ did abuse his discretion by refusing to accept the untimely submission of evidence.

In his second issue, Claimant argues that the WCJ did not provide a reasoned decision because he did not provide an adequate reason for rejecting Claimant's testimony. Claimant argues that because he testified through an interpreter, the WCJ lacked the ability to consider his demeanor. Claimant also argues that his testimony was consistent with the testimony of Employer's witnesses; it was inconsistent for the WCJ to find his testimony incredible but accept the testimony of Employer's witnesses.

Employer counters that the Claimant's testimony was not consistent with that of Employer's witnesses. Both parties agreed that Claimant had fallen at work, but only Claimant contended that he could not do his regular job after the injury and remained on light-duty work until Employer dismissed him because "something was wrong with the insurance." R.R. 109a.

The Act requires a WCJ to render a reasoned decision. Section 442(a) sets forth standards for a reasoned decision:

> 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 workers' compensation judge shall specify the evidence upon which the workers' compensation judge relies and state the reasons for accepting it in conformity with this section. When faced with conflicting evidence, the workers' compensation judge 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 *workers' compensation judge 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 (emphasis added). Where a witness appears "live" before the WCJ, his decision to make a credibility determination on the basis of witness demeanor satisfies the reasoned decision requirement of Section 442(a). *Daniels v. Workers' Compensation Appeal Board (Tristate Transport)*, 828 A.2d 1043, 1053 (Pa. 2003).

Claimant argues that because he testified through an interpreter the WCJ could not make a credibility determination on the basis of witness demeanor.

Claimant offers no legal authority to support this contention, and he does not explain why his credibility could not be evaluated on the basis of demeanor. The assessment of witness demeanor is not based on words alone but upon the overall appearance and the facial expressions of the witness. *See Bobst v. Bobst*, 54 A.2d 898, 900 n.3 (Pa. 1947) (demeanor includes the lifting of an eyebrow, the shrug of a shoulder, the flash of the eye, a facial expression or other spontaneous gesture); *Casne v. Workers' Compensation Appeal Board (Stat Couriers, Inc.)*, 962 A.2d 14, 19 (Pa. Cmwlth. 2008) (stating that a WCJ's credibility determination represents the evaluation of a total package of testimony in the context of the entire record).

Claimant is also incorrect that his testimony aligned with that of Employer's witnesses. Hull and Ross testified that Claimant, with the exception of one day, continued to perform his regular job without restrictions and without complaints of pain. This testimony was consistent with Dr. Weinstein's testimony that Claimant did not need any work restrictions and that on February 5, 2008, Claimant reported that he "was doing his regular job." R.R. 252a. By contrast, Claimant testified that because of pain from the work injury, he was only able to work light-duty until his employment ended several weeks later.

In sum, we reject Claimant's contention that the WCJ did not provide a reasoned decision.

In his third, and final, issue, Claimant argues that the WCJ erred in not awarding Claimant unreasonable contest fees. The WCJ did not specifically address this issue, and Employer responded that Claimant did not submit a *quantum meruit* application. In any event, Claimant raised the issue to the Board. The Board explained that the claim petition sought total disability benefits from the

date of the injury, ongoing. Although Employer agreed that Claimant sustained a work injury, it contested Claimant's contention that the injury caused any disability. The Board found that contest reasonable.

We agree with the Board. Section 440(a) of the Act allows an award of attorney's fees to a claimant unless "a reasonable basis for the contest has been established by the employer or the insurer." 77 P.S. §996(a), added by the Act of February 9, 1972, P.L. 25. This Court has long held that "the existence of an issue of the degree of disability" or "conflicting medical testimony concerning the extent of a disability" establishes a reasonable basis for contesting a claim petition. *Varghese v. Workmen's Compensation Appeal Board (M. Cardone Industries)*, 573 A.2d 630, 632 (Pa. Cmwlth. 1990). For purposes of workers' compensation, "a 'disability' is a term synonymous with 'loss of earning power.'" *Id.* at 633.

Employer presented evidence that Claimant returned to work without restrictions as well as medical testimony that the fall did not cause any disability, *i.e.*, loss of earning power. Thus, a reasonable contest was presented.

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

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MARY HANNAH LEAVITT, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sergio Alvarez Corona, Petitioner	: :	
v.	:	No. 1018 C.D. 2014
Workers' Compensation Appeal Board (Ragland Corporation), Respondent	: : :	

O R D E R

AND NOW, this 9th day of January, 2015, the order of the Workers' Compensation Appeal Board, dated May 22, 2014, in the above-captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge