

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Lukehart Lundy and Mutual	:	
Benefit Insurance Company,	:	
Petitioners	:	
	:	
v.	:	No. 1249 C.D. 2009
	:	
Workers' Compensation Appeal	:	Submitted: October 23, 2009
Board (Piszker),	:	
Respondent	:	

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**

In this workers' compensation appeal, Lukehart & Lundy (Employer) asks whether the Workers' Compensation Appeal Board (Board) erred in affirming a Workers' Compensation Judge's (WCJ) decision granting Lisa Piszker's (Claimant) claim petition. Employer argues the WCJ's decision is not supported by competent evidence, and the WCJ improperly substituted his own judgment for that of the medical experts on the issue of causation. Discerning no merit in Employer's arguments, we affirm.

Claimant worked for Employer, a law firm, as its real estate coordinator. In June 2007, Claimant filed a claim petition alleging that on October 24, 2006, she sustained a work injury described as a dislocated jaw and damage to the left ear. Employer denied the allegations. Hearings ensued before a WCJ.

Before the WCJ, Claimant testified she sustained injuries during an incident in which she attempted to remove an empty five-gallon water jug from a water cooler in Employer's office when the cooler became loose and struck her underneath the jaw. Claimant testified she blacked out for a few seconds and developed immediate numbness on the left side of her head. Claimant further explained she had pain that radiated around her jaw and ear and up to her temple. Claimant testified she then scheduled an appointment with her family dentist, who immediately referred her to Jeffrey Rice, D.M.D, an oral and maxillofacial surgeon (Claimant's Oral Surgeon). Claimant explained her Oral Surgeon performed surgery on her left jaw joint in April 2007. She testified she suffered immediate complications from the surgery, which included severe swelling that stretched from her ear across her cheekbone as well as pressure in her left ear. Claimant explained she also continues to suffer symptoms of vertigo and "severe fullness" in her left ear. Reproduced Record (R.R.) at 117a. Claimant testified as a result of these symptoms she has "balance issues" and is unable to operate a motor vehicle. R.R. at 118a. Claimant explained that while her Oral Surgeon partially released her to return to work, her otolaryngologist, who treats her for her ongoing ear problems, has not released her to return to work. Id.

In support of her claim petition, Claimant also presented the deposition testimony of her Oral Surgeon, who first examined Claimant in November 2006, at which time he elicited a history regarding the work incident. Claimant's Oral Surgeon testified Claimant presented with complaints of pain in her temporomandibular joint (TMJ), difficulty opening her mouth and headaches. He further testified he attempted to treat Claimant's symptoms with medication,

but Claimant continued to experience pain. As a result, Claimant's Oral Surgeon ordered an MRI, which revealed Claimant's left jaw was partially out of the socket. He further testified that, because conservative treatments were ineffective, he recommended surgery. Claimant's Oral Surgeon performed surgery to place cartilage from Claimant's left jaw back into the appropriate position. Claimant's Oral Surgeon testified Claimant experienced complications shortly after the surgery, which included swelling and pain in her left ear. As a result, Claimant's Oral Surgeon prescribed antibiotics and decongestants. Because Claimant continued to experience ear problems, Claimant's Oral Surgeon referred her to an otolaryngologist. Claimant's Oral Surgeon also noted that in follow up appointments, Claimant complained of symptoms of vertigo. Claimant's Oral Surgeon explained his final diagnosis was TMJ dysfunction, which was aggravated by the work incident.

Claimant also presented the testimony of J. Ralph Lewis, M.D, a board-certified otolaryngologist (Claimant's ENT Specialist), who first examined Claimant in June 2007. Based on his initial examination and his review of Claimant's medical records, Claimant's ENT Specialist opined Claimant suffers post-traumatic hydrops, which refers to the inappropriate build-up of pressure within the endolymphatic chamber of the inner ear. Claimant's ENT Specialist testified Claimant's hydrops condition did not respond to treatment. He further opined to a reasonable certainty that Claimant's hydrops condition was related to complications Claimant suffered from the surgery performed by Claimant's Oral Surgeon. Claimant's ENT Specialist further opined Claimant was incapable of returning to work during the course of his treatment.

Claimant also presented the testimony of Joseph Furman, M.D., who is board-certified in neurology (Claimant's Neurologist), and who first examined Claimant in May 2007 for complaints of dizziness. Based on Claimant's history and his testing and examination, Claimant's Neurologist opined Claimant had evidence of benign positional vertigo and endolymphatic hydrops. Claimant's Neurologist opined Claimant's complaints are related either to her work-related head injury or the surgery on her left jaw.

In opposition to Claimant's claim petition, Employer presented the testimony of R. Kent Galey, D.M.D., a board-certified oral and maxillofacial surgeon (Employer's Oral Surgeon), who examined Claimant in May 2007. Employer's Oral Surgeon testified the MRI performed on Claimant's jaw showed a right normal TMJ and a left TMJ with a slight anterior disc subluxation. Employer's Oral Surgeon opined Claimant's MRI was a virtually normal MRI and that the slight anterior disc subluxation was the result of a stretched ligament. Employer's Oral Surgeon opined Claimant did not sustain any TMJ injuries as a result of the work incident. He further noted Claimant had a long history of TMJ problems prior to the work incident.

Employer also presented the testimony of David Lobas, M.D, a board-certified neurologist (Employer's Neurologist), who examined Claimant in November 2007. Employer's Neurologist testified, based on his review of Claimant's medical records, Claimant had ongoing physical problems ranging from pain symptoms, bowel symptoms, Eustachian tube dysfunction, dizziness,

depression, headaches and migraines. Employer's Neurologist opined Claimant's conditions were not related to any work incident.

Ultimately, the WCJ credited the testimony of Claimant and her physicians. The WCJ found Claimant sustained a work-related aggravation of pre-existing TMJ. The WCJ also found that as a result of the work incident and the resultant surgery Claimant developed an infection that caused swelling and pressure on her left inner ear and eardrum and caused a hydrops condition to develop, which rendered Claimant totally disabled. Thus, the WCJ granted Claimant's claim petition.

Employer appealed, and the Board affirmed. This appeal by Employer followed.<sup>1</sup>

Initially, we note that the WCJ's authority over questions of credibility, conflicting evidence and evidentiary weight is unquestioned. Minicozzi v. Workers' Comp. Appeal Bd. (Indus. Metal Plating, Inc.), 873 A.2d 25 (Pa. Cmwlth. 2005). The WCJ, as fact-finder, may accept or reject the testimony of any witness in whole or in part. Id. We are bound by the WCJ's credibility determinations. Id.

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<sup>1</sup> Our review is limited to determining whether necessary findings were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Minicozzi v. Workers' Comp. Appeal Bd. (Indus. Metal Plating, Inc.), 873 A.2d 25 (Pa. Cmwlth. 2005).

Moreover, “[i]t 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.” Delaware County v. Workers’ Comp. Appeal Bd. (Baxter Coles), 808 A.2d 965, 969 (Pa. Cmwlth. 2002) (citation omitted). We examine the entire record to see if it contains evidence a reasonable person might find sufficient to support the WCJ’s findings. Minicozzi. If the record contains such evidence, the findings must be upheld, even though the record may contain conflicting evidence. Id. This Court cannot, nor will we, consider the existence of other testimony that might support findings different from those found by the WCJ. Id.

Additionally, in performing a substantial evidence analysis, we must view the evidence in the light most favorable to the prevailing party. WAWA v. Workers’ Comp. Appeal Bd. (Seltzer), 951 A.2d 405 (Pa. Cmwlth. 2008). Also, we are to draw all reasonable inferences deducible from the evidence in support of the fact finder’s decision in favor of the prevailing party. Id.

Employer first argues the WCJ erred in determining Claimant met the burden of proof on her claim petition. Specifically, Employer asserts the testimony of Claimant’s medical experts was equivocal and therefore does not constitute competent medical evidence to support an award of benefits.

To sustain an award of benefits, a claimant has the burden to establish she suffered a work-related injury and this injury resulted in disability. Jordan v. Workers’ Comp. Appeal Bd. (Phila. Newspapers, Inc.), 921 A.2d 27 (Pa. Cmwlth.

2007), appeal denied, 596 Pa. 748, 946 A.2d 689 (2008). Of further note, in Moltzen v. Workmen's Compensation Appeal Board (Rochester Manor), 646 A.2d 748, 750 (Pa. Cmwlth. 1994), this Court explained:

Our Supreme Court has held that when a [c]laimant in good faith seeks medical treatment for a work-related injury and the medical treatment itself either aggravates the existing injury or causes new or additional injury, the law regards the new injury as having been caused by the original accident, and compensation is payable for the disability associated with the aggravation or new injury.

Furthermore, a claimant bears the burden of presenting unequivocal medical testimony to establish a causal link between a work incident and a disability when such a causal link is not obvious, and the causal link is not obvious if a claimant has a pre-existing condition related to the same body part the claimant alleges was injured at work. Moyer v. Workers' Comp. Appeal Bd. (Pocono Mountain Sch. Dist.), 976 A.2d 597 (Pa. Cmwlth.), appeal denied, \_\_\_ Pa. \_\_\_, 982 A.2d 62 (2009).

Whether medical testimony is unequivocal is a question of law fully reviewable on appeal. Terek v. Workmen's Comp. Appeal Bd. (Somerset Welding & Steel, Inc.), 542 Pa. 453, 668 A.2d 131 (1995). Unequivocal medical testimony is testimony that in the opinion of the medical expert, the claimant's condition, in fact, resulted from the work experience. Johnson v. Workers' Comp. Appeal Bd. (Abington Mem'l Hosp.), 816 A.2d 1262 (Pa. Cmwlth. 2003). In determining whether medical testimony is unequivocal, we must view the medical testimony as a whole, recognizing questions of credibility and the resolution of conflicting testimony of two or more witnesses are within the province of the WCJ. Id.

A medical expert's testimony "will be found to be equivocal if it is based only upon possibilities, is vague, and leaves doubt." Kurtz v. Workers' Comp. Appeal Bd. (Waynesburg Coll.), 794 A.2d 443, 449 (Pa. Cmwlth. 2002). "[T]he requirement that medical evidence be unequivocal cannot reasonably be viewed as a demand for perfect testimony from members of the medical profession." Children's Hosp. of Phila. v. Workmen's Comp. Appeal Bd. (Washington), 547 A.2d 870, 872 (Pa. Cmwlth. 1988).

Here, in granting Claimant's claim petition, the WCJ made the following pertinent findings:

12. Based upon a careful review of the entire record in this matter, and viewing the evidence as a whole, your [WCJ] believes and finds as fact that:
  - a. The Claimant suffered a blow to the left/central part of her lower jaw in the course and scope of her employment on or about October 24, 2006, while removing an empty plastic water jug from a water cooler at work in the morning before any of her co-workers had arrived for work;
  - b. Said trauma caused aggravation of pre-existing [TMJ] dysfunction which the Claimant had been suffering for a period of years;
  - c. As a direct result of said injury the Claimant sought and obtained treatment with providers including her local dentist, Dr. Gigliotti, and [Claimant's Oral Surgeon];
  - d. After attempts at conservative treatment failed, [Claimant's Oral Surgeon] performed surgery on April 12, 2007, on the Claimant's left TMJ joint as a direct result of the trauma that she had suffered on October 24, 2006, where he placed the cartilage



back into the socket and cauterized the attached ligaments and sutured the cartilage in place hoping that a scar band would form and hold the cartilage in the fossa;

e. As a direct result of said trauma and said surgery the Claimant developed an infection which caused swelling and pressure on her left inner ear and eardrum and caused a hydrops condition to develop which has totally disabled the Claimant as of all material times;

f. The Claimant could have returned to work as of May 14, 2007, if her only problem was the TMJ condition but because of the causally-related hydrops condition which has developed[,] the Claimant has been and remains totally disabled at all material times thereafter; and

g. I do not believe that the Claimant had fully recovered as of the date of either [Employer's Oral Surgeon's] IME or [Employer's Neurologist's] IME.

In reaching these findings, I have accepted all of the testimony of the Claimant and her fiancé and [Claimant's physicians]; and I have rejected all the testimony of [Employer's Oral Surgeon and Employer's Neurologist], to the extent that it was inconsistent with the testimony of the Claimant and her witnesses. I had the opportunity to observe the Claimant's demeanor as a witness when she testified as well as her fiancé's demeanor as a witness when he testified, and I believed them. [Claimant's physicians] each provided logical, reasonable, scientific, rational and fully understandable opinions in support of the causal relationship between the Claimant's problems and disability and the events that occurred at work on October 24, 2006, when she was changing the water bottle on the office cooler. While it is apparent that the Claimant had some prior problems with her inner ears and some prior problems with her TMJ joints and various other health problems, I do not believe that her treatment and surgery with [Claimant's Oral Surgeon] and the

ensuing infection and swelling and resultant hydrops problem are solely the result of pre-existing conditions and I did not find the explanations offered by [Employer's Oral Surgeon and Employer's Neurologist] to that effect the least bit credible or convincing. [Claimant's physicians] have all been actively involved in the Claimant's care and treatment over a sustained period of time, and I felt that their opinions in this case were far more credible and convincing and far more reliable than those offered by [Employer's Oral Surgeon and Employer's Neurologist] to the extent that [Employer's Oral Surgeon's and Employer's Neurologist's] opinions were in fact contradictory to the Claimant's experts.

WCJ Op., Finding of Fact No. 12.

Upon review of the credited testimony of Claimant's Oral Surgeon, Claimant's ENT Specialist and Claimant's Neurologist, we believe the WCJ's grant of the claim petition is supported by substantial, competent evidence.

To that end, Claimant's Oral Surgeon opined Claimant's work incident caused an aggravation of her TMJ. R.R. at 493a. Claimant's Oral Surgeon further explained, after conservative treatment attempts proved unsuccessful, he performed surgery to repair the subluxating disc in Claimant's left jaw. R.R. at 489a-90a. Claimant's Oral Surgeon also testified after the surgery Claimant developed problems with her left jaw and ear, including pain, pressure and swelling, as well as vertigo. R.R. at 492a, 496a, 506a.

In addition, Claimant's ENT Specialist opined with "reasonable certainty" that Claimant suffered post-traumatic hydrops and disabling vertigo as a

result of ear swelling and an ear infection caused by the surgery performed by Claimant's Oral Surgeon. R.R. at 356a-58a. Claimant's ENT Specialist further opined Claimant was not capable of performing her pre-injury job during the course of his treatment. R.R. at 359a.

Also, Claimant's Neurologist opined Claimant suffered from endolymphatic hydrops, commonly referred to as Meniere's disease. R.R. at 221a. Claimant's Neurologist further opined Claimant's complaints of dizziness were related to a problem with her left inner ear that was either a direct result of the head trauma Claimant suffered as a result of the work incident or the surgery Claimant's Oral Surgeon performed on Claimant's left jaw. R.R. at 226a.

The above evidence provides adequate support for the WCJ's determinations that: Claimant sustained a work-related injury to her lower left jaw; this incident caused an aggravation of Claimant's pre-existing TMJ disorder; conservative attempts to treat Claimant's TMJ disorder proved unsuccessful, resulting in the need for surgery; the surgery caused various complications, including pain and swelling in Claimant's left ear inner ear and eardrum and subsequently caused a hydrops condition to develop which rendered Claimant totally disabled. Because the WCJ's determinations are supported by the credited and unequivocal opinions of Claimant's Oral Surgeon, Claimant's ENT Specialist and Claimant's Neurologist, we discern no error in the WCJ's decision grant of Claimant's claim petition.

Employer also maintains the WCJ improperly substituted his own medical judgment for that of the physicians who testified here. Employer argues the opinions expressed by the WCJ allowed him to make a “quantum leap” from Claimant’s pre-existing TMJ condition combined with an alleged bump on the jaw to the severe, disabling hydrops Claimant allegedly now suffers. Employer argues, however, there is no record evidence that provides the requisite causal connection.

Contrary to Employer’s assertions, the WCJ did not make a “quantum leap” in finding the work incident aggravated Claimant’s TMJ. Indeed, Claimant’s Oral Surgeon specifically opined his “final diagnosis would be a [TMJ] dysfunction, which was aggravated by the injury which she received with the water bottle.” R.R. at 493a (emphasis added). Thus, the WCJ’s finding is directly supported.

Further, we disagree with Employer’s assertion that the record does not support the WCJ’s finding that Claimant developed an infection, which in turn caused swelling and pressure in the inner ear, resulting in hydrops. Our review of the record reveals adequate support for the challenged finding. Claimant’s Oral Surgeon testified that a week after he performed surgery on Claimant in April 2007, Claimant returned to his office complaining of ear problems. R.R. at 491a. Claimant’s Oral Surgeon explained that “sometimes from the swelling [that occurs after the surgery] you get some blockage of the ear and some pressure forming in [the ear].” Id. Based on his concern that Claimant may have had an ear infection, Claimant’s Oral Surgeon prescribed medication and referred Claimant to an ENT specialist. Id. Claimant’s ENT Specialist testified that the April 2007 surgery

caused complications, including ear pain, swelling and infection. R.R. at 357a. Based on his examinations of Claimant, Claimant's ENT Specialist diagnosed post-traumatic hydrops. R.R. at 354a-55a. Claimant's ENT Specialist opined, with reasonable certainty, that the swelling and infection caused by the surgery in turn caused the hydrops condition. R.R. at 356a-58a. As such, the testimony of Claimant's Oral Surgeon and Claimant's ENT Specialist are sufficient to support the challenged finding.

In sum, viewing the evidence in the light most favorable to Claimant, and giving her the benefit of all reasonable inferences arising from the evidence, the record supports the WCJ's determinations.

Based on the foregoing, we affirm.<sup>2</sup>

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ROBERT SIMPSON, Judge

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<sup>2</sup> As a final issue, Employer contends the WCJ's decision does not constitute a "reasoned decision" because the WCJ did not adequately explain his reasons for discrediting Employer's medical evidence. Our review of the certified record, however, reveals Employer did not raise this issue in its appeal to the Board. Therefore, this issue is waived. See Borough of Honesdale v. Workmen's Comp. Appeal Bd. (Martin), 659 A.2d 70 (Pa. Cmwlth. 1995) (issues not properly raised before the Board are waived).

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**ORDER**

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

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ROBERT SIMPSON, Judge