IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Bush, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Commonwealth of Pennsylvania Liquor Control Board), Respondent	:	No. 2311 C.D. 2012
	:	Submitted: March 28, 2013

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: June 12, 2013

Joseph Bush (Claimant) seeks review of the Order of the Workers' Compensation Appeal Board (Board) that reversed the Workers' Compensation Judge's (WCJ) grant of Claimant's Claim Petition.

On December 31, 2007, Claimant began working for the Pennsylvania Liquor Control Board (Employer) as a liquor store clerk. Notes of Testimony, July 9, 2009 (N.T. 7/9/09), at 6; Reproduced Record (R.R.) at 50.

On March 26, 2009, two masked robbers held up the liquor store where Claimant worked. One of the robbers put a gun in the assistant manager's back and marched him toward the office. The other robber approached Claimant and told him to open the register. The robber who allegedly had a gun came near the Claimant, stared at him, and pointed the gun in front of him. Claimant pressed

the panic button immediately, then called 911 once the robbers left. N.T. 7/9/09 at 9-10; R.R. at 53-54.

Claimant did not sustain a physical injury during the robbery. However, Claimant started having panic attacks. It took him about one-half hour to stop shaking before he could write a police statement. When he went home that night after the incident, he felt like he was being smothered. He kept waking up and he was nauseous. N.T. 7/9/09 at 10; R.R. at 54.

After the robbery, Claimant contacted the District Manager's office to get help for his condition, and he was referred to the panel doctor, Dr. Daniel Kortsch (Dr. Kortsch). On March 31, 2009, Dr. Kortsch told Claimant to continue taking the Zoloft he was already taking, prescribed Xanax, and referred Claimant to both a psychologist, Sherry Landes, Ph.D. (Dr. Landes), and a psychiatrist, Dr. Scott Fleischer (Dr. Fleischer). Additionally, Dr. Kortsch completed a Medical Status Report to Employer. The Medical Status Report indicated that Claimant was not able to perform his job duties due to anxiety and post-traumatic stress disorder. N.T. 7/9/09 at 10-12; R.R. at 54-56.

On April 8, 2009, Employer filed a Notice of Compensation Denial (NCD) and contested whether Claimant suffered a work-related injury.

On April 13, 2009, Claimant filed a Claim Petition and alleged that on March 26, 2009, he suffered an injury in the course and scope of his employment described as "Anxiety, Post-Traumatic Stress Disorder." Claim Petition, April 13,

2009, at 1; R.R. at 3. Claimant sought full disability benefits from March 26, 2009, into the future, as well as the payment of medical bills and counsel fees.

Claimant recounted that, years before the work injury, he had social anxiety issues. When he experienced a couple of deaths in the family, he sought psychological counseling. The treatment, which lasted about six months, took place some ten years prior. Since that time, Claimant was prescribed Paxil or Zoloft. In 2004, Claimant began seeing Dr. Landes as a result of a car accident that resulted in a fatality. Claimant treated with Dr. Landes from June 30, 2004, until May 12, 2005. Although Claimant continued to take Zoloft, he had no issues with panic attacks, anxiety or depression from 2005 until the armed robbery in 2009. N.T. 7/9/09 at 13-15; R.R. at 57-59.

Claimant then saw Dr. Fleischer, who provided counseling and medication, once or twice per month. Specifically, Dr. Fleischer increased the Zoloft from 100 to 200 milligrams, and added Cymbalta. N.T. 7/9/09 at 16; R.R. at 60.

At hearing, Claimant testified that he continued to feel very anxious and withdrawn. He still struggled with anger, panic attacks, flashbacks, and depression. Claimant explained that social aspects of his life have been greatly curtailed because "[i]t's just a whole change of personality for me." N.T. 7/9/09 at 18; R.R. at 62.

Claimant continued to treat with Dr. Landes and Dr. Fleischer, but he remained unable to resume his pre-injury position because he was depressed, anxious, and "unable to concentrate properly." Notes of Testimony September 14, 2009 (N.T. 9/14/09) at 5; R.R. at 98.

When Claimant was hired, he received training from Employer which lasted about three days. Claimant recalled that armed robbery was covered in a cursory manner and the "Open Key"[1] issue was mentioned. In the event of a robbery, Claimant was instructed not to resist and to turn over any cash available. Claimant did not recall seeing a video called, "Armed for Safety." Once he began working at the store, the manager, Gail Kirrstetter (Ms. Kirrstetter), informed Claimant about the panic button and instructed him that it would draw the police. There was one panic button at each of the two registers, and one around the neck of the manager. The Claimant felt like robbery was "one of those things where you never think it's going to happen to you." N.T. 9/14/09 at 25; R.R. at 118.

Claimant submitted the deposition testimony of Dr. Landes, a licensed psychologist. Dr. Landes first evaluated Claimant on June 30, 2004. Deposition of Sherri Landes, Ph.D., November 23, 2009, (Dr. Landes Deposition) at 13.[2] Claimant was seen after his involvement in a fatal car accident. Since then he experienced panic attacks for about ten years. Claimant was already taking Zoloft. Claimant also experienced fear of driving, fear of retribution by the family of the

[1] The "Open Key" referred to a key on a register drawer so that any clerk can open the register drawer quickly in the event of a robbery.

[2] The deposition of Dr. Landes was not included in the Reproduced Record.

victim, flashbacks, concentration deficits, decreased appetite and lack of motivation after the car fatality. Dr. Landes Deposition at 14-15. Treatment with psychotherapy and biofeedback was instituted. As a result of this treatment, Claimant was discharged, symptom-free, on April 19, 2005.

Dr. Landes saw Claimant again on April 2, 2009. Dr. Landes Deposition at 17. Since Dr. Landes had last seen him, Claimant had retired from the U.S. Postal Service, and he began working for Employer. The 2009 work incident traumatized Claimant. Dr. Landes diagnosed Claimant with post-traumatic stress disorder as a result of March 26, 2009, robbery. Dr. Landes Deposition at 24. The 2004 car accident played no role, as Claimant had recovered from that incident, and had a hiatus from treatment for four or five years. Dr. Landes Deposition at 25.

When last seen shortly before the deposition, Claimant was doing "fairly well." Dr. Landes Deposition at 27. Generally, the symptoms had diminished but Claimant was still fearful of returning to the liquor store. Dr. Landes opined that Claimant was unable to resume his pre-injury position at the liquor store because he remained traumatized by the robbery. Dr. Landes believed he might be able to work in an area not open to the general public. Dr. Landes Deposition at 29.

Employer submitted the deposition testimony of Timothy J. Michals, M.D. (Dr. Michals), a psychiatrist, who examined of Claimant on July 31, 2009. Deposition of Timothy J. Michals, M.D., January 19, 2010 (Dr. Michals's

Deposition), at 25.[3] Claimant provided a history to Dr. Michals and informed him of the robbery on March 26, 2009.

Dr. Michals's diagnosis was post-traumatic stress disorder as a result of the armed robbery. Dr. Michals's Deposition at 40. Dr. Michals opined that three more months of treatment would be necessary but that Claimant was not disabled by his psychological condition. The previous psychological issues, from which Claimant had recovered, reflected his ability "to get back on his feet." Dr. Michals's Deposition at 42. Claimant might experience increasing symptoms when he was in a public place but Claimant could return to work, "[n]ot generally interacting with the public, per se." Dr. Michals's Deposition at 54.

Employer submitted the deposition testimony of Thomas J. Doyle (Mr. Doyle), a twelve-year employee of Employer and the training manager for Employer for three years. Deposition of Thomas J. Doyle (Mr. Doyle Deposition), January 25, 2010, at 6; R.R. at 172. As training manager, Mr. Doyle's duties included explaining to new employees the procedures of the Employer and making employees aware of their duties and responsibilities. Mr. Doyle Deposition at 8; R.R. at 174.

Mr. Doyle participated in the training of Claimant in January 2008. Mr. Doyle Deposition at 10; R.R. at 176. At that time, Claimant was instructed on many topics that pertained to the possibility of armed robbery, shoplifting, other problems with taking cash from the store, and other criminal activity during the

[3] The deposition of Dr. Michal's was not included in the Reproduced Record.

three-day period of orientation. Mr. Doyle Deposition at 11; R.R. at 177. Claimant was shown a video concerning the use of the "Open Key" on the cash register, and another video entitled "Armed with Safety," which explained what employees should do in the event of a robbery. Claimant was provided a booklet, "Work Rules and Guide to Better Service," which provided training on the use of the "Open Key" and armed robbery. The DVD video on armed robbery was ten or eleven minutes long, and included a five to ten minute discussion of the topic during orientation. Mr. Doyle Deposition at 19-20; R.R. at 185-186. In addition, each new employee was also given the Armed Robbery pamphlet, which provided details about the employee's actions when confronted by an armed robber. Mr. Doyle further stated that liquor stores deal with large amounts of money, and robbery is something that employees should be aware of. Mr. Doyle Deposition at 24; R.R. at 190. New employees are instructed on the use of the Open Key, which enables an employee to quickly open the cash register if confronted with an armed robber. The Employee Information Handbook also discussed safety, workplace violence, and emergencies. New employees were permitted to keep copies of the information papers and booklets for future reference. Mr. Doyle Deposition at 34; R.R. at 200.

Employer also submitted the deposition testimony of Marlene Ketusky (Ms. Ketusky), a twenty-three year employee and trainer for Employer. Deposition of Marlene Ketusky (Ms. Ketusky Deposition), January 25, 2010, at 6; R.R. at 239. Ms. Ketusky testified about the extent to which the new employee orientation involved the subject of armed robbery. She explained that the subject of armed robbery came up in the new employee orientation DVD, the discussion

about the "Open Key" on the cash registers, and the discussion about robberies in the "Work Rules and Guide to Better Service." One half-hour to forty-five minutes was devoted to various discussions about armed robbery and other criminal activity during the new employee orientation. Ms. Ketusky Deposition at 10-11; R.R. at 243-244.

Employer submitted the deposition testimony of Ms. Kirrstetter, an employee of Employer for twenty-one years. Deposition of Gail Kirrstetter (Ms. Kirrstetter Deposition), January 25, 2010, at 6; R.R. at 266. At the time of Claimant's incident, Ms. Kirrstetter was a manager for Employer. After a new employee completed the orientation program, Ms. Kirrstetter provided additional training about the presence and use of the store alarm system. A new employee was also instructed about the various placards in the back of the store which discussed the actions to be taken in the event of an armed robbery. Ms. Kirstetter Deposition at 1-12; R.R. at 270-272.

Ms. Kirrstetter informed Claimant that in the event of an armed robbery, employees should follow the robber's instructions without resistance. Ms. Kirstetter Deposition at 14; R.R. at 274. She also showed Claimant where the panic buttons were located. Ms. Kirstetter was aware that Claimant and another employee were present during the armed robbery. The other employee returned to work within one week after the incident but he requested a transfer to another location. Ms. Kirstetter Deposition at 18-19; R.R. at 278-279.

By Decision and Order on June 8, 2010, the WCJ granted Claimant's Claim Petition and determined that a robbery at a liquor store constituted abnormal working conditions such that Claimant was entitled to benefits.

The WCJ found Claimant and Dr. Landes credible. The WCJ found Dr. Michals, Mr. Doyle, Ms. Ketusky and Ms. Kirstetter credible and persuasive only to the extent that they were consistent with the testimony and opinions of Claimant and Dr. Landes.

Employer appealed to the Board who reversed and determined that the robbery of Claimant was not an abnormal working condition:

> In Pa. Liquor Control Board v. WCAB (Kochanowicz), 29 A.3d 105 (Pa. Cmwlth. 2011), the general manager of a retail liquor store was robbed at gun point and thereafter suffered Post-Traumatic Stress Disorder. The Court determined that claimant's psychic injury was the result of normal working conditions and reversed the WCJ's grant of the Claim Petition. Significant in the Court's analysis was that claimant admitted he attended training on Workplace Violence and was provided with pamphlets and educational tools on the handling of a robbery. Based on the employer's evidence on the number of robberies per year of its Southeastern Pennsylvania retail stores, the Court concluded that robberies of liquor stores were a normal condition of retail liquor store employment in today's society.
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> The instant case is also on point with McLaurin v. W.C.A.B. (SEPTA), 980 A.2d 186 (Pa. Cmwlth. 2009). In McLaurin, a passenger pulled a gun on a SEPTA bus driver and the driver thereafter suffered from Post-Traumatic Stress Disorder. The Court held that such an incident was not an abnormal working condition for a SEPTA bus driver. Testimony established that new drivers were given training on how to deal with difficult

situations and passengers in the form of a training DVD and a Rules and Regulations Manual. Further, busses were equipped with silent alarms that drivers could activate in case of an emergency. The Court reasoned and held as follows:

[Claimant] offered no proof that the...incident represented something that a SEPTA bus driver could not anticipate. On the other hand, SEPTA offered evidence showing that such incidents did occur with enough regularity that handling of them had been built into the operators' training program. The WCJ therefore did not commit an error of law by holding that McLaurin's psychic injury was not the result of an abnormal working condition....

In holding the situation did not constitute an abnormal working condition, the court relied on the fact that attacks on bus drivers happened with "enough regularity that handling of them had been built into the operators' training program." Likewise, in the instant case, Claimant credibly testified that part of his orientation program discussed what to do in case a robbery occurred, and he acknowledged that he received a pamphlet that contained information regarding what to do in case of a robbery. He also credibly testified that the store was equipped with panic buttons, one of which he used on the day of the robbery, and he was also instructed on how to use the "open key" on the cash register in case of a robbery. Further, he also acknowledged being given a pamphlet entitled "Work Rules and Guide to Better Service" that briefly discussed what to do in the event of a robbery.

While the Defendant in McLaurin put forth statistical evidence that attacks on drivers occurred on a frequent basis, the WCJ misinterpreted McLaurin as requiring an employer to put forth statistics regarding the frequency of armed robberies that took place in its stores. The Court did not require such evidence in order to find an incident was not an abnormal working condition.[1] The WCJ also erred in placing emphasis on the fact that there was no evidence that Claimant worked in a high crime area or that Claimant had never been exposed to an armed

robbery while working for Defendant [LCB] prior to the date in question. The Court in McLaurin did not require an individual person at a given location be subject to robberies or assaults on more than one occasion in order for such incidents to be considered a normal working condition, nor did it require a person work in a high crime area in order for assaults or robberies to be considered normal. Rather, the Court examined whether SEPTA bus drivers, not just the claimant, were exposed to assaults on a frequent enough basis that how to deal with such situations became part of employer's training program.

Claimant's subjective belief that a robbery would not happen to him is not dispositive. The proper inquiry in this case is whether robberies are something that people employed as liquor store clerks can anticipate occurring such that they are not an abnormal working condition….As stated above, the Court in McLaurin placed weight on the fact that attacks on bus drivers, in general, happened with "enough regularity that handling of them had been built into the operators' training program." Robberies of liquor stores occurred on a frequent enough basis that Defendant [LCB] incorporated information about what to do if one occurred into its orientation program, placed placards in its stores describing what to do in the event of a robbery, instructed clerks in the use of the "open key" button on the cash registers, and installed panic buttons in stores that had experienced robberies. Therefore, under McLaurin and Pa. Liquor Control Board, the incident in question did not constitute an abnormal working condition and we reverse

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[1] We note that in requiring Defendant to put forth evidence, such as statistics showing the frequency that liquor stores in Pennsylvania were robbed, the WCJ improperly shifted the burden onto Defendant [LCB] to disprove that a robbery was not an abnormal working condition rather than requiring Claimant to first establish, in the context of his Claim Petition, that such an event was an abnormal working condition.

Decision and Order of the Board, December 18, 2012, at 7-10.

Claimant contends[4] the Board erred when it reversed the WCJ and determined there were no abnormal working conditions.

When pursuing a workers' compensation claim petition, the claimant bears the burden of proving all of the elements required to establish that he or she is entitled to benefits under the Workers' Compensation Act (Act).[5] *Babich v. Workers' Compensation Appeal Board (CPA Department of Corrections)*, 922 A.2d 57, 63 (Pa. Cmwlth. 2007). When a claimant alleges a psychic injury, "he must prove that he was exposed to abnormal working conditions and that his psychological problems are not a subjective reaction to normal working conditions." *Id.* (citing *Martin v. Ketchum*, 523 Pa. 509, 568 A.2d 159 (1990)). Psychic injury cases are highly fact-sensitive and the working conditions must be considered in the context of the specific employment. *Pa. Department of Corrections/SCI-Waymart v. Workers' Compensation Appeal Board (Cantarella)*, 835 A.2d 860, 862 (Pa. Cmwlth. 2003).

While there is no bright-line test or a generalized standard, we consider whether the working conditions were foreseeable or could have been anticipated. *Id.* (citing *City of Philadelphia v. Civil Service Commission of the City of Philadelphia*, 565 Pa. 265, 772 A.2d 962 (2001)).

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[4] This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence, or whether constitutional rights were violated. *Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation)*, 589 A.2d 291 (Pa. Cmwlth. 1991).

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

In the present controversy, the Board determined the WCJ erred when she determined the robbery was an abnormal working condition. The Board relied on *McLaurin v. Workers' Compensation Appeal Board (SEPTA)*, 980 A.2d 186 (Pa. Cmwlth. 2009), which held that if the employer provided training to its employees on how to handle a specific working condition, that working condition was foreseeable and could have been anticipated.

Here, Employer provided Claimant with training that instructed him how to act should he be the victim of an armed robbery or other criminal activity. Claimant admitted that he attended the orientation program and received training and educational tools geared towards armed robberies and thefts. Given these findings, Claimant should have anticipated being robbed at gunpoint.

Claimant had the burden to prove by objective evidence that his injury was not a subjective reaction to normal work conditions. He failed to offer proof that the March 2009 incident represented something that a liquor store clerk could not anticipate. Conversely, Employer offered testimonial evidence that such incidents did occur with enough regularity that handling of them was built into the orientation program. This Court is constrained to conclude the Board did not err when it determined that Claimant's psychic injury was not the result of an abnormal working condition.

Accordingly, the decision of the Board is affirmed.

BERNARD L. McGINLEY, Judge

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Joseph Bush, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Commonwealth of Pennsylvania Liquor Control Board), Respondent	:	No. 2311 C.D. 2012

O R D E R

AND NOW, this 12th day of June, 2013, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge