[J-61-2014][M.O. – Todd, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

DAVID CRUZ	:	No. 69 MAP 2012
	:	
	:	Appeal from the Order of the
	:	Commonwealth Court at No. 636 CD
	:	2011 dated 10/19/11, reconsideration
v.	:	denied 12/7/11 affirming the order of the
	:	Worker's Compensation Appeal Board,
	:	at No. A10-0632 dated 3/16/11
WORKERS COMPENSATION APPEAL	:	
BOARD (KENNETT SQUARE	:	
SPECIALTIES AND PMA MANAGEMENT	:	
CORPORATION)	:	
	:	
APPEAL OF: KENNETT SQUARE	:	
SPECIALTIES AND PMA MANAGEMENT	:	ARGUED: November 28, 2012
CORPORATION	:	RESUBMITTED: June 23, 2014

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: July 21, 2014**

I join the lead opinion insofar as it determines that the burden of proof fell to Kennett Square Specialties (Employer) to demonstrate that David Cruz (Claimant) was unable to obtain employment because of some reason other than his injury. See Opinion Announcing the Judgment of the Court (OAJC), slip op. at 16. Further, while I agree there was insufficient evidence to support the finding by the Workers' Compensation Judge (WCJ) that Employer carried its burden in this regard, my reasoning differs somewhat from that reflected in the lead opinion.

As the lead opinion recites, at the hearing Claimant testified that he was born in Ecuador and arrived in the United States approximately ten years ago. See OAJC, slip op. at 3; N.T., Oct. 22, 2008, at 23. Employer then asked several questions as to Claimant's work-authorization status, including whether Claimant was a naturalized citizen or had a green card, and whether he was an undocumented worker. These questions were not answered because Claimant's attorney objected to them on grounds that the answers might incriminate his client. See N.T., Oct. 22, 2008, at 23-26. Upon review, the Commonwealth Court suggested Claimant's "refusal" to answer these questions was "the only evidence on which the WCJ concluded that Claimant was not authorized to work in the United States." Kennett Square Specialties v. WCAB (Cruz), 31 A.3d 325, 328 (Pa. Cmwlth. 2011). Based on that premise, the court held that the WCJ's conclusion was unsupported by substantial evidence, since adverse inferences from refusals to answer "do[] not constitute evidence, period." Id. at 329.

While I find that the Commonwealth Court reached the correct result based on the state of the record (discussed further below), I do not wholly endorse its analysis. Inferences do not exist in a vacuum, but stem from factual evidence. See, e.g., Commonwealth v. Brown, 617 Pa. 107, 147, 52 A.3d 1139, 1163 (2012) (referring to a fact-finder's ability to "draw reasonable inferences from basic facts to ultimate facts" (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979))). Thus, where a witness affirmatively refuses to answer a question on grounds that the answer might incriminate him, I would not assign absolutely no evidentiary value to such refusal. Indeed, the Supreme Court has observed as a general precept that refusals to answer, in a non-criminal setting and in reference to a question regarding potential criminality, are "relevant facts" that may be considered in the interest of "improv[ing] the chances for accurate decisions." Baxter v. Palmigiano, 425 U.S. 308, 319, 96 S. Ct.

1551, 1558 (1976).[1] Thus, if Claimant had, in fact, declined on Fifth Amendment grounds to answer the immigration-related questions posed by Employer, I might conclude that the adverse inferences arising from such refusals, combined with the other evidence of record, were adequate to sustain the WCJ's ruling. See City of Phila. v. WCAB (Kriebel), 612 Pa. 6, 17, 29 A.3d 762, 769 (2011) ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."); see also Vann v. UCBR, 508 Pa. 139, 147, 494 A.2d 1081, 1085 (1985) ("The question of the sufficiency of the evidence to meet the [employer's] burden [of proof] must be examined against the complete record." (emphasis added)).

A review of the hearing transcript, however, reveals that Claimant never refused to answer the immigration and work-authorization questions. Rather, his attorney interposed timely objections, after which Employer abandoned the issue and began a different line of questioning without ever insisting that Claimant answer or refuse to answer, or giving Claimant an opportunity to respond in any way. While this may seem like a technicality, we cannot surmise what Claimant would have said if he had been required to answer Employer's questions, and the attorney's objections were insufficient to invoke the Fifth Amendment privilege on Claimant's behalf. Accord United States v. Schmidt, 816 F.2d 1477, 1481 n.4 (10th Cir. 1987) ("Only the appellants, and not their counsel, are the proper parties to interpose a [Fifth-Amendment] claim of privilege[.]"); see also Textron Fin. Corp. v. Eddy's Trailer Sales, 2010 WL 1270182, at *3 (E.D.N.Y. 2010) (citing cases and holding that a witness's attorney cannot invoke the Fifth

[1] The Supreme Court's expression in Baxter related to silence in the face of an accusation. As a matter of logic, the same conclusion pertains to a refusal to answer on the grounds that a truthful answer may incriminate the witness. Cf. Gray v. State, 796 A.2d 697, 715 (Md. 2002) (observing that, even in criminal cases, invocation of the Fifth Amendment privilege has evidentiary value, albeit the fact-finder may be precluded from considering it).

Amendment privilege on behalf of his client because the privilege is personal); State ex rel. Butterworth v. Southland Corp., 684 F. Supp. 292 (S.D. Fla. 1988) (same); see also State v. McGuire, 253 S.E.2d 103, 105 (S.C. 1979) (finding that a witness must personally invoke his Fifth Amendment privilege, and that a judge cannot invoke it for him). As for any suggestion by Claimant's attorney that the answers might incriminate his client, it may be noted that objections by counsel do not constitute evidence. Accord, e.g., United States v. Serrato, 742 F.3d 461, 466 (10th Cir. 2014); State v. Forrest, 183 S.W.3d 218, 230 (Mo. 2006). In light of the foregoing, there is simply no evidence of record, or even a "fact" of silence on Claimant's part, from which an adverse inference may be drawn to be considered in conjunction with Claimant's testimony.

I recognize that we granted discretionary review, in part, to address the question, as framed by Employer, whether the WCJ's decision was supported by substantial evidence "where the record, in its totality, together with an adverse inference, [supports] the contention that the Claimant is an undocumented worker[.]" Cruz v. WCAB (Kennett Square Specialties), 616 Pa. 549, 550, 51 A.3d 183, 183 (2012) (per curiam). However, "[c]ourts are intended to decide cases on the record made and the applicable law." Dep't of Envtl. Res. v. Pa. Power Co., 461 Pa. 675, 695, 337 A.2d 823, 833 (1975) (internal quotation marks omitted). For the reasons expressed, I would find that the question posed by Employer makes the false assumption that facts exist in "the record made" from which an adverse inference may be drawn. That being the case, and in light of the paucity of other proofs on the question, I join the lead opinion's holding that the WCJ's conclusion pertaining to Claimant's work-authorization status was unsupported by substantial evidence.

Finally, I would be receptive, in an appropriate case, to reconsidering the soundness of Reinforced Earth's determination that a worker's immigration status alone

can present a lack of earning power for purposes of an employer's request to suspend benefits, so as to relieve the employer of the burden to demonstrate physical recovery from the injury. See Reinforced Earth Co. v. WCAB (Astudillo), 570 Pa. 464, 479-80, 810 A.2d 99, 108 (2002) (Opinion Announcing the Judgment of the Court). The plurality made that suggestion by analogy to other circumstances such as incarceration, voluntary retirement, or a subsequent non-work-related injury, all of which could also relieve the employer of the same burden. See id. at 478-79, 810 A.2d at 107-08 (reviewing cases). Notably, the plurality's reasoning with regard to immigration is contained in a relatively brief paragraph that does not supply any focused analysis dealing with an injured worker whose only other "disability" involves his work-authorization status. See id. at 479-80, 810 A.2d at 108.[2] Moreover, unauthorized work status is materially different from the other enumerated situations because, but for the injury, the worker might have been able to obtain similar employment elsewhere. Accord Moyera v. Quality Pork Int'l, 825 N.W.2d 409, 420 (Neb. 2013) (listing cases in which courts have allowed benefits, concluding that "even if undocumented employees cannot legally work in the United States, they could have worked elsewhere but for their work-related injury"); see also Economy Packing Co. v. Ill. Workers' Comp. Comm'n (Navarro), 901 N.E.2d 915 (Ill. Ct. App. 2009) (surveying cases).

Separately, and as the Commonwealth Court has noted, denying benefits on account of immigration status also tends to undermine federal immigration policy by giving employers an incentive to hire undocumented workers:

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[2] I recognize that Mr. Justice Nigro's concurrence, which I joined, expressed a similar viewpoint. See id. at 481, 810 A.2d at 109 (Nigro, J., concurring) ("I agree . . . that Reinforced Earth does not need to establish that it referred available jobs to Claimant in order for Claimant's benefits to be suspended[.]"). However, I now believe this position is worth reconsidering in the context of appropriately developed and focused advocacy.

> [I]t would not serve public policy to deny workers' compensation benefits to an illegal alien merely because of their immigration status because all that would do is reward an employer who failed to properly ascertain an employee's immigration status at the time of hire. Further, to do so would potentially subvert any public policy against illegal immigration because employers may actively seek out illegal aliens rather than citizens or legal residents because they will not be forced to insure against or absorb the costs of work-related injuries.

Reinforced Earth Co. v. WCAB (Astudillo), 749 A.2d 1036, 1039 (Pa. Cmwlth. 2000) (footnote and internal quotation marks omitted), quoted in part in Reinforced Earth, 570 Pa. at 471-72, 810 A.2d at 103; accord Dowling v. Slotnik, 712 A.2d 396, 404 (Conn. 1998); Economy Packing, 901 N.E.2d at 923.[3] As well, at least one court has observed that denying benefits on the basis of immigration status could undermine public policy in a different way, namely, by causing employers to "become lax in workplace safety." Rajeh v. Steel City Corp., 813 N.E.2d 697, 703 (Ohio Ct. App. 2004).[4]

For all of these reasons, I believe that it may be appropriate to revisit Reinforced Earth's analysis in the context of a dispute in which the issue is properly raised.

Mr. Chief Justice Castille joins this concurring opinion.

Mr. Justice McCaffery joins the portion of the concurring opinion in which Mr. Justice Saylor expresses a receptivity to reexamination of Reinforced Earth.

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[3] "[W]e do not believe that eligibility for workers' compensation benefits in the event of a work-related accident can realistically be described as an incentive for undocumented aliens to unlawfully enter the United States. Rather, excluding undocumented aliens from receiving certain workers' compensation benefits would relieve employers from providing benefits to such employees, thereby contravening the purpose of the [federal Immigration Reform and Control Act (the "IRCA")] by creating a financial incentive for employers to hire undocumented workers. . . . [C]ourts in other jurisdictions have almost uniformly held that the IRCA does not preclude undocumented aliens from receiving workers' compensation benefits." Id. (collecting cases).

[4] There may also be a substantial equitable concern whereby an employer who knowingly benefits by hiring an unauthorized worker should be estopped from claiming an entitlement to a suspension of benefits on those same grounds.