

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Deborah Tencer,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1101 C.D. 2009
	:	SUBMITTED: September 11, 2009
Workers' Compensation Appeal	:	
Board (Engle Printing),	:	
	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE JAMES R. KELLEY, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: March 22, 2010

Deborah Tencer (Claimant) appeals the decision of the Workers' Compensation Appeal Board (Board) affirming the decision to dismiss Claimant's petition to review utilization determinations and to grant the petition to terminate benefits. We affirm.

On November 29, 2004, Claimant sustained a work-related injury while in the employ of Engle Printing (Employer). Claimant was working as a delivery person when, while stopped at a traffic light, she was rear-ended. Following the accident, Claimant drove herself to the hospital because she was experiencing neck pain. Claimant was diagnosed with soft tissue injuries. Subsequently, Claimant was treated by her family physician who referred her to a

chiropractor. Claimant continued to work for Employer despite experiencing pain. Prior to the accident, Claimant had been diagnosed with fibromyalgia. Following her work injury, the specialist treating Claimant for fibromyalgia referred her to Dr. Laurence A. Primack, M.D., a neurologist. Claimant was also referred to Dr. Molter, a physiatrist. Another physiatrist, Dr. Patel, referred Claimant to Dr. Singer, an orthopaedic surgeon. Dr. Singer referred Claimant to Dr. Drass, an anesthesiologist and pain management specialist. Dr. Primack also referred Claimant to Dr. Zimmerman, an otolaryngologist who then referred Claimant to Dr. Saltzburg, an orthopaedic surgeon.

An Agreement for Compensation was issued on July 1, 2005 describing Claimant's injury as a cervical strain. In June of 2005, Claimant was restricted to two days of work a week. A supplemental agreement was issued on November 8, 2005, providing for the modification of benefits. On October 27, 2005, Dr. Primack took Claimant off work entirely. On December 19, 2005, Employer filed a petition to terminate workers' compensation benefits alleging that Claimant was fully recovered from the November 29, 2004 injury as of November 8, 2005. On January 18, 2006, Employer filed a utilization review request regarding the treatment of Michael C. Saltzburg, D.O. from December 7, 2005 forward. Dr. Milton J. Klein, D.O. issued a utilization review finding Dr. Saltzburg's treatment to be reasonable and necessary on December 7, 14, and 21, 2005, but unreasonable and unnecessary thereafter because Dr. Saltzburg's notes showed that the treatment was not benefiting Claimant. Dr. Mitchell E. Antin, D.O. also reviewed Dr. Saltzburg's treatment of Claimant. Dr. Antin concluded that Dr. Saltzburg's treatment was unreasonable and unnecessary because the injection therapy used to treat Claimant was clinically ineffective, did not conform

to any known acceptable medical treatment standard, and the escalating use of narcotics for subjective pain is not indicated in a chronic pain management program.

On April 26, 2006, Claimant filed a petition to review the utilization determinations of Dr. Klein and Dr. Antin. The petition to review utilization determinations was consolidated with the petition to terminate. The Workers' Compensation Judge (WCJ) dismissed Claimant's petition to review utilization determinations and granted Employer's petition to terminate benefits. Claimant appealed to the Board, which vacated the WCJ's decision because of discrepancies between the WCJ's summaries and the record. *See* Reproduced Record (R.R.) at 213a. The Board remanded the case and ordered the WCJ to "summarize the evidence, render clarified and/or new credibility determinations and render findings of fact and conclusions of law consistent with the evidence." R.R. at 213a-214a. Upon remand, the WCJ again dismissed Claimant's petition to review utilization determinations and granted Employer's petition to terminate benefits effective November 8, 2005. The Board affirmed, and this appeal followed.

Claimant asserts that the Board erred in affirming the WCJ's decision for four reasons. First, Claimant contends that the WCJ erred by failing to make findings of facts regarding the different type of pain Claimant experienced prior to her work injury compared to the pain she experienced after her injury. Claimant also asserts that the WCJ's findings of fact were not supported by substantial evidence and the WCJ's credibility determinations were unsupported. Finally, Claimant contends that the Board erred in affirming the WCJ's finding that Employer had met its burden to show that Claimant was fully recovered from her work injury.

Claimant challenges Finding of Fact 10 wherein the WCJ found that Claimant had testified that she had previously been diagnosed with fibromyalgia from a prior strain and that she had further testified that the pain from the cervical strain was more exact and deeper than fibromyalgia pain, which she characterized as a general achiness. R.R. at 219a. Claimant suggests that although Finding of Fact 10 is based upon her testimony, the WCJ failed to assess other related testimony, including that prior to the accident, she was able to walk and perform her other daily activities without the presence of debilitating pain and the fact that she had missed only a few days of work in four years prior to her work injury despite her fibromyalgia diagnosis. Claimant contends that this was a critical error because Dr. Talbott's opinion, upon which the WCJ based his decision, was predicated on the argument that Claimant did not report a difference in her pain before and after the work injury. Claimant alleges that the WCJ failed to adequately explain why he rejected Claimant's testimony that the pain she experienced following her work injury was different and more intense than the fibromyalgia pain she had previously experienced. Claimant also argues that the WCJ's conclusions are not supported by substantial evidence because he failed to address the fact that prior to the accident Claimant was fully functioning at work and home and that post-accident she is not able to work.

In rendering a decision, the WCJ is not required to discuss every piece of evidence presented. *Stout v. Workers' Comp. Appeal Bd. (Pennsbury Excavating, Inc.)*, 948 A.2d 926, 932 (Pa. Cmwlth. 2008). "The WCJ is only required to make the findings necessary to resolve the issues raised by the evidence and relevant to the decision." *Id.* It is irrelevant whether the record contains evidence to support findings other than those made by the WCJ; the critical inquiry

is whether there is evidence to support the findings actually made. *City of Philadelphia v. Workers' Comp. Appeal Bd. (Smith)*, 946 A.2d 130, 137 (Pa. Cmwlth. 2008) [citing *Hoffmaster v. Workers' Compensation Appeal Board (Senco Products, Inc.)*, 721 A.2d 1152, 1155 (Pa. Cmwlth. 1998)].

The WCJ generally accepted Claimant's testimony, but also credited the testimony of employer's expert, Dr. Talbott, that Claimant's complaints of pain down the right side of the neck, across the shoulder and the down the right arm with burning pain when her clothes touched the top part of her back were unrelated to her work injury and that this pain was related to the Claimant's fibromyalgia. The WCJ relied upon Dr. Talbott's testimony that loss of normal cervical lordosis, a finding that is consistent with muscular spasm, existed in pre-injury cervical spine x-rays taken December 15, 2003, and Claimant's medical history, which indicated that Claimant had a pre-accident history of complaints of pain in her upper extremity. Once the WCJ concluded that Claimant's injury had resolved and her pain was unrelated to her work injury, the WCJ was not required to address why Claimant experienced a different type of pain following the accident. The Board found that the WCJ adequately explained his reasons for finding that Claimant's work injury had resolved and that those findings were supported by the record. We agree.

Second, Claimant asserts that the decision was not supported by substantial evidence. Claimant alleges that Finding of Fact 12, concluding that the loss of cervical lordosis could only be related to her pre-injury fibromyalgia condition, is not supported by any medical evidence of record. Claimant contends that the WCJ's conclusion is based upon an assumption that her fibromyalgia was

the cause of the loss of cervical lordosis, and that this assumption prejudiced Claimant's position in this case. Specifically, the WCJ found:

11. In her testimony, the Claimant stated her present pain is down the right side of the neck, across the shoulder and down the right arm. The Claimant complained of burning pain when her clothes touched the top part of her back. (Finding of Fact #17)

12. I credited this testimony. However, Dr. Talbott commented that loss of normal cervical lordosis, a finding that is consistent with muscular spasm, existed in pre-injury cervical spine x-rays taken December 15, 2003. In that context, the finding could be related only to the Claimant's pre-accident fibromyalgia condition. (Finding of Fact #24) Dr. Talbott also related the loss of normal cervical lordosis in post-accident x-rays to the cervical strain recognized by the Employer in the Assessment for Compensation. Dr. Talbott held an opinion the Claimant had recovered from this strain when the May 17, 2005 MRI of the neck revealed no loss of cervical lordosis.

R.R. 219a.

The WCJ is the ultimate finder of fact, and the findings may not be disturbed unless they are not supported by substantial, competent evidence. *Westinghouse Electric Corp. v. Workers' Comp. Appeal Bd. (Weaver)*, 823 A.2d 209, 215 (Pa. Cmwlth. 2003). As fact-finder, the WCJ is permitted to draw reasonable inferences from the evidence. *Bentley v. Workers' Comp. Appeal Bd. (Pittsburgh Bd. of Educ.)*, ___ A.2d ___ 2009 (Pa. Cmwlth. No. 1560 C.D. 2008 filed Nov. 18, 2009) [citing *General Electric Co. v. Workmen's Comp. Appeal Bd. (Valsamaki)*, 593 A.2d 921, 924 (Pa. Cmwlth. 1991)]. We believe the WCJ drew a reasonable inference from the testimony. Moreover, Dr. Talbott specifically opined that Claimant's current pain is related to her underlying fibromyalgia and the WCJ

noted that Claimant had a pre-accident history of complaints of pain in her upper extremity. Thus, both Dr. Talbott's testimony and the record support the WCJ's ultimate conclusions, and whether the pre-injury loss of cervical lordosis was related to her fibromyalgia or some other pre-injury condition is of no moment.

Claimant again asserts that the WCJ's statement in Finding of Fact 12 that he credited the testimony of Claimant is not accurate. Claimant argues that if the WCJ had credited Claimant's testimony, the WCJ would have been unable to credit Dr. Talbott's testimony that he was unable to distinguish any difference in the type of pain which Claimant described as having prior to the accident from the pain she described as experiencing post-accident. The WCJ 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. *Patton v. Workers' Comp. Appeal Bd. (Lane Enterprises, Inc.)*, 958 A.2d 1126, 1133 (Pa. Cmwlth. 2008) *allocatur denied*, 600 Pa. 775, 968 A.2d 1281 (2009). The WCJ generally credited the testimony of Claimant but gave more evidentiary weight to Dr. Talbott's testimony where it was inconsistent with Claimant's. The WCJ relied upon Dr. Talbott's explanation regarding Claimant's symptomatology and diagnostic test results in concluding that Claimant's work-related injury had resolved. This was well within the WCJ's fact-finding authority.

Third, Claimant asserts that the Board erred when it failed to find that the WCJ improperly credited the testimony of Dr. Talbott over the testimony given by Dr. Saltzburg and Dr. Primack. Claimant attacks Finding of Fact 13, which concluded that the findings and opinions of Dr. Talbott were more credible and persuasive than the findings and opinions of Dr. Saltzburg and Dr. Primack; accepted Dr. Talbott's opinions that Claimant's cervical strain had resolved and

that the right shoulder MRI findings could not be related to the work injury based upon patient history and pre-accident complaint in her right upper extremity; noted that Claimant's clinical findings were normal in Dr. Talbott's and Dr. Primack's November 2005 examinations; rejected Dr. Primack's finding of chronic mild C5 radiculopathy; rejected Dr. Saltzburg's finding of discoloration and cyanosis of Claimant's nail beds on her right hand; and noted Dr. Primack's agreement that Claimant's condition could be preexisting. R.R. 219a-220a. Claimant contends that Dr. Talbott's opinion is based upon his failure to fully develop Claimant's history, and therefore, does not support the termination of benefits. In addition, Claimant asserts that the WCJ failed to make overall determinations concerning Claimant's credibility. Claimant contends that the WCJ was required to explain why he generally accepted Claimant's testimony, yet also accepted Dr. Talbott's testimony.

These arguments are also without merit. Dr. Talbott reviewed Claimant's medical history and noted the differences in pain that Claimant experienced following the accident, but ultimately determined that Claimant's complaints were attributable to her pre-existing fibromyalgia. Similarly, the WCJ credited that Claimant was experiencing pain, but accepted Dr. Talbott's opinion that the pain was unrelated to the work injury and that cervical strain had resolved. As noted above, the WCJ, as the ultimate finder of fact, is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part. *Patton*.

Finally, Claimant maintains that the Board erred in affirming the WCJ's decision without explaining his reasons for discrediting parts of Claimant's testimony. "[W]here the fact-finder has had the advantage of seeing the witnesses

testify and assessing their demeanor, a mere conclusion as to which witness was deemed credible, in the absence of some special circumstance, could be sufficient to render the decision adequately reasoned.” *Patton*, 958 A.2d at 1136 [quoting *Daniels v. Workers' Compensation Appeal Board (Tristate Transport)*, 574 Pa. 61, 77, 828 A.2d 1043, 1053 (2003)]. Moreover, we believe the WCJ adequately explained his credibility findings based on the medical testimony and records.

For all the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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ORDER

AND NOW, this 22nd day of March, 2010, the order of Workers' Compensation Appeal Board in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge