IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Constance Mancuso, Petitioner	:	
v.	:	No. 1123 C.D. 2009
Workers' Compensation Appeal Board (Kellogg Company), Respondent	:	Submitted: November 20, 2009

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: January 7, 2010**

Constance Mancuso (Claimant) filed two claim petitions seeking workers' compensation benefits for separate injuries to her left and right shoulders. She also filed two penalty petitions alleging her employer violated the Workers' Compensation Act.[1] A Workers' Compensation Judge (WCJ) denied Claimant's petitions. The Workers' Compensation Appeal Board (Board) affirmed. On appeal, Claimant asserts the WCJ capriciously disregarded uncontroverted evidence of her injuries, erred in failing to award unreasonable contest counsel fees or penalties, and erred in relying on an independent medical examination occurring years after her injuries. We affirm.

In 1994, Claimant sustained a compensable cervical injury while working for Kellogg Company (Employer). Employer accepted liability for the

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

injury. A WCJ eventually approved the parties' compromise and release (C&R) in November, 2000.

About three months later, on February 21, 2001, Claimant filed two claim petitions. The first petition set forth an injury date of October 1, 1999. The claim petition alleged "[l]eft shoulder pain. Diagnosed as strain, possible impingement syndrome, possible frozen shoulder." Certified Record (C.R.) for Docket No. A08-0963, at Claim Pet. Particularly relevant, the petition further alleged Claimant sustained the injury when "[s]tanding on [a] transporter [and] it lunged forward [and jerked the] left shoulder." Id. Claimant sought disability benefits for the closed period of December 11, 2000 through February 19, 2001.

The second claim petition alleged an injury date of September 15, 2000. The claim petition described Claimant's injury as "[r]ight shoulder pain. Diagnosed as strain with possible impingement." C.R., for Docket No. A08-0962, at Claim Pet. Claimant alleged the injury resulted from "[r]epetitious upper extremity use as part of job duties." Id. Claimant sought disability benefits for the same closed period.

In answer to the claim petitions, Employer maintained the parties' 2000 C&R released it from liability for any work injuries Claimant may have sustained during her employment. Therefore, the C&R barred Claimant's petitions as a matter of law because both shoulder injuries allegedly occurred prior to approval of the C&R, and because Claimant verified in the C&R she did not sustain any other injuries.

A second WCJ bifurcated the above legal issue from the merits of the claim petitions and heard evidence on the participants' understanding of the C&R proceedings. In October, 2003, the WCJ found in favor of Employer and dismissed the claim petitions. Claimant appealed. In January, 2004 the Board reversed the WCJ's order and remanded the matter for hearings on the merits.[2]

In the interim, Claimant filed two penalty petitions alleging Employer violated Section 406.1 of the Act[3] by failing to promptly investigate Claimant's injuries and failing to acknowledge the compensability of the injuries within 21 days of receiving notice.

At hearing, Claimant, who returned to work in February 2001, described her job duties as a line operator. Relative to the 1999 left shoulder injury, Claimant testified she worked a line in which she placed cardboard boxes into a magazine which then fed the boxes into a machine where they were filled with bagged cereal. Claimant stated the repetitive nature of placing cartons in the magazine caused a burning sensation in her left shoulder. Importantly, Claimant's testimony regarding the mechanism of injury is different from that alleged in the claim petition, i.e., the claim petition alleged Claimant sustained the left shoulder injury when operating a transporter.

[2] Employer did not cross-appeal from the Board's order reversing the WCJ's 2003 decision that the C&R barred Claimant's petitions.

[3] Added by the Act of February 8, 1972, P.L. 25, 77 P.S. §717.1.

Claimant produced two first aid injury reports for the left shoulder injury. One report was dated October 1, 1999 and alleged injury resulting from continuous motion of lifting cartons. The second report was dated November 1, 1999, and indicated left shoulder pain upon movement of lifting. Claimant also submitted a November 3, 1999 return to work for the left shoulder injury. Notably, the return to work form, signed by Claimant, indicated a left shoulder injury about two months prior to the form's completion. In December, 2000, Claimant had manipulation under anesthesia which released her left shoulder.

Regarding the right shoulder injury, Claimant testified she injured her shoulder on September 15, 2000, while operating a transporter. The machine kicked into gear and jerked forward, pulling her right shoulder. Again, Claimant's testimony regarding the mechanism of the right shoulder injury differed from that described in the claim petition, i.e., the claim petition alleged Claimant sustained the right shoulder injury as a result of repetitive work movements. Claimant produced a first aid report for this injury which corresponded to her testimony.

Because Claimant sought disability benefits for a period of less than 52 weeks,[4] Claimant submitted the following relevant documentary evidence: two medical reports from Lancaster General Hospital indicating a left shoulder manipulation in December, 2000 and a right shoulder fluoroscopy in April, 2001;

[4] See Section 422(c) of the Act, added by the Act of June 26, 1919, P.L. 642, 77 P.S. §835, and redesignated and amended by the Act of July 2, 1993, P.L. 350. This section provides that if a claim for disability is for 52 weeks or less, a medical report is admissible as evidence unless the party against whom the report is offered objects.

progress notes from one of Employer's panel physicians; and, progress notes from her physician, Dr. Gregg Faluso (Claimant's treating physician).

Claimant also submitted her treating physician's July, 2007 letter to Employer's counsel, which indicated Claimant suffered right shoulder pain and weakness with negative evidence of damage to the shoulder joint. Believing Claimant had a repetitious job, the treating physician opined the muscular pain was due to repetitive movement. The treating physician believed permanent restrictions are necessary to keep Claimant within her functional capabilities. Claimant's treating physician's letter did not address the left shoulder injury.

Employer offered the medical report of Dr. S. Ross Noble (Employer's medical expert), who conducted an independent medical examination of Claimant in September, 2006. Thus, the IME occurred 7 years after the alleged 1999 left shoulder injury and 6 years after the alleged 2000 right shoulder injury. Importantly, Claimant provided Employer's medical expert with a history of injuries resulting solely from repetitive movement. See Employer's Ex. D-5.

Employer's medical expert reviewed Claimant's medical records and recited his findings on examination. Of further note, Employer's medical expert visited Employer's facility and observed operation of the line and transporter jobs alleged to have caused Claimant's injuries. Employer's medical expert opined repetitive movement at work did not cause Claimant's injuries in that her jobs did not require repetitive movement of the shoulders. He explained repetitive movement shoulder injuries are uncommon because the shoulder muscles tire out

before any injury occurs to the anatomic structure. Employer's medical expert also pinpointed inconsistencies between Claimant's testimony and her claim petitions.

In an April, 2008 decision, the WCJ rejected Claimant's testimony as not credible. The WCJ also rejected the opinions of Claimant's treating physician and Employer's panel physician as incompetent and unpersuasive. However, the WCJ found Employer's medical expert's opinion credible, unequivocal and persuasive.

The WCJ's analysis focused solely on Claimant's credibility. At length, the WCJ noted the following inconsistencies:

- In her Claim Petition alleging a 1999 work injury, Claimant indicated that she was injured on **10/1/1999**; the Petition indicated the following mechanism of injury: "Standing on transporter when it lunged forward jerking left shoulder."

- At the time of her testimony on 8/15/2006, Claimant said that she suffered an injury to her left shoulder when she was **working on a packing line**. She described "bringing cartons over in large cages", taking a "stack of cartons out of the cages", and sliding them into a "magazine" which loads the bag of cereal into the cartons.

- There were 2 First Aid Reports regarding a 1999 incident. Claimant admitted signing the documents, which were completed by a First Aid Attendant. Only **one** of the First Aid Forms indicated an injury date of 10/1/1999; that form indicated 10/1/1999 as the injury date and the reporting date, and described the injury as "Continuous Motion Causes Employee Pain in L Shoulder from Lifting Cartons."

- The second 1999 First Aid Report described Claimant's report of an injury occurring on "Nov 1, 1999"; this incident was reported on "**Nov 1, 1999**"

and -like the other form - was signed by Claimant. The mechanism of injury which was recorded on this First Aid Form was: "Continuous motion of lifting cartons" and noted "She has shoulder pain, pain upon movement.

- When Claimant made a report about her left shoulder problems on 11/3/1999, she described being injured about "**2 months" earlier** – a history that was not offered at the time of her testimony.

- In her Claim Petition alleging a 2000 work injury, Claimant indicated an injury date of 9/15/2000 and described the injury as "Repetitious upper extremity use as part of job duties." In that Petition, Claimant sought payment of full disability from 12/11/2000 to 2/19/2001.

- At the time of her testimony, Claimant described being injured as a result of a "bad transporter" which was going very slow, and all of the sudden "kicked into place", causing it to "jerk". Claimant explained that it "jerked" her body and "pulled" her shoulder.

- The 2000 First Aid Report indicated an injury and reporting date of 9/15/2000. The Form noted an injury on the moving transporter; the injury occurred when it "jerked" and Claimant "flew"; her right shoulder was "sore & stiff" and she had some ["]maneuverability problems". Significantly, Claimant was *not* taken to the medical facility after reporting this alleged injury.

- Claimant testified that she was continuously using her "left arm", and claimed that she "did the same motions" on both lines" [sic]. Yet, she testified that she did not have the same symptoms in both arms; she testified that she had "two different sets of symptoms".

- Despite reporting that she had two different types of symptoms, and two different injury dates- one injury to the right shoulder and one to the left- Claimant **claimed the same period of wage loss** in both Claim Petitions.

- In his report recommending surgery for Claimant, [her treating physician] indicated, "I am told she has a repetitive job", a statement which supports [Employer's] argument that Claimant's medical experts were not aware of the actual duties Claimant performed at work.

- With respect to the right shoulder injury that Claimant alleged happened on 9/15/2000, [Employer's panel physician's] notes indicate that **he actually saw Claimant that very day!** Yet, Claimant did not tell [panel physician] that she had suffered an injury to her right shoulder that day, and there was nothing in his note of 9/15/2000 to support Claimant's claim of a work injury on that date.

- In a report dated 11/30/2000, [Claimant's treating physician] indicated that Claimant was seen for her left shoulder on 11/28/2000. During that visit, Claimant reported that she injured her right shoulder at work in September. His report states that Claimant said she felt "**immediate pain" but wasn't sure if it was a "tear" or a snap"** – a history that Claimant never mentioned at the time of her testimony.

WCJ Dec., 4/30/08, at 15-18 (citations omitted; emphasis in original).

The WCJ concluded Claimant provided inconsistent and irreconcilable explanations for her alleged shoulder injuries. In addition, the WCJ found Claimant's testimony regarding the repetitive nature of her job unpersuasive. As a result of Claimant's inconsistent and discredited testimony, the WCJ rejected her medical evidence as incompetent. Accordingly, the WCJ concluded Claimant failed to meet her burden of proving left and right shoulder injuries sustained during the course of her employment. On appeal, the Board affirmed.

In this appeal, Claimant asserts the WCJ capriciously disregarded evidence of her injuries, erred by failing to award unreasonable contest counsel fees or penalties, and erred by relying on Employer's medical expert's IME report.[5]

[5] Our review is limited to determining whether substantial evidence supports the WCJ's findings of fact, whether errors of law were committed, or whether constitutional rights were violated. Minicozzi v. Workers' Comp. Appeal Bd. (Ind. Metal Plating, Inc.), 873 A.2d 25 (Pa. Cmwlth. 2005). Where substantial evidence supports the WCJ's findings of fact, they are **(Footnote continued on next page…)**

A review for capricious disregard is an appropriate component of appellate consideration in every case in which is it properly brought before the Court. Leon E. Wintermyer, Inc. v. Workers' Comp. Appeal Bd. (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002). A capricious disregard of the evidence has been described as a deliberate disregard of competent evidence which one of ordinary intelligence could not possibly avoid in reaching a result, or the willful or deliberate ignorance of evidence a reasonable person would consider important. Id. at 203, 812 A.2d at 487 n.12.

At the outset, it is important to note the WCJ here based her decision to deny the claim petitions solely on Claimant's credibility. In Daniels v. Workers' Compensation Appeal Board (Tristate Transport), 574 Pa. 61, 828 A.2d 1043 (2003), our Supreme Court thoroughly addressed a WCJ's obligation to articulate reasons for her credibility determinations depending on whether a witness appears before the WCJ or whether the WCJ is presented with deposition testimony. In the former instance, the Court held a WCJ may merely conclude as to which witnesses are deemed credible. This is because the WCJ can observe the witnesses' demeanor and make an "on-the-spot, and often times instinctive, determination that one witness is more credible than another." Id. at 77, 828 A.2d at 1053. "The

(continued…)

conclusive on appeal. Agresta v. Workers' Comp. Appeal Bd. (Borough of Mechanicsburg), 850 A.2d 890 (Pa. Cmwlth. 2004). Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. 3D Trucking Co., Inc. v. Workers' Comp. Appeal Bd. (Fine & Anthony Holdings Int'l), 921 A.2d 1281 (Pa. Cmwlth. 2007). It is irrelevant whether the record contains evidence to support contrary findings; the critical inquiry is whether there is evidence to support the WCJ's actual findings. Minicozzi.

basis for the conclusion that certain testimony has the 'ring of truth,' while other testimony does not, may be difficult or impossible to articulate - - but that does not make such judgments invalid or unworthy of deference." Id.

Beyond the requirements of Daniels, the WCJ here provided an explanation for discrediting Claimant's testimony. If the inconsistencies the WCJ identified were limited solely to differences between the claim petitions and Claimant's testimony, we might conclude a scrivener's error occurred. However, the discrepancies noted by the WCJ go beyond such an error.

Claimant's documentary evidence suggests three different dates for the alleged 1999 left shoulder injury: October 1, November 1, and about "2 months" prior to November 3, 1999, or early September 1999. Claimant's Exs. C-1; C-2. Neither the November 1 first aid report nor the November 3 return to work form referred to the alleged October 1, 1999 left shoulder injury. In addition, Claimant never sought to amend her claim petitions to be consistent with her testimony. See 34 Pa. Code §131.35(a) ("[a] party has the right to amend a pleading at any time in a proceeding before a [WCJ], unless the [WCJ] determines that another party has established prejudice as a result of the amendment.); Lehigh Valley Coal Sales Co. v. Workmen's Comp. Appeal Bd. (Swantek), 443 A.2d 1339 (Pa. Cmwlth. 1982) (amendment of petitions is to be liberally allowed). Thus, the record supports the WCJ's conclusion Claimant provided three inconsistent dates for her left shoulder injury.

There are also unanswered questions regarding the September 15, 2000 right shoulder injury. If Claimant felt a "tear" or "snap" in her right shoulder as she described to her treating physician, it is not reflected in the corresponding first aid report. Compare Claimant's Ex. C-9, at 16, with Ex. C-5. Furthermore, Claimant's alleged shoulder injury is not reflected in the progress notes of Employer's panel physician who examined Claimant on September 15, 2000. While Claimant contends she could not have reported the injury to the panel physician because the injury occurred after her visit, we note the first aid report lists the time of injury as 3:00 a.m. and time of the report as 7:00 a.m. See Claimant's Ex. C-5. The physician's notes were transcribed at 9:05 a.m., just two hours after Claimant reported the injury. See Claimant's Ex., C-4.

According to the evidence, Claimant's alleged right shoulder injury occurred before her appointment. Had Claimant sustained a "snap" or "tear" to the right shoulder only hours before her appointment, we would expect Claimant to report the injury to the panel physician inasmuch as the first aid report identifies "immediate pain" and "maneuverability" problems in the right shoulder as a result of the alleged incident. See Claimant's Ex. C-9, at 15; Claimant's Ex. C-5.

In addition, Claimant failed to persuade the WCJ that the line operator position is repetitive. In claim proceedings, a claimant bears the burdens of production and persuasion. Crenshaw v. Workmen's Comp. Appeal Bd. (Hussey Copper), 645 A.2d 957 (Pa. Cmwlth. 1994). Here, the WCJ found Employer's medical expert's opinion persuasive where he testified the line operator job is not repetitive and a shoulder injury could not occur on the transporter as Claimant

alleged. Employer's medical expert offered his opinion based on a view of Employer's facilities. The WCJ was free to afford Employer's medical expert's opinion greater weight. See Miller v. Workers' Comp. Appeal Bd. (Airborne Freight), 817 A.2d 1200 (Pa. Cmwlth. 2003) (the extent of a medical witness's knowledge of a claimant's job requirements is a matter within the sound judgment of the WCJ, who decides whether to accept the evidence and what weight to accord it).[6]

We are ever-mindful the WCJ retains sole authority of credibility determinations and evidentiary weight. Lahr Mech. v. Workers' Comp. Appeal Bd. (Floyd), 933 A.2d 1095 (Pa. Cmwlth. 2007). In view of the above, we cannot conclude the WCJ capriciously disregarded Claimant's evidence or that the record as a whole does not support the WCJ findings. Thus, we discern no error in the WCJ's order denying Claimant's claim petitions for left and right shoulder injuries.[7]

In her second allegation of error, Claimant asserts the WCJ erred by failing to award unreasonable contest counsel fees or penalties for Employer's

[6] We further note Claimant gave Employer's medical expert a history of shoulder injuries as a result of repetitive movement. Claimant did not inform the expert she sustained any injury while operating a transporter. See Employer's Ex. D-5. The WCJ also considered this discrepancy when determining Claimant's credibility.

[7] We also reject Claimant's assertion the WCJ erred by failing to address the opinion of the second panel physician contained in November 3, 1999 return to work form. The WCJ is not required to provide a line-by-line analysis of the evidence to explain how a particular result is reached. Acme Mkts., Inc. v. Workers' Comp. Appeal Bd. (Brown), 890 A.2d 21 (Pa. Cmwlth. 2006).

violation of the Act. Section 440(a) of the Act, 77 P.S. §996(a), provides that a claimant who prevails in any contested matter in whole or in part is entitled to counsel fees unless the employer establishes a reasonable contest. However, Claimant did not prevail on any disputed issue and, therefore, an award of counsel fees is not appropriate. Watson v. Workers' Comp. Appeal Bd. (Special People in Ne.), 949 A.2d 949 (Pa. Cmwlth. 2008); Amoratis v. Workers' Comp. Appeal Bd. (Carolina Freight Carriers), 706 A.2d 368 (Pa. Cmwlth. 1998).

The Act also permits an award of penalties against an employer violating the provisions of the Act, the rules, or the regulations. Section 435 of the Act.[8] When a violation of the Act occurs, the imposition and amount of penalties, if any, is within the discretion of the WCJ. City of Phila. v. Workers' Comp. Appeal Bd. (Sherlock), 934 A.2d 156 (Pa. Cmwlth. 2007).

Section 435(d)(i) of the Act provides that "[e]mployers and insurers may be penalized a sum not exceeding ten per centum of the amount awarded and interest accrued and payable …." The Court has construed the phrase "of the amount awarded" in Section 435(d)(i) as indicating "the legislature's intention to award penalties only when a claimant is awarded benefits." Jaskiewicz v. Workmen's Comp. Appeal Bd. (James D. Morrisey, Inc.), 651 A.2d 623, 626 (Pa. Cmwlth. 1994). Thus, a precondition to the imposition of penalties is the determination that a claimant is entitled to workers' compensation. Wyche v. Workers' Comp. Appeal Bd. (Pimco), 706 A.2d 1297 (Pa. Cmwlth. 1998).

[8] Added by the Act of February 8, 1972, P.L. 25, 77 P.S. §991.

Because the WCJ's denial of Claimant's claim petition was proper here and no benefits were awarded, there was no measure against which the WCJ could use to award penalties.

In her final assignment of error, Claimant maintains the WCJ erred in relying on Employer's medical expert's opinion that Claimant did not suffer work injuries to her left and right shoulders where the expert did not conduct his IME until several years after Claimant's injuries. The lapse in time between Claimant's injuries and the IME, Claimant contends, rendered Employer's medical expert's testimony incompetent as a matter of law.

As explained above, however, the WCJ rejected Claimant's testimony. Claimant bore the burden of proving all the elements of her claim. Inglis House v. Workmen's Comp. Appeal Bd. (Reedy), 535 Pa. 135, 634 A.2d 592 (1993). Because Claimant failed to meet this burden, it is of no moment Employer offered contrary evidence. Thus, we need not consider whether the delay between Claimant's alleged dates of injury and Employer's medical expert's IME rendered the expert's opinion incompetent.

Accordingly, we affirm.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Constance Mancuso, Petitioner	:	
v.	:	No. 1123 C.D. 2009
Workers' Compensation Appeal Board (Kellogg Company), Respondent	:	

O R D E R

AND NOW, this 7th day of January, 2010, the order of the Workers' Compensation Appeal Board is **AFFIRMED.**

ROBERT SIMPSON, Judge