Stine v. Workers' Compensation Appeal Board

2004 | Cited 0 times | Supreme Court of Pennsylvania | January 22, 2004

Submitted: August 29, 2003

OPINION NOT REPORTED

MEMORANDUM OPINION

Virginia Stine appeals from an order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of a Workers' Compensation Judge (WCJ). Stine contends on appeal that the WCJ erred in modifying her benefits because Employer failed to timely provide her with the required form LIBC-757, Notice of Ability to Return to Work, and because the testimony of Employer's medical expert established that the proposed alternative job was outside of her physical restrictions.

Stine was employed by Hoffman Mills, Inc. (Employer) as a bulk material inspector. She sustained a work-related injury on December 11, 1996 and received benefits pursuant to a notice of compensation payable that described her injury as "cerviothoracic spinal muscle strain." Steven J. Triantafyllou, M.D., a board-certified orthopedic surgeon contracted by Employer, examined Stine on June 8, 1998 and concluded that she could return to work subject to restrictions he imposed on lifting, reaching above shoulder level, bending and climbing. Stine returned to work on July 2 and 3, 1998 in a light-duty job in the stockroom.

On July 27, 1998, Stine filed a penalty petition alleging that on or about June 13, 1998 Employer unilaterally ceased payment of her benefits in violation of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§1 - 1041.4, 2501 - 2626. On July 29 Employer filed a review medical, modification and suspension petition alleging that Stine returned to modified work earning wages greater than or equal to her pre-injury wages, that Stine reached maximum medical improvement and that she required no further medical treatment for her work injuries. At the October 1998 hearing, the WCJ granted Employer's request to amend the petition to include a review of the average weekly wage. Stine thereafter filed a second penalty petition alleging that Employer refused to pay for medical treatment that was reasonable and necessary and causally related to her work injury. The petitions were consolidated.

Stine testified about her attempt to return to work and her inability to perform the light-duty job. Stine's medical witness, Dr. Edwin Aquino, practices physical medicine and rehabilitation, and he first examined Stine on July 6, 1998. Dr. Aquino diagnosed Stine with work-related chronic cervical and lumbosacral strain and sprain mechanism, and he treated her utilizing physical therapy,

injections, medications, a TENS unit and home exercises. He released Stine from work for the period July 20 through August 20, 1998 so that she could participate fully in physical therapy. After a January 1999 functional capacity evaluation which indicated that Stine could perform light-physical work, Dr. Aquino informed Employer that he was releasing Stine to return to light-duty work on a trial basis.

Employer presented the deposition testimony of Dr. Triantafyllou and the testimony of Tammy Thrush, a human resources representative employed by Employer. Dr. Triantafyllou diagnosed Stine with pre-existing cervical and lumbar disc disease unrelated to the work injury and work-related cervical and lumbar strain. Stine had reached maximum medical improvement by the time he examined her, and she was able to return to light-duty work at the restrictions he imposed. Thrush testified that Employer offered Stine a light-duty job in its stockroom beginning June 25, 1998 that satisfied Dr. Triantafyllou's restrictions. Instead of returning to work, Stine informed Employer that she was scheduled to see Dr. Michael Connor, D.O., the following Monday. Dr. Connor subsequently released Stine to return to work within the restrictions set by Dr. Triantafyllou. Employer's plant shut down for vacation from July 4 through 9, 1998, and on July 10 Dr. Connor informed Thrush that he imposed an additional work restriction that Stine could do no reaching above shoulder level. Thrush informed Dr. Connor that Employer would accommodate the additional restriction, but Stine failed to return to work after July 3. Stine did not complain to Thrush that she was asked to perform tasks beyond her restrictions. Employer also offered an affidavit from Sarah Schmidt, a claims representative for Employer's insurer, concerning the suspension of Stine's benefits from June 15 through July 4, 1998.

The WCJ found the testimony of Thrush, the medical opinion of Dr. Triantafyllou and the affidavit of Schmidt to be more credible and persuasive than the evidence presented from Stine and Dr. Aquino. The WCJ concluded, among other things, that Stine failed to sustain her burden of proving that Employer violated the Act by unilaterally ceasing payment of Stine's benefits or by failing to pay her medical expenses; that Employer failed to sustain its burden of proving that Stine's benefits should be suspended; that Employer sustained its burden of proving that Stine's benefits should be modified to a temporary partial disability rate of $9.08 per week effective July 2, 1998; and that Employer had a reasonable basis to pursue its petitions and to contest Stine's petitions. The WCJ denied and dismissed the penalty and suspension petitions; dismissed the review medical petition; granted the modification petition; ordered Employer to deduct twenty percent from the temporary partial disability benefits and to pay that sum to Stine's counsel; ordered Employer to pay for all reasonable, necessary and directly-related medical expenses; and ordered Employer to reimburse Stine for her litigation costs.

The Board determined that the WCJ's decision modifying Stine's benefits was supported by substantial, competent evidence and that the WCJ did not err in concluding that Employer presented a reasonable contest. However, the Board remanded the matter to the WCJ for an explanation of the finding of fact regarding the reduction of Stine's average weekly wage. Upon remand, the WCJ

admitted additional evidence and thereafter adjusted Stine's average weekly wage and corresponding disability rate. He ordered Employer to pay any past due and owing temporary partial disability benefits, with interest, subject to a credit for any indemnity/wage loss benefits paid pursuant to the WCJ's earlier decision; to deduct twenty percent from the indemnity and interest award and to pay the sum to Stine's counsel; to remain responsible for all reasonable and necessary and directly-related medical expenses; and to reimburse Stine for her litigation costs upon their documentation. On appeal, the Board incorporated by reference its prior opinion and order and affirmed the WCJ's decision and order. [1]

Stine first contends that Employer failed to provide her with a form LIBC-757, Notice of Ability to Return to Work, and that its failure to do so requires reversal of the modification of her benefits. Employer argues that Stine waived this issue because she failed to raise it before the WCJ and the Board during any of the prior proceedings. Rule 1551, Pa. R.A.P. 1551, provides that "[n]o question shall be heard or considered by the court which was not raised before the government unit[.]" Counsel has failed to direct the Court's attention to where the question was first raised, see Pa. R.A.P. 2117(c), and upon its review of the record the Court has determined that the only reference to Stine's first issue is contained in the appellate brief filed with this Court. Therefore, the issue is waived. Pa. R.A.P. 1551; Henry v. Workers' Compensation Appeal Board (Keystone Foundry), 816 A.2d 348 (Pa. Cmwlth. 2003). [2]

Stine next contends that Employer failed to establish that it referred her to an available job that fit within the occupational category for which she was given clearance. In a proceeding to modify a claimant's benefits, the employer must provide medical evidence of a change in the claimant's condition and prove that the employer referred the claimant to an available job that fits within the occupational category for which the claimant was given clearance. Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.), 516 Pa. 240, 532 A.2d 374 (1987). See also Eidem v. Workers' Compensation Appeal Board (Gnaden-Huetten Memorial Hosp.), 560 Pa. 439, 746 A.2d 101 (2000). After an employer complies with these requirements, the claimant must demonstrate follow through on the job referral in good faith. Id.; Royal v. Workers' Compensation Appeal Board (Mayfield Foundry, Inc.), 722 A.2d 1145 (Pa. Cmwlth. 1999).

Based on the results of Dr. Triantafyllou's evaluation of Stine's physical abilities, Employer's human resources manager, Linda Reed, sent Stine a letter informing her that Dr. Triantafyllou released her to light-duty work. Reed offered Stine a light-duty job in the stockroom in building number three to begin June 25, 1998 from 7:00 a.m. to 3:00 p.m. Monday through Friday and informed her of the wages that she would earn and where to report for work. Stine worked for two days, and, even though Employer agreed to accommodate Dr. Connor's added restrictions, she failed to return to work. Thrush testified that Stine would have been asked to perform a variety of jobs within her restrictions. Unlike the claimant in Protection Technology, Inc. v. Workmen's Compensation Appeal Board (Dengler), 665 A.2d 557 (Pa. Cmwlth. 1995), cited by Stine as authority, she was not asked by Employer to return to work at the time-of-injury inspector position, which was beyond Stine's

physical ability to perform. Thus Stine has failed to prove that Employer violated the Kachinski mandates or that the Board committed an error in affirming the modification of Stine's benefits. The Court thus affirms.

DORIS A. SMITH-RIBNER, Judge

ORDER

AND NOW, this 22nd day of January 2004, the order of the Workers' Compensation Appeal Board is affirmed.

DORIS A. SMITH-RIBNER, Judge

1. This Court's review in administrative agency appeals is limited to determining whether constitutional rights were violated, whether an error of law was committed, whether a practice or procedure of a Commonwealth agency was not followed and whether the findings of fact are supported by substantial evidence in the record. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; Gunter v. Workers' Compensation Appeal Board (City of Philadelphia), 573 Pa. 386, 825 A.2d 1236 (2003). The WCJ is the fact finder and his or her credibility determinations cannot be disturbed on appeal. Hills Department Store No. 59 v. Workmen's Compensation Appeal Board (McMullen), 646 A.2d 1272 (Pa. Cmwlth. 1994).

2. Employer attached to its brief a copy of form LIBC-757, which it contends was sent to Stine. Employer requests a remand for findings on this issue if the Court determines that it was not waived. Because the Court did find a waiver of this issue, a remand is unnecessary.