# IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Amy Alexander, | : | |
| Petitioner | : | |
| | : | |
| v. | : | No. 1550 C.D. 2010 |
| | : | SUBMITTED: February 11, 2011 |
| Workers' Compensation Appeal | : | |
| Board (US Airways Group, Inc.), | : | |
| Respondent | : | |

**BEFORE:** **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
**HONORABLE PATRICIA A. McCULLOUGH,** Judge
**HONORABLE JOHNNY J. BUTLER,** Judge

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY**
**PRESIDENT JUDGE LEADBETTER** **FILED: August 9, 2011**

Claimant Amy Alexander petitions for review of the order of the Workers' Compensation Appeal Board (Board) that reversed the decision of the Workers' Compensation Judge (WCJ) to grant her claim petitions. We reverse and remand.

Claimant, a flight attendant for Employer US Airways Group, Inc., filed two claim petitions in this matter, both dated November 16, 2007. In one, she alleged that she suffered injuries to her low back, neck, elbow, head and chest as a result of a September 4, 2007 work incident which involved moving a heavy beer

bucket while seated.[1] In the other, she alleged that she aggravated the September 4th injuries and sustained new ones on November 11, 2007, while performing physical therapy for the previous injuries in a hotel room during a layover. In answers to those petitions, Employer denied Claimant's material allegations.

The WCJ granted both claim petitions, accepting as credible the testimony of Claimant and Christian Fras, M.D., a board-certified orthopedic surgeon. Dr. Fras examined Claimant on November 28, 2007, and January 2, 2008. Noting that Claimant had previous lumbar disc herniation in 2003, he testified that he reviewed MRI reports concerning her lumbar spine dated May 1, 2003, October 15, 2007, and December 5, 2007. He diagnosed her with cervical disc herniation and symptomatic degenerative disc disease of the lumbar spine. He opined that she materially aggravated the underlying lumbar degenerative disc disease on September 4th and that she suffered a cervical disc herniation at C5-6 as a result of the November 11th incident. He concluded that, as a result of the September 4th injuries, Claimant was disabled such that she could not perform the tasks required of a flight attendant. He concluded that, as a result of the November 11th incident, "she would be restricted from pushing and pulling meal carts, stowing luggage, and moving cabin drawers." Finding of Fact No. 7.

In finding Dr. Fras to be credible and convincing as to his diagnosis of Claimant, the WCJ determined that his opinions were supported by the diagnostic test results, his clinical observations and Claimant's credible testimony.

[1] The WCJ in his decision references both September 4th and 5th as the date of the first incident. Claimant testified that it was September 4th, which is the date reflected on the relevant paperwork, including an October 2, 2007 notice of temporary compensation payable and a November 1, 2007 notice stopping temporary compensation and notice of compensation payable for medical treatment only due to Claimant's November 1st return to work.

Accordingly, having concluded that Claimant met her burden of establishing that she suffered work-related injuries to her back on September 4th and to her neck and head on November 11th, the WCJ ordered Employer to pay Claimant weekly disability benefits of $598.46 from September 5, 2007, and into the future, with 10% interest on delayed compensation payments. The WCJ also determined that Employer was entitled to modify and reduce payments based on any wages Claimant earned after September 5, 2007.

The Board reversed the WCJ's decision, concluding that Dr. Fras' testimony was not competent to establish the required causal connection between Claimant's September 4th injuries and a loss of earnings because he formed his opinions without the benefit of reviewing the relevant previous medical records.[2] Specifically, it noted that Dr. Fras did not review the panel physician's medical records before his deposition, that he did not review any medical records from Claimant's previous injuries and that he had only recently begun to familiarize himself with the chronology of her medical history. Further, it noted that Dr. Fras first saw Claimant after her injuries and, therefore, could have no personal knowledge of her pre-injury condition.

In support of its decision, the Board cited *Southwest Airlines v. Workers' Compensation Appeal Board (King)*, 985 A.2d 280 (Pa. Cmwlth. 2009), a case in which this Court rejected as incompetent a doctor's medical opinion as to causation because his opinions were based on an incomplete and inaccurate medical history, as well as the claimant's personal opinion as to causation.

[2] In light of its disposition of the competency issue, the Board declined to address Employer's additional arguments that the WCJ capriciously disregarded competent evidence, that he did not issue a reasoned decision and that Claimant's petitions should have been dismissed with regard to alleged injuries to her head, chest and elbow.

Specifically, we concluded that the medical evidence was legally insufficient because it showed that the doctor diagnosed the claimant without any personal knowledge of her prior medical issues and corresponding treatment and without reviewing any of her extensive relevant medical records, which were similar to the litigated claim. Further, we noted that the claimant had obfuscated her medical history. We turn now to Claimant's timely petition for review in the present case.

It is well-established that a claimant has the burden of establishing her right to compensation and all of the elements necessary to support an award of benefits, including a causal relationship between a work-related incident and the alleged disability. *Rife v. Workers' Comp. Appeal Bd. (Whitetail Ski Co.)*, 812 A.2d 750 (Pa. Cmwlth. 2002). Where "the causal connection between the employment and the injury is not obvious, a claimant must present unequivocal medical testimony to establish the connection." *Id*. at 754. The determination of whether medical testimony is unequivocal is a question of law, subject to this Court's plenary review. *Merchant v. Workers' Comp. Appeal Bd. (TSL, Ltd.)*, 758 A.2d 762 (Pa. Cmwlth. 2000). Further, we must view the evidence in a light most favorable to the party who prevailed before the WCJ. *Waldameer Park, Inc. v. Workers' Comp. Appeal Bd. (Morrison)*, 819 A.2d 164 (Pa. Cmwlth. 2003).

On appeal, Claimant asserts generally that the Board erred in not conducting its review of the record in the light most favorable to her as the prevailing party. More specifically, she argues that *King* is distinguishable, first citing Employer's November 1st issuance of a medical-only notice of compensation payable as an indication that there is no dispute that the September

4th low back injury actually took place.[3] Second, she points out that the doctor in *King* relied upon a fabricated history provided by the claimant, unlike in the present case where she did not deny prior back or neck problems and treatment. Third, Claimant notes that the record reflects that Dr. Fras did review at least some previous medical records prior to his deposition. She emphasizes that there is no requirement that a medical expert review all of a claimant's medical records. Claimant notes that "the fact that a medical expert does not have all of a claimant's medical records goes to the weight given the expert's testimony, not its competency." *Calex, Inc. v. Workers' Comp. Appeal Bd. (Vantaggi)*, 968 A.2d 822, 827 (Pa. Cmwlth.), *appeal denied*, 603 Pa. 686, 982 A.2d 1229 (2009). Further, Claimant points out that, consistent with the WCJ's findings, Dr. Fras had diagnostic bases for his opinions. For example, Dr. Fras compared the MRI films that he had ordered with prior MRI reports of Claimant's low back.[4]

We agree. First, the WCJ fully credited Claimant's testimony relating to her injuries, which was consistent with the history and complaints she presented to Dr. Fras. Although they ultimately reached different conclusions, both Dr. Fras and Dr. Brody, Employer's expert, fully credited Claimant's complaints. Thus, Dr. Fras did not base his opinions on an inaccurate history.

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[3] We agree with Employer that merely issuing a medical-only notice of compensation payable for the September 4th injuries does not mean that it accepted liability. *See Bellefonte Area Sch. Dist. v. Workmen's Comp. Appeal Bd. (Morgan)*, 627 A.2d 250, 254 (Pa. Cmwlth. 1993), *aff'd per curiam*, 545 Pa. 70, 680 A.2d 823 (1994) (noting "long-established practice of voluntarily paying medical and hospital expenses of injured employees beyond those required by statute" to help those employees regain their health and/or to mitigate future costs.).

[4] Claimant also asserts that the Board erred in failing to acknowledge that, as found by the WCJ, she was disabled from the November 11th injuries, separate from her disability as a result of the September 4th injuries. We disagree. The Board clearly acknowledged and considered both injuries in its analysis.

Next, the Board's statement that, "Dr. Fras acknowledged that he formed his opinions without the benefit of reviewing the relevant previous medical records," appears to have been based upon a misapprehension of the testimony. Although he had reached his diagnosis based upon Claimant's history, his examination and the 2007 reports, he had reviewed additional information related to the earlier injuries by the time of his testimony. Specifically, the record fully supports the WCJ's Finding of Fact No. 7 that Dr. Fras in rendering his opinion had considered Claimant's previous lumbar issues and also at least one past MRI report. Dr. Fras' Deposition, Notes of Testimony (N.T.) at 7-8, 21, 24, 30; R.R. at 110a-11a, 124a, 127a, 133a. In addition, Dr. Fras testified that even the records that he reviewed on the day of his deposition were substantially consistent with what Claimant had related to him regarding her prior history. *Id.* at 36; R.R. at 139a. Thus, unlike in *King*, this is not a situation where the doctor was unaware of the claimant's medical history or had relied upon the claimant's inaccuracies. As the WCJ found, Dr. Fras' opinions were "supported by the diagnostic test results, his clinical observations and the credible testimony of Ms. Alexander." Finding of Fact No. 10.

Finally, in reference to the Board's notation that Dr. Fras first saw Claimant only after her injuries and, therefore, could have no personal knowledge of her pre-injury condition, we point out that, unless the medical expert is also claimant's longstanding treating doctor, he or she usually will not have seen a claimant prior to that claimant suffering a work injury. This is especially true in cases where a claimant must seek out a specialist who he or she might not see in the normal course or, whereas here, panel physicians were involved after the

claimant's injuries. At all events, such considerations go to the weight of the evidence, not its competency.[5]

Accordingly, we conclude that Dr. Fras' testimony is competent as a matter of law. Further, we reiterate the well-established tenet that the WCJ as the ultimate fact finder is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part. *Milner v. Workers' Comp. Appeal Bd. (Main Line Endoscopy Ctr.)*, 995 A.2d 492 (Pa. Cmwlth. 2010). Determinations of credibility and evidentiary weight are within the WCJ's exclusive province. *Ward v. Workers' Comp. Appeal Bd. (City of Phila.)*, 966 A.2d 1159 (Pa. Cmwlth.), *appeal denied*, 603 Pa. 687, 982 A.2d 1229 (2009). Neither this Court nor the Board in their appellate capacities is entitled to reassess the credibility of witnesses or to reweigh their testimony. Therefore, we reverse the order of the Board, and remand for the Board's consideration of the other issues raised by Employer in its appeal.

**BONNIE BRIGANCE LEADBETTER,**
President Judge

[5] Employer also argues that we should affirm the Board on the ground that the November 11th injuries did not occur within the course and scope of Claimant's employment due to her reckless and negligent actions in attempting to perform wall squats in a hotel room in her bare feet and without a mat. *See Sekulski v. Workers' Comp. Appeal Bd. (Indy Assocs.)*, 828 A.2d 14, 19 (Pa. Cmwlth. 2003) (claimant engaging in reckless actions was not in course and scope of employment because "[t]o hold otherwise would impose liability on an employer for the safety of its employees 24 hours a day regardless of whether the employee is actually furthering its business or affairs when injured."). This argument is without merit. Not only was Claimant a traveling employee, but she was injured while doing physical therapy exercises prescribed for her September 4th work-related injuries. *See Berro v. Workmen's Comp. Appeal Bd. (Terminix Int'l, Inc.)*, 645 A.2d 342 (Pa. Cmwlth. 1994); *Lenzner Coach Lines v. Workmen's Comp. Appeal Bd. (Nymick)*, 632 A.2d 947 (Pa. Cmwlth. 1993).

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**O R D E R**

AND NOW, this 9th day of August, 2011, the order of the Workers' Compensation Appeal Board is hereby REVERSED and the above matter is REMANDED for the Board's consideration of the other issues raised by Employer in its appeal.

Jurisdiction relinquished.

**BONNIE BRIGANCE LEADBETTER,**
President Judge