

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kimberly Noble,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 682 C.D. 2014
	:	Submitted: October 24, 2014
Workers' Compensation Appeal	:	
Board (Wimex Beauty Supply),	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE COLINS**

FILED: January 6, 2015

Kimberly Noble (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) that affirmed the decision and order of the Workers' Compensation Judge (WCJ) dismissing her Claim Petition. For the reasons set forth below, we affirm.

Claimant worked for Wimex Beauty Supply (Employer) as a customer service representative and packer off and on from 1998 through January 6, 2011, taking orders over the phone and packing and shipping the ordered items. (WCJ Decision Finding of Fact (F.F.) ¶5; Hearing Transcript at 7; Employer Ex. 1 Claimant Dep. at 5.) From July 2010 on, there had been hostility between Claimant and a co-worker, Maria Ruiz, who was also a customer service

representative and packer. (WCJ Decision F.F. ¶¶9-10; Employer Ex. 1 Claimant Dep. at 7-8, 22.) Ruiz had harassed Claimant on a number of occasions, threatening to beat her up and cursing at her. (WCJ Decision F.F. ¶¶9-10; Employer Ex. 1 Claimant Dep. at 7, 10-11, 22.)

On January 6, 2011, Ruiz came over to Claimant's work station, yelling at Claimant that she didn't like the way Claimant acted and was "going to shut [Claimant] up." (WCJ Decision F.F. ¶¶9-10; Employer Ex. 1 Claimant Dep. at 6, 9-10.) Claimant responded by saying to Ruiz "f--k you, bitch," and Ruiz physically attacked Claimant. (WCJ Decision F.F. ¶¶9-10; Employer Ex. 1 Claimant Dep. at 6, 9-10.) Claimant did not lose consciousness or suffer any head injury other than an abrasion on her forehead, but did sustain cervical and lumbar strains from which she fully recovered. (WCJ Decision F.F. ¶¶14-15; Employer Ex. 1 Claimant Dep. at 7; Employer Ex. 2 Winkleman Dep. at 13, 17-26, 31, 44 & Ex. C-2; Employer Ex. 3 Nolan Dep. at 15-18, 24-26.) Following the altercation, Employer discharged Claimant. (Employer Ex. 1 Claimant Dep. at 20.)

On January 17, 2011, Claimant filed a Claim Petition seeking total disability benefits and payment of her medical bills. On February 3, 2011, Employer timely answered the Claim Petition, denying Claimant's allegations. The WCJ held a hearing on the Claim Petition at which Claimant testified and received deposition testimony of four witnesses: Claimant, Claimant's physician, who began treating her a month after the altercation, a neurologist who examined Claimant on behalf of Employer, and an orthopedic surgeon who examined Claimant on behalf of Employer.

On May 18, 2012, the WCJ issued a decision dismissing Claimant's Claim Petition. In this decision, the WCJ found that Claimant's injuries were not

covered by the Workers' Compensation Act (the Act)¹ because Employer had proved that the attack was motivated by the personal animosity between Ruiz and Claimant and was not related to work. (WCJ Decision F.F. ¶¶9-10, Conclusions of Law (C.L.) ¶¶1-4.) The WCJ also concluded that Claimant had not shown that she suffered any disability from the cervical and lumbar strains and abrasion that she sustained in the altercation, finding the testimony of both of Employer's medical witnesses credible and rejecting the testimony of Claimant's physician as neither credible nor persuasive. (*Id.* F.F. ¶¶13-16, C.L. ¶¶5-7.) Claimant appealed, and on March 26, 2014, the Board issued an opinion affirming the WCJ's decision. This appeal followed.²

Claimant argues that her injuries from Ruiz's attack were work-related injuries covered by the Act. We do not agree.

Under the Act, an employer is generally liable for compensation for injuries suffered by an employee in the course of her employment. Section 301(a) of the Act, 77 P.S. § 431; *LeDonne v. Workers' Compensation Appeal Board (Graciano Corp.)*, 936 A.2d 124, 129 (Pa. Cmwlth. 2007). The Act, however, excludes from compensation injuries intentionally inflicted by third-parties, including co-workers, based on personal animosity unrelated to the claimant's employment. Section 301(c)(1) of the Act, 77 P.S. § 411(1); *LeDonne*, 936 A.2d at 129; *Helms v. Workmen's Compensation Appeal Board (United States Gypsum*

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

² Our review is limited to determining whether an error of law was committed, whether the WCJ's necessary findings of fact are supported by substantial evidence, or whether Board procedures or constitutional rights were violated. *LeDonne v. Workers' Compensation Appeal Board (Graciano Corp.)*, 936 A.2d 124, 129 n.7 (Pa. Cmwlth. 2007).

Co.), 654 A.2d 106, 108 (Pa. Cmwlth. 1995); *Rosenfelt v. Workmen's Compensation Appeal Board (Regal Corrugated Box Co.)*, 402 A.2d 1151, 1152 (Pa. Cmwlth. 1979). Section 301(c)(1) of the Act provides in relevant part:

The term "injury arising in the course of his employment," as used in this article, shall not include an injury caused by an act of a third person intended to injure the employe because of reasons personal to him, and not directed against him as an employe or because of his employment.

77 P.S. § 411(1).

It is the employer's burden to prove the personal animosity defense. *Heath v. Workers' Compensation Appeal Board (Pennsylvania Board of Probation and Parole)*, 860 A.2d 25, 29-30 (Pa. 2004); *Helms*, 654 A.2d at 108-09; *Motion Control Industries v. Workmen's Compensation Appeal Board (Buck)*, 603 A.2d 675, 678 (Pa. Cmwlth. 1992); *Wills Eye Hospital v. Workmen's Compensation Appeal Board (Dewaele)*, 582 A.2d 39, 40 (Pa. Cmwlth. 1988), *aff'd without op.*, 582 A.2d 857 (Pa. 1990). The motivation of the assailant is a question of fact for the WCJ to determine. *M & B Inn Partners, Inc. v. Workers' Compensation Appeal Board (Petriga)*, 940 A.2d 1255, 1259 (Pa. Cmwlth. 2008); *Repco Products Corp. v. Workmen's Compensation Appeal Board (Habecker)*, 379 A.2d 1089, 1091 (Pa. Cmwlth. 1977). The WCJ may properly conclude that an attack by a co-worker at work was motivated by personal reasons and is not covered by the Act where there is evidence of pre-existing animosity between the assailant and the claimant not related to work duties and evidence that the altercation arose out of that personal hostility. *Helms*, 654 A.2d at 108-09 (workers' compensation benefits were properly denied for injuries in workplace fight where evidence showed pre-existing animosity between claimant and other participant over other participant's drug use); *Rosenfelt*, 402 A.2d at 1152-53 (affirming denial of

compensation where evidence supported finding that workplace injury was due to attack by a co-worker motivated by personal animosities).

Here, the WCJ found that Employer satisfied its burden of proof and that Ruiz's attack on Claimant was motivated by personal animosity toward Claimant not related to any work activities. (WCJ Decision F.F. ¶¶9-10, C.L. ¶¶2-4.) These findings are supported by substantial evidence. Claimant testified that Ruiz had a pre-existing personal hostility toward her for months before the altercation and that this ongoing animosity was the reason for the attack. (Employer Ex. 1 Claimant Dep. at 7-9.) Claimant testified:

Q. What prompted the fight?

A. It was ongoing. She was harassing me for a while.

Q. When you say harassing you, can you elaborate on that?

A. I mean it's a place of business and she'd be yelling, I'm going to kick your ass, you f--king bitch and, you know, ongoing. He would pick me up from work and like I'd be so frustrated because of this bitch.

(*Id.* at 7.) Claimant testified that the reason for Ruiz's hostility and harassment was that "[w]e didn't get along." (*Id.* at 8-9.)

Moreover, the words exchanged between Ruiz and Claimant at the time of the altercation show only personal animosity, not any work activity or work-related event. Claimant testified:

Q. If I understand this correctly, she just walked up and punched you?

A. Yes. She was yelling at me first. It wasn't the first time.

Q. I understand there were some words exchanged before the physical altercation?

A. Yes.

Q. Do you have a recollection of what those words were?

A. She just said I think I'm tough and I walk around here and she's going to shut me up and, you know.

Q. How did you respond?

A. She's tired of the way I walk around that place. How did I respond?

Q. Yes.

A. That day? I just – she came to my desk and she took her earrings off and I just was tired of her shit and I just was like, f--k you, bitch. That's what I said to her.

(*Id.* at 9-10.)

Claimant argues that Ruiz attacked her because of a dispute over a workplace computer several days earlier. The WCJ, however, specifically rejected that contention and found that the attack was not related to the computer incident. (WCJ Decision F.F. ¶10, C.L. ¶4.) The WCJ's findings, where supported by substantial evidence, are binding on this Court. *Crompton Corp v. Workers' Compensation Appeal Board (King)*, 954 A.2d 751, 753-54 (Pa. Cmwlth. 2008); *Rosenfelt*, 402 A.2d at 1152-53. The WCJ's rejection of Claimant's contention that the altercation was work-related is amply supported by Claimant's testimony that there was long-standing personal animosity that pre-dated the computer incident, that the attack arose out of that pre-existing hostility and that the words exchanged before the attack consisted solely of angry personal epithets with no reference to the computer incident at all.

Because the WCJ found that the co-worker's attack was motivated by personal animosity unconnected to work and that finding is supported by

substantial evidence, Claimant's injuries are not covered by the Act. 77 P.S. § 411(1); *LeDonne*, 936 A.2d at 131; *Helms*, 654 A.2d at 108-09; *Rosenfelt*, 402 A.2d at 1152-53.³ Accordingly, the Board correctly affirmed the WCJ's dismissal of Claimant's Claim Petition in this matter and we therefore affirm the Board's order.

JAMES GARDNER COLINS, Senior Judge

³ Claimant also argues that the WCJ erred in holding that she did not suffer any disability as a result of the work incident. While it is unnecessary to address this issue because Claimant's injuries are not covered by the Act, this argument is without merit. Under the Act, a claimant seeking disability benefits must prove that the incident on which she bases her claim for benefits caused an injury that rendered her incapable of performing her time-of-injury job. *Vista International Hotel v. Workmen's Compensation Appeal Board (Daniels)*, 742 A.2d 649, 654 (Pa. 1999); *Reyes v. Workers' Compensation Appeal Board (AMTEC)*, 967 A.2d 1071, 1077-78 (Pa. Cmwlth. 2009) (*en banc*); *School District of Philadelphia v. Workers' Compensation Appeal Board (Lanier)*, 727 A.2d 1171, 1172-73 (Pa. Cmwlth. 1999). Unless the claimant's inability to perform her time of injury job is obvious, the claimant must prove that disability by unequivocal medical testimony. *Reyes*, 967 A.2d at 1077; *Lanier*, 727 A.2d at 1173-74; *Somerset Welding & Steel v. Workmen's Compensation Appeal Board (Lee)*, 650 A.2d 114, 117 (Pa. Cmwlth. 1994). The only unequivocal medical testimony that Claimant was unable to perform her job duties at any time as a result of her injuries was the testimony of her medical witness, Dr. Kaplan. Because the WCJ found that Dr. Kaplan's testimony was not credible (WCJ Decision F.F. ¶¶13, 16), the WCJ properly held that Claimant failed to sustain her burden of proving disability.

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ORDER

AND NOW, this 6th day of January, 2015, the order of the Workers' Compensation Appeal Board in the above matter is AFFIRMED.

JAMES GARDNER COLINS, Senior Judge