

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Candy Irvin, :  
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 Petitioner :  
 :  
 v. :  
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 Workers' Compensation Appeal :  
 Board (Hampton Inn & Suites and :  
 Mountain Spring Hotel), : No. 1060 C.D. 2010  
 Respondents : Submitted: October 29, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McGINLEY

FILED: December 10, 2010

Candy Irvin (Claimant), *pro se*, challenges the order of the Workers' Compensation Appeal Board (Board) which affirmed the workers' compensation judge's denial of her claim petition.

Claimant worked as a housekeeper for Hampton Inn & Suites-Mountain Spring Hotel (Employer). Claimant alleged that on June 7, 2007, she "turned to the left to pull up the duvet cover inside the insert thing, and I felt like this pop under my rib cage." Notes of Testimony, September 27, 2007, (N.T.) at 7. Claimant went to the hospital that night and was prescribed Ibuprofen. She returned to work and completed an accident report which stated, "I must of [sic] pulled to [sic] hard or lifted to [sic] much or turned wrong way." Incident Report, June 9, 2007, at 1. Claimant then worked light duty, stuffing envelopes, folding towels and pillow cases, and dusting. Claimant treated with Dr. Zimmerman on or

about June 13, 2007, and was given Flexeril and a five pound lifting restriction. On or about July 9, 2007, Claimant again saw Dr. Zimmerman and was released to her time of injury job with the proviso that she be allowed forty minutes to clean a room rather than the thirty minutes Employer required. Claimant remained on light duty through July 11, 2007.<sup>1</sup> On July 16, 2007, Diana Bernardo (Bernardo), Employer's general manager, contacted Claimant and informed her that she was to report for regular duty on July 17, 2007, based on Dr. Zimmerman's release. Claimant did not return to work. Employer discharged her from employment.

On August 1, 2007, Claimant petitioned for benefits and alleged that she suffered, "Pain above the left breast and pain in left arm, neck and back" when cleaning a room on June 7, 2007. Claim Petition, August 1, 2007, at 1.

Before the WCJ, Claimant testified that she was required to clean a room in thirty minutes which included "making the beds, stripping the beds, clean the bathroom, scrubbing the tub, scrubbing the sink, scrubbing the floor, vacuuming, dusting. Just an overall clean the whole entire area." N.T. at 6. Claimant testified that she went to the hospital for treatment on June 7, 2007, and complained of "shoulder pain, chest pain, upper left back pain, lower rib cage pain." N.T. at 8. Claimant testified that Bernardo told her "if you can't perform the 30-minute room time, we have no work for you." N.T. at 13. Thereafter Claimant did not work for Employer. N.T. at 13. Claimant continued to get "lower rib pain . . . like a sharp shooting, punching pain. Then I get pain in the back of my neck . . . up through the back of my head. And I get headaches. And .

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<sup>1</sup> Claimant was on a pre-scheduled vacation from July 2, through July 8, 2007.

. . . it'll hurt . . . right here under my left arm . . . .” N.T. at 14. She did not believe that she could return to her time of injury job. N.T. at 14. Claimant testified that when she briefly worked at a bowling alley, as a cashier at Dollar Tree, and as a hostess at a restaurant, she experienced pain. Notes of Testimony, May 6, 2008, (N.T. 5/6/2008) at 14-16. On cross-examination, Claimant admitted that she had pain in her left side and shoulder about two months before June 7, 2007. N.T. at 18-19. Claimant admitted that Dr. Zimmerman cleared her to clean a room in thirty minutes by July 17, 2007. N.T. at 23.

Claimant presented the deposition testimony of Jared B. Heinz, D.C. (Dr. Heinz), Claimant's treating chiropractor since August 27, 2007. At that initial visit Claimant was seen by another chiropractor in Dr. Heinz's office. Dr. Heinz first examined Claimant on September 20, 2007. After an examination on December 21, 2007, Dr. Heinz's diagnosis was “costochondritis<sup>[2]</sup>, left shoulder sprain/strain, left shoulder internal derangement, myospasm and cervical sprain/strain.” Deposition of Jared B. Heinz, D.C., March 17, 2008, (Dr. Heinz Deposition) at 13. After subsequent examinations of Claimant, Dr. Heinz added “cervical disc lesion” to his diagnosis. Dr. Heinz Deposition at 16. Dr. Heinz testified within a reasonable degree of chiropractic certainty that Claimant's conditions were caused by her work injury on June 7, 2007. Dr. Heinz Deposition at 16-17. Claimant could return to work with restrictions of “no reaching overhead with her left arm, no lifting greater than 20 pounds.” Dr. Heinz Deposition at 17. He did not believe that Claimant could return to her time of injury job. Dr. Heinz

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<sup>2</sup> Dr. Heinz explained that costochondritis is an inflammation of the costochondral articulation which is where the rib attaches to the sternum. Dr. Heinz Deposition at 36.

Deposition at 17. On cross-examination, Dr. Heinz admitted that the history Claimant provided for him differed from that she gave the emergency department at the hospital. Claimant told Dr. Heinz's associate that the acute incident occurred on June 7, 2007, while she told the emergency room she had experienced pain for three months before that. Dr. Heinz Deposition at 28.

Bernardo testified that the forty minute limitation to clean rooms did not "make sense to me because the duties in cleaning a room are exactly the same, whether you clean them in 40 minutes or 30 minutes, and I told her it didn't make sense that her doctor would give her a note that said 40 minutes." Notes of Testimony, February 5, 2008, (N.T. 2/5/08) at 12. After Dr. Zimmerman released Claimant to clean rooms in thirty minutes, Claimant told Bernardo, "I'm going to call my doctor, and I'll call you back." N.T. 2/5/08 at 14. Claimant did not call her back. N.T. 2/5/08 at 14. Employer sent a "Job Abandonment Letter" to Claimant which she received on July 26, 2007. The letter informed Claimant that she no longer had a job. N.T. 2/5/08 at 21.

Employer presented the deposition testimony of Lucian Bednarz, M.D. (Dr. Bednarz), a board-certified physiatrist. Dr. Bednarz examined Claimant on December 14, 2007, took a history, and reviewed medical records. Dr. Bednarz characterized Claimant as exhibiting "a moderate degree of symptom exaggeration" and "a submaximal effort." Deposition of Lucian Bednarz, M.D., May 9, 2008, (Dr. Bednarz Deposition) at 11. Dr. Bednarz concluded, "Assuming the history provided was an accurate reflection of the mechanism, it was my opinion that she may have sustained a thoracic strain as described involving the

muscles and ligaments of her mid back.” Dr. Bednarz Deposition at 12. Dr. Bednarz opined that Claimant had recovered from the thoracic strain and could return to her time of injury job with no restrictions. Dr. Bednarz Deposition at 12-13. Dr. Bednarz disagreed with the diagnosis of Dr. Heinz and stated that costochondritis would not be long standing. Further, Claimant did not suffer a left shoulder sprain/strain, a left shoulder internal derangement, a mild spasm cervical sprain/strain, or a cervical disc lesion. Dr. Bednarz Deposition at 17-18.

The WCJ denied and dismissed the claim petition. The WCJ made the following relevant findings of fact:

63. This Judge finds that Claimant was not a credible witness. She testified before this Judge that she was stripping a bed at work on June 7, 2007 and felt a pop and had pain under her ribcage. She completed an accident report on June 9, 2007 which she admits was inconsistent with her testimony. The history she gave the emergency room was she presented with complaints of left chest wall pain, left chest pain in the front and back, and tightness in her neck and left arm. The report indicated her pain had been going on for three months and she denied trauma. Claimant gave Dr. Zimmerman a history of hurting her chest at work but also said she had similar problems two months earlier. She specifically denied before this Judge having problems with her chest, back, left shoulder, arm or neck prior to June 7, 2007. Claimant was not reporting shoulder or neck pain to Dr. Zimmerman in June or July but reported significant pain to Dr. Hanson in August, almost three months post injury and seven weeks after she stopped working. She stopped working based on the advice of her attorney, not that of a doctor.

64. This Judge finds the testimony of Claimant that she sustained a work injury on June 7, 2007 was not credible based on the foregoing.

65. This Judge finds the testimony of Dr. Heinz is not credible. The doctor relied upon Claimant's history to him which this Judge finds not credible.

WCJ's Decision, October 29, 2008, Findings of Fact Nos. 63-65 at 13.

Claimant appealed to the Board which affirmed.

Claimant complains that she should have received unemployment compensation, that the WCJ erred when he denied her claim petition, that Bernardo and Dr. Bednarz made false statements, that the WCJ and Employer failed to take into account her anxiety while testifying, and that the Board erred when it allowed her to submit more evidence on her behalf but did not consider it.<sup>3</sup>

Initially, this Court notes that Claimant has petitioned for review from the decision of the Board. The denial of her petition for unemployment benefits is not before this Court.

Claimant next contends that the WCJ erred when he denied her claim petition because the WCJ should have found her and Dr. Heinz credible.

In a claim petition the claimant bears the burden of proving all elements necessary to support an award. Innovative Spaces v. Workmen's Compensation Appeal Board (DeAngelis), 646 A.2d 51 (Pa. Cmwlth. 1994). To

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<sup>3</sup> This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact were 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).

sustain an award, the claimant has the burden of establishing a work-related injury which resulted in disability.<sup>4</sup> If the causal relationship between the claimant's work and the injury is not clear, the claimant must provide unequivocal medical testimony to establish a relationship. Holy Family College v. Workmen's Compensation Appeal Board (KYCEJ), 479 A.2d 24 (Pa. Cmwlth. 1984).

The WCJ failed to find Claimant and Dr. Heinz credible, therefore Claimant failed to meet her burden of proving that she suffered a work-related injury which resulted in disability. The WCJ, as the ultimate finder of fact in compensation cases, has exclusive province over questions of credibility and evidentiary weight, and is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part. General Electric Co. v. Workmen's Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 529 Pa. 626, 600 A.2d 541 (1991). This Court will not disturb a WCJ's findings when those findings are supported by substantial evidence. Nevin Trucking v. Workmen's Compensation Appeal Board (Murdock), 667 A.2d 262 (Pa. Cmwlth. 1995). Claimant essentially asks this Court to reweigh the evidence. This Court will not do so.

Claimant next contends that her anxiety prevented her from focusing when she testified. She believes that she has been discriminated against because of an anxiety disorder. There is nothing in the testimony of the medical witnesses to

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<sup>4</sup> For workers' compensation purposes, disability is equated with a loss of earning power. Inglis House v. Workmen's Compensation Appeal Board (Reedy), 535 Pa. 135, 634 A.2d 592 (1993).

indicate that Claimant suffered from an anxiety disorder. Further, a review of the record reveals that Claimant did not raise this issue before the Board. Therefore, it is waived. In Budd Baer, Inc. v. Workers' Compensation Appeal Board (Butcher), 892 A.2d 64, 67 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 588 Pa. 784, 906 A.2d 544 (2006), this Court stated, "Issues not raised before the WCJ and the Board are deemed waived on appeal to this Court."

Claimant next contends that the Board erred when it did not consider a letter from her family doctor which was submitted and a description of two different jobs she performed for Employer. Once again, the WCJ was the factfinder. The Board will not consider evidence which was not presented before the WCJ.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge



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 Respondents :

**ORDER**

AND NOW, this 10th day of December, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

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BERNARD L. MCGINLEY, Judge