

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jeffrey Singleton,	:
Petitioner	:
	:
v.	: No. 2136 C.D. 2013
	: Submitted: June 20, 2014
Workers' Compensation Appeal	:
Board (Department of Transportation),:	
Respondent	:

BEFORE: HONORABLE DAN PELLEGRINI, President Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
PRESIDENT JUDGE PELLEGRINI      FILED: July 10, 2014

Jeffery Singleton (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) affirming the decision of a Workers' Compensation Judge (WCJ) which denied Claimant's Petition to Reinstate Compensation (reinstatement petition). For the reasons that follow, we affirm the Board.

On January 22, 2008, Claimant sustained chest and head injuries when a tree struck him during the course of his employment with the Commonwealth of Pennsylvania, Department of Transportation (Employer). On February 9, 2008, Employer issued a Notice of Compensation Payable recognizing the injuries as a

fracture and concussion and Claimant began receiving workers' compensation benefits.

In June 2008, Claimant underwent an Independent Medical Examination (IME) performed by Lucian P. Bednarz, M.D. (Dr. Bednarz), who concluded that Claimant was able to return to light-to-medium-duty work with temporary restrictions. Employer subsequently notified Claimant that a transitional duty assignment was available and Claimant returned to work on August 4, 2008. The following day, Employer issued a notice of suspension suspending Claimant's benefits as of August 4, 2008, due to his return to work at his pre-injury wage. Because Claimant was an equipment operator with a CDL license, he was required by federal regulations to take a drug test when he returned to work. The drug test revealed the presence of THC in his system and, as a result, Employer suspended and ultimately terminated Claimant's employment.<sup>1</sup>

On August 22, 2008, Claimant filed a reinstatement petition alleging that Employer unilaterally ceased paying his workers' compensation benefits as of August 7, 2008.<sup>2</sup> Before the WCJ, Claimant testified that he returned to work as instructed but that when Employer received the results of his drug test, Employer

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<sup>1</sup> Claimant filed a challenge petition to the suspension of benefits which the WCJ granted by decision dated November 11, 2009. By decision dated May 24, 2011, the Board reversed, finding that Claimant returned to work at his pre-injury wage, and that his subsequent absence from work and loss of earnings due to an unrelated positive drug test was not compensable. Therefore, Claimant's compensation is suspended effective August 4, 2008.

<sup>2</sup> Claimant also filed a Petition to Review Compensation, which the WCJ denied, but neither party raised any issues on appeal with respect to that petition.

suspended his employment. He explained that Employer required him to attend the State Employees Assistance Program (SEAP) before he could return to work, but that he had not completed the program. Claimant testified that Employer terminated his employment on October 6, 2008.

Leonard Sargent, D.C. (Dr. Sargent), a board certified chiropractor, testified that he first examined Claimant in April 2008 and released Claimant to return to modified-work duty on July 30, 2008, with restrictions on lifting and repetitive arm movements, and that he felt Claimant should return to work on a part-time basis. Dr. Sargent stated that after Claimant returned to work, Claimant advised him that he was put on full duty and was working eight hour days, and that Claimant had increased pain in his neck, head and arm as a result of his work duties. Dr. Sargent further testified that Claimant reported that he had received a positive drug test result for THC, and that he had been taking a supplement called “Ake-No-More.” Dr. Sargent stated that he submitted a sample of the supplement to NMS Labs (NMS) for testing, which sent him a report indicating that the supplement contained THC.<sup>3</sup> On cross-examination, Dr. Sargent admitted that he sent the “Ake-No-More” sample to the laboratory in a “Tic-Tac” container.

Leonard C. Giunta, D.O. (Dr. Giunta), who is board certified in family practice and acts as a panel physician, testified that he treated Claimant eight times

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<sup>3</sup> Susan L. Neith, a forensic chemist for NMS, testified that she performed tests on the “Ake-No-More” sample which confirmed the presence of THC. However, she denied any knowledge of the chain of custody of the sample prior to its arrival at NMS, and could not confirm whether the sample contained THC at the time of manufacture.

between January 30, 2008, and June 7, 2008. Dr. Giunta testified that he gave Claimant the “Ake-No-More” supplement in February 2008 because he was concerned with the amount of pain medication Claimant was taking. Dr. Giunta testified that he disputed the results of NMS Labs’ testing of the “Ake-No-More” sample, explaining that the study was done one month after Claimant’s positive drug test for THC and that the specimen should have been submitted in its original sealed container. Dr. Giunta also acknowledged that he did not know whether Claimant actually took any of the “Ake-No-More” capsules.

Martin D. Weaver, M.D. (Dr. Weaver), who is board certified in physical medicine and rehabilitation, testified that he treated Claimant from April 2008 until October 2008. Based on his review of Claimant’s medical records and a physical examination, Dr. Weaver testified that he did not believe Claimant could perform his pre-injury job duties. As a result, he imposed work restrictions on Claimant in August 2008, directing Claimant not to lift more than five pounds or make repetitive motions and to take periodic breaks due to pain or discomfort. Dr. Weaver further testified that he issued a report on September 24, 2008, in which he objected to Claimant’s returning to work due to Claimant’s medical condition and medications.

Karen Brown, Employer’s Human Resources Director, testified that because Claimant is an equipment operator with a CDL license, he was required by federal regulations to take a drug test upon his return to work. She testified that after Claimant’s drug test came back positive, he was required to complete a drug and alcohol rehabilitation program through SEAP, but she received no indication

that he completed the program. Brown also testified that but for Claimant's positive drug test, Claimant's modified-duty position would have continued to be available.<sup>4</sup>

The WCJ found as fact that Claimant stopped working after August 8, 2008, because of his positive drug test. In so finding, the WCJ rejected the testimony of Dr. Sargent and Dr. Weaver that Claimant was unable to perform light-duty work, noting that Claimant never testified he was unable to perform his assigned work. Moreover, the WCJ explained that although Claimant presented three witnesses in support of the allegation that the "Ake-No-More" supplement caused his positive drug test, he offered no testimony on the issue and never stated under oath that he actually took the supplement. The WCJ also credited the testimony of Human Resources Director Brown that Claimant was not permitted to return to work until he completed the SEAP drug treatment program, and noted that Claimant failed to present any evidence demonstrating successful completion of the program. The WCJ concluded that Claimant did not meet his burden of proving that his wage loss after August 8, 2008, was causally related to his work injury and, accordingly, denied the reinstatement petition.

Claimant then appealed to the Board, arguing, *inter alia*, that the WCJ erred in assigning him the burden of proving that the THC in his positive drug test

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<sup>4</sup> Jack Tarr, M.D. (Dr. Tarr), Employer's medical review officer, testified that Claimant's August 5, 2008 drug test specimen tested positive for THC, and that the chain of custody forms for Claimant's specimen were completed in accordance with all applicable federal regulations. He further explained that after receiving the positive test result, he contacted Claimant, who was unable to provide an adequate explanation for the result.

came from the “Ake-No-More” supplement provided by his physician. The Board affirmed, explaining:

[W]e conclude that once [Employer] established that Claimant was discharged for the positive drug test results, including evidence concerning the chain of custody, Claimant then had the burden to establish the existence of an explanation or excuse for those results, should any such excuse exist. See generally Shop Vac Corp. v. WCAB (Thomas), 929 A.2d 1236 (Pa. Cmwlth. 2007) (wherein the WCJ accepted the claimant’s explanations for her unexcused absences, in violation of company policy, as being related to her work injury). Again, because the WCJ found that Claimant failed to testify that he ever took the “Ake-No-More,” Claimant was unable to establish any explanation or excuse for the positive drug test results.

(Board’s November 5, 2013 Opinion at 8-9). This appeal by Claimant followed.<sup>5</sup>

On appeal, Claimant contends that he is entitled to a reinstatement of benefits because Employer improperly terminated him based on his positive drug test, and again alleges that the WCJ improperly placed the burden of proving that the “Ake-No-More” supplement contained THC on him rather than on Employer. Alternatively, Claimant argues that he established by substantial evidence that his modified work assignment was outside of the limitations imposed by his doctors.

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<sup>5</sup> Our review is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether errors of law were made, or whether constitutional rights were violated. *Namani v. Workers’ Compensation Appeal Board (A. Duie Pyle)*, 32 A.3d 850, 854 n.2 (Pa. Cmwlth. 2011).

Pursuant to Section 413(a) of the Workers' Compensation Act (Act),<sup>6</sup> a WCJ may reinstate a claimant's workers' compensation benefits upon proof that the claimant's disability has increased or recurred. *Namani*, 32 A.3d at 854. "A claimant seeking reinstatement of suspended benefits must prove that his or her earning power is once again adversely affected by his or her disability, and that such disability is a continuation of that which arose from his or her original claim." *Buford v. Workers' Compensation Appeal Board (North American Telecom)*, 2 A.3d 548, 558 (Pa. 2010). Once the claimant meets this burden, the burden then shifts to the party opposing the reinstatement petition to show that the claimant's loss in earnings is not caused by the disability arising from the work-related injury. "This burden may be met by showing that the claimant's loss of earnings is, in fact, caused by the claimant's bad faith rejection of available work within the relevant required medical restrictions or by some circumstance barring receipt of benefits that is specifically described under provisions of the Act or in this Court's decisional law." *Id.*<sup>7</sup>

Claimant's initial separation from employment was due to his positive drug test. Once Claimant tested positive for THC, he had the burden of establishing an excuse for the positive test result. While Claimant attempted to establish that the "Ake-No-More" supplement contained THC, his own witnesses

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<sup>6</sup> Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §772.

<sup>7</sup> See also *North Pittsburgh Drywall Co., Inc. v. Workers' Compensation Appeal Board (Owen)*, 59 A.3d 30, 41 (Pa. 2013) (holding that benefits should be reinstated if separation is proven to be related to claimant's work injury, but not reinstated if separation is related to claimant's bad faith conduct or voluntarily quitting).

offered conflicting testimony with respect to that issue and disagreed on whether the sample submitted for testing was sent in an appropriate container. In any event, Claimant never testified that he even took the “Ake-No-More” supplement. Claimant’s separation from employment then continued due to his failure to complete the SEAP drug treatment program as required by Employer. As the WCJ and Board recognized, Employer’s witness credibly testified that Claimant was not permitted to return to work until he completed the SEAP drug treatment program, and Claimant failed to present any evidence that he successfully completed the program. Claimant’s loss of earning power was ultimately because he did not complete the employee assistance program after his positive drug test. Accordingly, the Board did not err in denying his reinstatement petition.

Claimant also contends that the WCJ erred in failing to reinstate benefits because he established by substantial evidence that his modified work assignment was outside of the limitations imposed by his doctors. However, Claimant offered no testimony whatsoever indicating that he was unable to perform his assigned work duties, and the WCJ specifically rejected as not credible the testimony of Claimant’s treating physicians that Claimant was not able to perform the modified work duties.<sup>8</sup>

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<sup>8</sup> It is well settled that the WCJ is the ultimate fact finder and is empowered to determine witness credibility and evidentiary weight. *Leca v. Workers’ Compensation Appeal Board (Philadelphia School District)*, 39 A.3d 631, 634 n.2 (Pa. Cmwlth. 2012). The WCJ is free to accept or reject, in whole or in part, the testimony of any witness, including medical witnesses, and unless made arbitrarily or capriciously, a WCJ’s credibility determination will not be disturbed on appeal. *Id.*



Accordingly, the Board's order is affirmed.

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DAN PELLEGRINI, President Judge

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**ORDER**

AND NOW, this 10<sup>th</sup> day of July, 2014, the order of the Workers' Compensation Appeal Board, dated November 5, 2013, at No. A11-1420, is affirmed.

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DAN PELLEGRINI, President Judge