IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michelle Black, Petitioner	:	
v.	:	No. 1749 C.D. 2009
	:	Submitted: January 22, 2010
Workers' Compensation Appeal Board (City of Philadelphia-Prison System), Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: April 1, 2010

Michelle Black (Claimant) petitions for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of a Workers' Compensation Judge (WCJ) denying her Claim Petition filed against the City of Philadelphia Prison System (Employer). We affirm.

On February 6, 2006, Claimant filed her Claim Petition alleging she sustained injuries to her right leg and foot. Claimant asserted these injuries were causally related to her employment as a corrections officer. Claimant sought partial disability from July 20, 2004 through June 7, 2005, and total disability thereafter. Employer filed an untimely Answer denying Claimant's allegations.

Claimant did not initially object to the untimeliness of Employer's Answer and the parties proceeded with the presentation of evidence. Claimant testified that her employment required her to walk and stand the majority of the day. Claimant testified that she broke her right fourth toe in June of 2004 in a non-work-related incident. She returned to work in July of 2004 following recovery. After approximately two weeks back at work, Claimant began experiencing pain in her right foot. She was put on light duty. At one point, however, she was ordered to a position that required her to be on her feet five to six hours that day. Claimant came home from work and her foot was greatly swollen. She sought medical treatment.

Claimant eventually returned to work at a sedentary position in August of 2004. According to Claimant, Employer subsequently attempted to return her to regular duty. On June 8, 2005, she stopped working.

Claimant presented the testimony of Shailen Jallali, M.D., board certified anesthesiologist, who first examined her on December 2, 2005. At that time, Claimant had complaints of pain in her right foot and the anterior and lateral aspect of her lower leg. Based on Claimant's history, Dr. Jallali determined that any time Claimant does a lot of walking, she has problems with pain complaints. Dr. Jallali stated "[s]he's had a number of different studies including; MRIs of the feet, EMGs, a bone scan. Nothing really was diagnostic except the MRI shows an old healed fracture." Depo. dated 10/5/06, p. 9. Dr. Jallali's initial diagnosis consisted of two diagnoses. He diagnosed sural neuropathy as well as Complex Regional Pain Syndrome (CRPS). According to Dr. Jallali, people injure the sural nerve quite often when they "twist their ankles" as they put a stretch injury in that

nerve. Id. at 11. He added CRPS was a neurological disorder where the neural messages get misinterpreted as painful messages.

Dr. Jallali believed Claimant's CRPS and sural nerve injury were causally related to Claimant's employment. In regard to the nueropathic pain disorder, Dr. Jallali explained "I felt... that's developed over time. It sounds as if she had an initial injury that seemed to improve, get better, and then the more she's been walking on it, the worse her symptoms have become and I think its that constant walking on it that's actually exacerbated her pain process." Id. at 13. Dr. Jallali added, in regard to the CRPS, that "it's much more of a global problem. It's a neurological disorder not a local problem. There is nothing locally wrong with her foot, per say (sic)." Id. at 24. He discussed that the toe fracture healed but the nerves have become hypersensitized. Dr. Jallali concluded that with CRPS, the pain is disproportionate to the original problem.

Dr. Jallali did not believe Claimant was capable of returning to her pre-injury job. He opined Claimant could perform sedentary work. On cross-examination, Dr. Jallali agreed that although Claimant worked sedentary duty from August of 2004 through May of 2005, her symptoms nonetheless progressed during that time.

Employer presented the testimony of Ira C. Sachs, D.O., board certified orthopedic surgeon, who examined Claimant on November 15, 2006. Dr. Sachs found that Claimant's right foot and ankle had normal contour, no hyperhidrosis, no gross deformity, and no swelling. Dr. Sachs observed normal hair distribution and no nail bed changes. According to Dr. Sachs, Claimant gave non-atomic pain responses. The only abnormality Dr. Sachs found was an area of hyperpigmentation that measured one and a half centimeters. Dr. Sachs disagreed

that Claimant was suffering from a sural neuropathy or CRPS. Dr. Sachs discussed numerous medical records noting subjective complaints but failing to document any objective abnormality. According to Dr. Sachs, there is no causal relationship between Claimant's complaints of pain and her job duties.

By a decision circulated February 29, 2008, the WCJ credited Claimant's testimony "to the extent the Claimant believes that she has ongoing pain which she related to standing at work." Dec. dated 2/29/08, p. 6. Nonetheless, she credited the testimony of Dr. Sachs over the testimony of Dr. Jallali. In so doing, the WCJ observed, *inter alia*, that none of the diagnostic studies completed can confirm Dr. Jallali's diagnoses of sural neuropathy and CRPS. She added that while Dr. Jallali specified that the sural nerve is often injured when a person twists his or her ankle or sustains a stretch injury of that nerve, he did not indicate that type of injury is caused by prolonged standing. Further, the WCJ reiterated that Dr. Jallali conceded that although Claimant worked only a sedentary position from August of 2004 through May 15, 2005, her subjective complaints still progressed. In light of her credibility determinations, the WCJ denied Claimant's Claim Petition.[1]

For purposes of this appeal, it must be pointed out that in Finding of Fact No. 11 of her decision, the WCJ indicated as follows:

> In a letter dated October 30, 2007 and marked as Judge's "Exhibit 1", (sic) Claimant's counsel raises for the first

[1] Credibility determinations are the sole province of the WCJ. Campbell v. Workers' Compensation Appeal Board (Pittsburgh Post Gazette), 954 A.2d 726 (Pa. Cmwlth. 2008). The appellate role in a workers' compensation case does not include the reweighing of evidence or reviewing the credibility of the witnesses. Lehigh County Vo-Tech Sch. v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

> time the issue of Employer's late Answer. This Judge finds that Claimant has waived the issue of the timeliness of Employer's Answer by raising same more than 5 months after the close of the record and 20 months after the filing of the Claim Petition.[2]

The Board affirmed. This appeal followed.[3]

Claimant argues on appeal that the WCJ abused her discretion in failing to grant her Yellow Freight motion.[4] Claimant acknowledges that case law holds that when a claimant fails to timely object to a late answer, she is precluded from relying on the doctrine espoused in Yellow Freight. Claimant contends, however, that the instant matter presents unique circumstances whereupon her failure to object to Employer's late Answer until after evidence was submitted and the record closed should not result in waiver. According to Claimant, the transmittal letter that accompanied Employer's Answer was "backdated" to January 18, 2006. Claimant's brief, p. 15. Claimant contends she was prejudiced

[2] The October 30, 2007 letter referenced by the WCJ is not included in the record before us. Moreover, it is not listed on the "Witnesses and Exhibits" page that precedes the WCJ's decision.

[3] Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence, and whether constitutional rights were violated. YDC New Castle-PA DPW v. Workers' Compensation Appeal Board (Hedland), 950 A.2d 1107 (Pa. Cmwlth. 2008).

[4] The failure to file a sufficient, timely answer to a claim petition prohibits an employer from presenting evidence in rebuttal to the alleged facts or from asserting any affirmative defenses. Yellow Freight Sys., Inc. v. Workmen's Compensation Appeal Board (Madara), 423 A.2d 1125 (Pa. Cmwlth. 1981). The WCJ hearing the petition shall decide the matter only on the basis of the petition and any evidence presented by the claimant. Dandenault v. Workers' Compensation Appeal Board (Philadelphia Flyers, Ltd.), 728 A.2d 1001 (Pa. Cmwlth. 1999).

by this transmittal letter and that this fact distinguishes the present matter from previous cases.[5]

Included in what is colloquially referred to as the "blue packet" is Claimant's Claim Petition received by the Board on February 6, 2006, a Notice of Assignment Sheet indicating that the matter was assigned on February 10, 2006, and Employer's Answer marked as received by the Bureau of Workers' Compensation (Bureau) on March 7, 2006. Attached to Employer's Answer is a transmittal letter dated "January 18, 2006" that reads, in part:

> Dear Judge Lincicome,
>
> > Please be advised that this firm has been retained to represent the interests of the employer/insurer in connection with the above-captioned workers' compensation matter. Enclosed please find an original and one (1) copy of the defendant's Answer to the Employee's Claim Petition that I am filing with your office, kindly file the original of record and return a time-stamped copy to me in the envelope provided to acknowledge filing….

This letter accompanied Employer's Answer in an envelope postmarked March 6, 2006 and also bears a stamp that indicates it was received by the Bureau on March 7, 2006.[6]

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[5] Claimant explained the discovery of the late Answer as follows:

> Claimant's counsel employed a brief writer to prepare the proposed findings, and it was while creating a proposed record that the late answer and mis-dated cover letter were discovered.
>
> Claimant's brief, p. 14, n. 1.

[6] Claimant all but acknowledges these documents are not officially part of the record. Claimant, in brief, indicates she wrote a letter to the WCJ when submitting her proposed findings and brief whereupon she stated she was "attaching" these documents and "ask[ing] that [the

In a claim petition, the burden of proving all necessary elements to support an award rests with the claimant. Inglis House v. Workmen's Compensation Appeal Board (Reedy), 535 Pa. 135, 634 A.2d 592 (1993). The claimant must establish that his injury was sustained during the course and scope of employment and is causally related thereto. McCabe v. Workers' Compensation Appeal Board (Dep't of Revenue), 806 A.2d 512 (Pa. Cmwlth. 2002). When the connection between the injury and the alleged work-related cause is not obvious, it is necessary to establish the cause by unequivocal medical evidence. Hilton Hotel Corp. v. Workmen's Compensation Appeal Board (Totin), 518 A.2d 1316 (Pa. Cmwlth. 1986).

Section 416 of the Pennsylvania Workers' Compensation Act (Act) Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §821, provides:

> Within twenty days after a copy of any claim petition or other petition has been served upon an adverse party, he may file with the department or its workers' compensation judge an answer in the form prescribed by the department.
>
> Every fact alleged in a claim petition not specifically denied by an answer so filed by an adverse party shall be deemed to be admitted by him… If a party fails to file an answer and/or fails to appear in person or by counsel at the hearing without adequate excuse, the workers' compensation judge hearing the petition shall decide the matter on the basis of the petition and evidence presented.

WCJ] accept the same as collectively C-5." Claimant's brief, p. 14. These documents did not become part of the record and we will rely on these documents as they appear in the "blue packet" furnished by the Bureau. We must also point out that inasmuch as the Claim Petition, Answer, transmittal letter, and Notice of Assignment are not technically a part of the record, Employer objects to this Court's consideration of the same. Employer's brief, p. 14.

The statutory period for filing an answer begins to run from the date service by the Bureau of Workers' Compensation is made. Ross v. Workmen's Compensation Appeal Board (Allied Signal Corp), 616 A.2d 155 (Pa. Cmwlth. 1992). See also Heraeus Electro Nite Co. v. Workmen's Compensation Appeal Board (Ulrich), 697 A.2d 603 (Pa. Cmwlth. 1997). A claimant must properly object to the late filing of an answer in order to benefit from the Yellow Freight doctrine. Smith v. Workmen's Compensation Appeal Board (Dep't of Labor and Industry), 632 A.2d 1033 (Pa. Cmwlth. 1993). See also Williams v. Workmen's Compensation Appeal Board (Realty Serv. Co.), 646 A.2d 633 (Pa. Cmwlth. 1994)(holding the claimant waived the issue of the timeliness of the employer's answer when he failed to object to the employer's evidence at hearing and did not raise any argument relating to Yellow Freight until after the record was closed).

Generally, petitions and responsive pleadings are not evidence until formally offered and admitted into the record. Sanders v. Workers' Compensation Appeal Board (Marriott Corp.), 756 A.2d 129 (Pa. Cmwlth. 2000). See also Miller v. Workers' Compensation Appeal Board (Community Hosp. of Lancaster), 737 A.2d 830 (Pa. Cmwlth. 1999)(holding a claimant must introduce the employer's answer into the record to utilize an alleged admission contained therein). The failure to file a timely answer, however, presents a unique situation. William J. Donovan Sheet Metal v. Workers' Compensation Appeal Board (McCollum), 789 A.2d 344 (Pa. Cmwlth. 2001). In these types of cases, Section 416 of the Act dictates that the WCJ "shall decide the matter on the basis of the petition *and* evidence presented." Id. at 348. In the event of a late answer, the facts alleged in the claim petition are uncontested and the employer is deemed to have admitted the alleged facts. Id. Ultimately, the presentation of evidence is unnecessary. Id.

This is consistent with Section 35.125(d) of the General Rules of Administrative Practice and Procedure that states "[i]n no event, except in the case of a *noncontested proceeding*, may the pleadings be considered as evidence of fact *other than that of the filing thereof* unless offered and received in evidence under this part." (Emphasis added). 34 Pa. Code §34.125(d).

As noted, neither Claimant's Claim Petition, Employer's Answer, the transmittal letter, nor the Bureau's Notice of Assignment are technically a part of the record. In the event of an untimely answer, however, that does not preclude consideration of these documents. Section 35.125(d) of the General Rules of Administrative Practice and Procedure allows consideration as to whether an answer has been properly filed to determine whether there is a noncontested proceeding even without that document being formally offered and received as evidence.

We must determine whether there has been a late filing. Claimant filed her Claim Petition on February 6, 2006. Pursuant to Ross and Ulirich, the twenty day period to file an answer as set forth in Section 416 of the Act began to run from the date service by the Bureau of Workers' Compensation was made. The Bureau assigned the matter on February 10, 2006 in its Notice of Assignment constituting service on that date. Employer was required to file its Answer by March 2, 2006. Employer's Answer, however, was sent in an envelope bearing a United States Postmark dated March 6, 2006. It was marked received by the Bureau on March 7, 2006. The Answer was untimely exposing Employer to the risk of an unfavorable ruling based on the Yellow Freight doctrine. Indeed, despite the general rule that petitions and pleading are not parts of the evidentiary record until formally introduced and accepted as set forth in Sanders and Miller, the WCJ

may have decided the case based on the Claim Petition itself even without its formal submission. McCollum.[7]

Nonetheless, Claimant concedes, and the WCJ found, that Claimant failed to raise the issue of Employer's untimely Answer until after the submission of evidence and the close of the record. This renders any claim to relief under the Yellow Freight doctrine waived. Smith; Williams.

Claimant contends that this matter is distinguishable from Smith and Williams because the transmittal letter that accompanied Employer's Answer was "backdated" to January 18, 2006 thereby prejudicing her due to her reliance on that date. We cannot agree. Even if we were to ignore the US Postmark dated March 6, 2006 as well as the fact that both the Employer's Answer and the transmittal letter were stamped as received by the Bureau on March 7, 2006, Employer's transmittal letter was dated January 18, 2006, nineteen days before Claimant filed her Claim Petition. *Assuming arguendo* that Employer was acting unscrupulously when dating the transmittal letter as opposed to making a mere typographical error, such an attempt would be a dismal failure to deceive Claimant into believing that Employer was filing an answer to a claim petition which had not yet been filed. The fact that the transmittal letter that accompanied the Answer contained a date that preceded the filing of the Claim Petition by more than two weeks is more of a

[7] This Court recognizes that even if Section 35.125(d) of the General Rules of Administrative Practice and Procedure, Section 416 of the Act, and McCollum, allow us to consider the Claim Petition and Answer for the purposes of determining a late filing irrespective of whether they are included in the record, the fact remains that the Bureau's Notice of Assignment is not a part of the record. Nonetheless, we believe it would be an absurdity if we were able to review the parties' pleadings for the purposes of determining whether an untimely answer has been filed even without their formal submission into the record if we could not also review the document that establishes the commencement of the twenty-day period for the filing of the answer.

red flag than a postmark/time stamp that is dated within a few days of an answer's due date. Claimant, herself, readily admits that the untimeleness of the answer was readily discoverable when it was time to file briefs and proposed findings.

Claimant next argues that the WCJ failed to issue a reasoned decision. She contends that while the WCJ made credibility determinations and supported them with objective rationale, the WCJ failed to address the crucial point at issue; i.e., whether there has been an aggravation of a pre-existing toe fracture that undisputably occurred.[8] Specifically, she states "[t]he opinions of Drs. Jalali (sic) and Sachs conflicted on whether the Claimant currently or ever had CRPS or a sural neuropathy, and the WCJ was certainly able to decide this issue. However, the WCJ must also determine whether the Claimant aggravated a prior injury. In Claimant's case, she had a right 4th toe injury that originally disabled her from her job as a correctional officer before her return to work. [The WCJ's] decision is not reasoned until she answers this critical issue." Claimant's brief at p. 16.

When the WCJ has the opportunity to see the witnesses testify live, a mere conclusion as to whether she credits or rejects the witnesses' testimony, absent some special circumstance, is sufficient to render the decision adequately "reasoned." Daniels v. Workers' Compensation Appeal Board (Tristate Transp.), 574 Pa. 61, 828 A.2d 1043 (2003). When, however, the WCJ did not observe the respective demeanors of the witnesses, her resolution of the conflicting evidence cannot be supported by a mere announcement that she deemed one individual more credible than another. To the contrary, the WCJ must provide certain objective factors to support her acceptance or rejection of that evidence. Id. at 78, 828 A.2d

[8] Where a intervening incident materially contributes to the renewed physical disability, a new injury or aggravation has occurred. South Abington Twp. v. Workers' Compensation Appeal Board (Becker), 831 A.2d 175 (Pa. Cmwlth. 2003).

at 1053. A party may not challenge or second-guess the WCJ's reasons for the credibility determinations rendered. Dorsey v. Workers' Compensation Appeal Board (Crossing Constr. Co.), 893 A.2d 191 (Pa. Cmwlth. 2006).

Claimant's argument is problematic. Claimant chose to present Dr. Jallali and she is bound by his opinions. Dr. Jallali rendered two diagnoses, sural neuropathy and CRPS. The testimony elicited from Dr. Jallali regarding these diagnoses was interspersed with terminology normally associated with an aggravation. He discussed Claimant's initial fracture that she initially improved, but that upon returning to work, her pain complaints progressed. He elaborated that the more she walked, her pain was exacerbated. Dr. Jallali, however, never discussed an "aggravation" of Claimant's toe fracture as an injury separate and apart from her neuropathy and CRPS. We reiterate that Dr. Jallali mentioned that there was nothing wrong with Claimant's foot, per se, and that the non-work-related fracture did heal. He discussed that Claimant's nerves had become hypersensitized and that her pain complaints were disproportionate to her original injury.

Claimant's counsel was also operating under the assumption that Claimant's current complaints were attributable to a sural neuropathy and CRPS as opposed to an "aggravation" of the toe fracture. Dr. Jallali was provided with a lengthy hypothetical during his testimony. At the conclusion of the hypothetical, he was asked "can you offer an opinion as to whether or not the *Complex Regional Pain Syndrome*, as well as, the *injury to the sural nerve* were the result of her employment?" (Emphasis added). Depo. dated 10/5/06, pp. 22-23. Dr. Jallali responded agreeing that *those* conditions were attributable to Claimant's employment.

Claimant had the burden in this proceeding to establish that she sustained an injury in the course and scope of her employment. Inglis House. She had to do so by unequivocal medical evidence. Hilton Hotel Corp. Although the WCJ credited Claimant's "belief" that Claimant has pain that is somehow related to her employment, she nonetheless rejected Claimant's medical expert. The WCJ's credibility determinations are not reviewable. Campbell; Wolfe. Consequently, Claimant was unable to establish she had sural neuropathy or CRPS or that these conditions were causally related to her employment.

Claimant acknowledges that the WCJ provided objective reasons to support her credibility determinations. The WCJ has satisfied the Act's reasoned decision requirement. Daniels. To the extent Claimant attempts to circumvent the fact that we cannot review a WCJ's credibility determination by suggesting that the WCJ has failed to consider an aggravation, we reject this argument.

Claimant also argues that the WCJ abused her discretion in ordering her to submit to Dr. Sachs independent medical examination (IME). According to Claimant, she appeared for a scheduled IME on May 9, 2006 with "Dr. O'Kereke." Claimant's brief, p. 19. She indicates that Dr. O'Kereke was "several hours" late for the appointment. Id. at 19. Inasmuch as she had to pick up her children by a specific time and based on her assessment of how much longer she would have to wait to be examined, Claimant left without being seen by Dr. O'Kereke. Claimant posits that Employer subsequently filed a petition to compel her attendance at an examination with Dr. Sachs. The WCJ, per Claimant, granted this petition on September 19, 2006 and directed that the examination take place within thirty days. On the date of Claimant's scheduled examination, Claimant states Employer's designated transportation company failed to pick her up. Claimant

asserts that she objected to a third IME but the WCJ overruled that objection. Claimant finally met with Dr. Sachs on November 15, 2006 and his deposition did not take place until March 1, 2007.

Claimant contends she was prejudiced by the delays. Specifically, Dr. Jallali did not have the benefit of Dr. Sachs report when he testified on October 5, 2006. She adds the WCJ relied heavily on Dr. Sachs unrebutted criticisms of Dr. Jallali's opinions. Further, Claimant contends that she had to pay multiple fees to have an independent nurse attend the IMEs. Claimant concedes, however, that the WCJ indicated she could introduce these expenses as costs.

In support of her argument, Claimant relies on Section 131.53(f) of the Special Rules of Administrative Practice and Procedure Before Workers' Compensation Judges (WCJ Rules) that states:

> Dates of the medical examinations, if not scheduled prior to the first hearing actually held, shall be scheduled within 45 days after the first hearing actually held.

34 Pa. Code §131.53(f).

Claimant further relies on Section 131.63(c) of the WCJ Rules that states:

> The deposition of a medical expert testifying for the moving party shall be taken within 90 days of the date of the first hearing scheduled unless the time is extended or shortened by the judge for good cause shown. The deposition of a medical expert testifying for the responding party shall be taken within 90 days of the date of the deposition of the last medical expert testifying on behalf of the moving party.

34 Pa. Code §131.63(c).

Review of additional legal principles is necessary. Section 314(a) of the Act, 77 P.S. §651(a), provides:

> At any time after an injury the employe, if so requested by his employer, must submit himself for examination, at some reasonable time and place, to a physician or physicians … who shall be selected and paid by the employer…. The [WCJ] may at any time after the first examination, upon petition of the employer, order the employe to submit himself to such further examinations as the [WCJ] shall deem reasonable and necessary….

The grant or denial of an order to compel attendance at an independent medical examination under Section 314 of the Act is within the sound discretion of the WCJ. Davis v. Workers' Compensation Appeal Board (Woolworth Corp.), 928 A.2d 429 (Pa. Cmwlth. 2007). This Court has declined to infringe on the WCJ's authority and discretion to compel an employee's attendance at an IME. Id. at 433, n. 7. The WCJ's decision will be reversed only upon a showing of abuse of discretion. School Dist. of Phila. v. Workers' Compensation Appeal Board (Landon), 707 A.2d 1176 (Pa. Cmwlth. 1998).

Moreover, a party wishing to present rebuttal testimony may do so by notifying the WCJ in writing within twenty-one days after the testimony to be rebutted has been given. 34 Pa. Code §131.63(d). Rebuttal testimony shall be taken no later than forty-five days after the conclusion of the case of the party presenting the testimony to be rebutted. 34 Pa. Code §131.53(e).

Ultimately, a WCJ may, for good cause shown, waive or modify any provision of the WCJ Rules. 34 Pa. Code §131.3(a). Whether the WCJ should waive any of the WCJ Rules is a matter that is also committed to the sound discretion of the WCJ. Atkins v. Workers' Compensation Appeal Board (Stapley in Germantown), 735 A.2d 196 (Pa. Cmwlth. 1999). Assuming prejudice is an element in analyzing whether the WCJ should grant a waiver of the WCJ Rules, the party objecting to the admission of evidence dilatorily garnered must establish

that the delay has rendered her incapable of responding to such evidence because *i.e.*, a witness has died or evidence has been lost. Id. at 199.

This Court sympathizes with Claimant's frustration in regard the difficulty she experienced in submitting to an IME and the delays that happened in her case. Unfortunately, we are not persuaded that she is entitled to any relief irrespective of her complaints. We would be remiss if we did not point out that Claimant has failed to direct us to any testimony or discussion on record setting forth the events Claimant described in brief or any objections to the second and third IME requests. The deposition of Dr. Sachs is also devoid of any objection to the taking of his testimony. These facts alone are significantly detrimental to Claimant's arguments.[9]

Furthermore, Section 131.53 of the WCJ Rules cited by Claimant states only that an IME must be "scheduled" within 45 days of the first hearing. Claimant does not assert that the IME with Dr. O'Kereke that she left voluntarily prior to actually being examined was not scheduled within the appropriate time frame. Section 314(a) of the Act instructs that the WCJ may order Claimant to attend additional IMEs. Such an order is within the sound discretion of the WCJ, Davis, and we will not infringe on the WCJ's determination absent an abuse of discretion. Landon. The record, as it stands, does not reveal any abuse of discretion.

[9] Irrespective of our discussion regarding this Court's ability to consider the pleadings in this matter despite the fact that they were not a part of the record, we reiterate the general rule that items not part of the record may not be considered by an appellate body on review. Bingnear v. Workers' Compensation Appeal Board (City of Chester), 960 A.2d 890 (Pa. Cmwlth. 2008). Moreover, briefs filed in this Court are not part of the evidentiary record and assertions of fact therein that are not supported by the evidentiary record may not form the basis of any action by this Court. Id. at 896.

Claimant challenges that Dr. Sachs did not conduct the IME until after her medical witness testified and that Dr. Jallali was therefore deprived the opportunity to defend his opinions. Claimant, however, could have chosen to take a rebuttal deposition after Dr. Sachs testified consistent with Sections 131.53(e) and 131.63(d) of the WCJ Rules. It is acknowledged that Dr. Sachs deposition was to be taken within ninety days of Dr. Jallali's deposition consistent with Section 131.63(c) of the WCJ Rules. This deadline was exceeded by several months. Nonetheless, the WCJ may waive or modify any provision of the WCJ Rules upon good cause shown. 34 Pa. Code §131.3(a). This is again subject to the WCJ's discretion, Atkins, whereupon no abuse of that discretion appears in the record. To the extent Claimant suggests she was prejudiced by the WCJ in waiving WCJ Rule 131.63(c), we reiterate that to the extent a showing of prejudice may be required to infringe upon a WCJ's discretion to waive or modify any of the WCJ Rules would necessarily include Claimant being incapable of responding to additional evidence presented. Atkins. That is not the case here as we have already indicated Claimant could have taken a rebuttal deposition.

After a review of the record, we conclude that the Board did not err in affirming the WCJ's decision as all findings are supported by substantial evidence. Accordingly, the order of the Board is affirmed.

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JIM FLAHERTY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michelle Black,	:	
Petitioner	:	
	:	
v.	:	No. 1749 C.D. 2009
	:	Submitted: January 22, 2010
Workers' Compensation	:	
Appeal Board (City of Philadelphia-	:	
Prison System),	:	
Respondent	:	

O R D E R

AND NOW, this 1st day of April, 2010, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

JIM FLAHERTY, Senior Judge