IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Debra Sommer, Petitioner	:	
v.	:	No. 2540 C.D. 2010
Workers' Compensation Appeal Board (Allegheny Specialty Practice Network), Respondent	:	Submitted: March 11, 2011

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: May 19, 2011**

Debra Sommer (Claimant) petitions for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed a Workers' Compensation Judge's (WCJ) denial of her claim petition seeking a closed period of benefits. The WCJ rejected Claimant's testimony that she sustained an injury at work. Because substantial evidence supports the WCJ's determinations, we affirm.

Claimant worked for Allegheny Specialty Practice Network (Employer), as a patient access representative. In June 2009, Claimant filed a claim petition alleging she sustained a work-related right foot injury in September 2008. Claimant alleged the injury occurred at work when she lost her balance as she stepped on the threshold separating the kitchen from the carpeted waiting room. Specifically, she alleged an injury to the fifth metatarsal of her right foot. Employer denied the material allegations. A hearing ensued.

Before the WCJ, Claimant testified her job as a patient access representative involved working with Robert E. Schilken, M.D., a board certified orthopedist (Orthopedist), and other physicians in Employer's practice group. Therefore, Claimant worked in the same building with Orthopedist and for the same Employer. Orthopedist treated Claimant after the alleged work injury and released her to her pre-injury position as of late-July 2009. The WCJ made the following pertinent findings regarding Claimant's testimony (with emphasis added):

> 1. Claimant testified substantially as follows:
>
> (a) She was employed as a patient access representative and was responsible for checking patients in and out and maintaining charts. On September 16, 2008, while carrying two boxes of charts, [Claimant] tripped over the threshold separating the office kitchen from the waiting room, landing on her knee and noticing pain in her right foot. Claimant told [Orthopedist] what had occurred and he instructed her to ice the foot over the next few days. She alleged that she reported the injury to her manager, Christina Feiling, the same day.
>
> Upon her return to work on September 22, 2008, [Orthopedist] x-rayed her foot and placed her in a boot. On December 10, 2008, she heard a "pop" in her foot, prompting additional x-rays. She did not return to work and underwent surgery by [Orthopedist] in January 2009. On July 30, 2009, the doctor released her to return to her pre-injury position.

Finding of Fact (F.F) No. 1(a); R.R. at 19a-27a, 31a-33a. In further support of her claim petition, Claimant also submitted a report from Orthopedist.[1]

[1] Since Claimant sought less than 52 weeks of benefits, Claimant could submit a health care provider's report regarding the cause and extent of disability. See Section 422 of the **(Footnote continued on next page…)**

In response, Employer offered the testimony of Christina Feiling, its Practice Manager (Manager), who is responsible for, among other things, Employer's workers' compensation issues. Manager testified "Claimant did not report a work injury or otherwise contact her on September 16, 2008." F.F. No. 3(c); R.R. at 50a, 53a-55a. Instead, Manager testified (with emphasis added):

> Claimant did call [Manager] on September 25, 2008 to inquire if it was permissible for her to wear an orthopedic boot to work. [Manager] approved the request and inquired what had happened. In response, Claimant told her that she had hurt herself "in her kitchen." At no time during their conversation did Claimant tell [Manager] that she had injured her foot at work, either on that day or an earlier date. If Claimant had reported an injury, [Manager] would have complied with company policy by completing an incident report and directing Claimant to Employee Health.

F.F. No. 3(d) (emphasis added); R.R. at 55a-58a.

Ultimately, the WCJ credited the testimony of Manager over that of Claimant. The WCJ denied benefits based on Claimant's failure to prove a work injury. Specifically, the WCJ determined (with emphasis added):

> 5. I find that Claimant did not suffer a work-related injury on September 16, 2008. I find Claimant's testimony incredible and unconvincing. This credibility determination is based upon the irreconcilable inconsistencies between Claimant's testimony and the testimony of [Manager], same [sic] which I deem

(continued…)

Workers' Compensation Act, Act of June 2, 1915, P.L. 736, as amended, added by the Act of June 26, 1919, P.L. 642, 77 P.S. §835; City of Harrisburg v. Workers' Comp. Appeal Bd. (Palmer), 877 A.2d 555 (Pa. Cmwlth. 2005).

credible and persuasive. Claimant's assertion that she reported a work injury on September 16, 2008 was credibly and directly refuted by [Manager], the alleged recipient of that report. [Manager's] testimony was unequivocal and straightforward and she provided a logical explanation of her level of certainty. Specifically, [Manager] explained that if an injury had been reported on September 16, 2008, it would have generated both an incident report and an entry in Claimant's personnel file. [Manager's] credibility-both as to her denial of a work injury being reported and her habit of carefully documenting events-is corroborated by the memos she drafted on September 25, 2008 and November 11, 2008. The fact that the memos were prepared contemporaneous with the events they summarize enhances the weight and credibility of these documents. Claimant's insistence that she reported a work injury to [Manager] on September 16, 2008 is clearly incredible and unworthy of belief.

6. The substantial competent evidence of record establishes that Claimant first contacted [Manager] on September 25, 2008 to obtain permission to wear an orthopedic boot at work. In response to [Manager's] inquiry as to what had happened, Claimant reported that she had been injured in "her kitchen" and did not report her condition as being work-related. She proceeded to submit treatment bills to her private health insurer. Then, six weeks later, Claimant reported her condition as work-related. Claimant's clear lack of credibility, as to the report of a work injury taints her testimony as to all issues, including, most importantly, the allegation that she suffered a work injury on September 16, 2008. The fact that Claimant may have completed an incident report within 120 days of the alleged injury date does not cure this deficiency.

It is acknowledged that [Orthopedist] related Claimant's foot condition to work events. However, the doctor's report makes it clear that his opinion as to causation is predic[a]ted upon Claimant's truthfulness and veracity. As Claimant's allegation of a work injury is incredible, [Orthopedist's] opinion on causation is tainted and rendered equivocal.

F.F. Nos. 5, 6.

Claimant appealed, and the Board affirmed. Claimant petitions for review to this Court.[2]

Claimant asserts the Board erred in upholding the WCJ's denial of her claim petition where Claimant presented uncontradicted evidence from her Orthopedist, an employee of Employer, regarding the cause of her injury.

At the outset, we note, the WCJ is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part. Watson v. Workers' Comp. Appeal Bd. (Special People in Northeast), 949 A.2d 949 (Pa. Cmwlth. 2008). Determinations of credibility and evidentiary weight are within the WCJ's exclusive province as fact-finder. Id. Moreover, determinations as to witness credibility and evidentiary weight are not subject to appellate review. Joy Global, Inc. v. Workers' Comp. Appeal Bd. (Hogue), 876 A.2d 1098 (Pa. Cmwlth. 2005).

We must affirm a WCJ's decision where the WCJ's findings are supported by substantial, competent evidence, notwithstanding the existence of evidence to the contrary. Watson. Further, we view the evidence in a light most favorable to the party who prevailed before the WCJ. WAWA v. Workers' Comp. Appeal Bd. (Seltzer), 951 A.2d 405 (Pa. Cmwlth. 2008). Also, we draw all

[2] Our review is limited to determining whether an error of law was committed, whether necessary findings of fact were supported by substantial evidence and whether constitutional rights were violated. 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).

reasonable inferences deducible from the evidence in favor of the prevailing party. Id.

In a claim proceeding, the claimant bears the burden of proving all elements necessary for an award. Watson. Specifically, a claimant must establish she sustained an injury during the course and scope of her employment and the injury is causally related to the employment. Id. A claimant must also prove the work injury resulted in a disability that continues for the period for which benefits are sought. Id.

A medical expert's opinion may be based on a personal history provided by a claimant. However, the expert's opinion is rendered incompetent if the history is not supported by competent evidence or is rejected by the WCJ. Sewell v. Workers' Comp. Appeal Bd. (City of Phila.), 772 A.2d 93 (Pa. Cmwlth. 2001).

Regarding the cause of Claimant's injury, Orthopedist's report states as follows:

> As you know, I have been seeing [Claimant] for her right fifth metatarsal fracture. As you know, [Claimant] is a 53-year-old female who injured her right foot at work on September 17, 2008. The patient states that she was carrying some paper materials from the storage area through a kitchen when she stepped on the threshold from the kitchen to the carpeted waiting room area and had pain in her right foot. It caused her to stumble and drop the materials. She states that she had significant pain in her right foot after that, so much so that she could not put her full weight down on her foot. She states that she ended up staying for the rest of work, but ended up going

> home and staying off of work for the following 2 days and resting her foot over the weekend.
>
> She did present to work on Monday, September 22, 2008, and had her foot evaluated by myself at that time.

Orthopedist's Report, 04/03/09 (emphasis added); R.R. at 69a.

Thus, as found by the WCJ, Orthopedist based his opinion regarding causation on the history he received from Claimant. However, the WCJ rejected Claimant's testimony regarding where her injury occurred. Instead, the WCJ accepted Manager's testimony that Claimant reported her injury occurred at home. Because Orthopedist based his opinions regarding causation on the history given by Claimant, and the WCJ rejected Claimant's testimony, the WCJ did not err in rejecting Orthopedist's opinions, which were predicated on a history the WCJ deemed not credible. Sewell.[3]

Nevertheless, based on her version of the facts, Claimant asserts this case is analogous to two cases where this Court has held that an employer, who disregarded its physician employee's opinion regarding the work-relatedness of an alleged injury and causation, was liable for unreasonable contest attorney fees. See Wallace v. Workers' Comp. Appeal Bd. (Pittsburgh Steelers), 722 A.2d 1168 (Pa.

[3] Moreover, Claimant mischaracterizes the facts. Although Claimant testified that Orthopedist told her to ice her foot on the day of the alleged injury, Claimant could not remember if Orthopedist examined her foot that day. WCJ Op., Finding of Fact No. 1; R.R. at 31a-32a. Incidentally, the report indicates a different date of injury than Claimant did in her testimony, and Claimant testified she stayed home on the date set forth in Orthopedist's report. Id.

Cmwlth. 1999); Milton S. Hershey Med. Ctr. v. Workmen's Comp. Appeal Bd. (Mahar), 659 A.2d 1067 (Pa. Cmwlth. 1995). We disagree.

First, in Hershey Medical Center, the claimant, a laboratory technician, worked with equipment, such as a pipette, which required depression of a plunger by the thumb. The claimant treated with a physician at the employer's medical center who specifically attributed the claimant's injury to her thumbs to "constant hyperextension positioning while pipetting." Id. at 1069. The employer initially contested the claim, but it later accepted liability for the injury. The claimant sought unreasonable contest fees for the period in which the employer contested liability given that the employer's physician examined the claimant and determined she sustained a work-related injury. Ultimately, this Court held the claimant was entitled to unreasonable contest fees.

Similarly, in Wallace, a professional football player injured his right knee during two games, and the team orthopedic surgeon examined him. The team surgeon performed surgery on the player's knee. Subsequently, the team surgeon opined the player's injuries directly resulted from the injuries sustained in the two games. Because the employer's physician was aware from the outset that Claimant sustained a work-related injury, but nevertheless contested the work-relatedness of the claimant's injury, this Court held the employer's contest was unreasonable.

In Hershey Medical Center and Wallace, the employers contested liability for the claimants' injuries despite their physicians' opinions that the injuries were work related. Here, however, Orthopedist based his opinions

regarding Claimant's injury on a history provided by the Claimant, which the WCJ deemed not credible. Moreover, unlike the facts presented here, in Hershey Medical Center and Wallace, the claimants prevailed before the workers' compensation authorities. Thus, these cases do not support Claimant's position.

Claimant also argues the WCJ's disregard of Orthopedist's report constitutes a capricious disregard of evidence. Again, we disagree.

A capricious disregard is a baseless disregard of apparently trustworthy evidence and occurs when the fact-finder deliberately ignores relevant, competent evidence. Williams v. Workers' Comp. Appeal Bd. (USX Corp.-Fairless Works), 862 A.2d 137 (Pa. Cmwlth. 2004). Where evidence is expressly considered and rejected, there is no capricious disregard. Nelson v. State Bd. of Veterinary Med., 938 A.2d 1163 (Pa. Cmwlth. 2007).

As set forth above, the WCJ here expressly considered and rejected Orthopedist's report; therefore, she did not capriciously disregard evidence from Orthopedist. Williams; Nelson. We discern no basis to disturb the Board's order upon review.[4]

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[4] Lastly, Claimant argues the WCJ erred in characterizing Orthopedist's opinion as "equivocal." To the contrary, Claimant argues Orthopedist rendered his opinion within a sufficient degree of certainty.

Even if we agree with Claimant that Orthopedist's opinion is unequivocal, his opinion still must be competent and accepted by the WCJ to support an award. Campbell v. Workers' Comp. Appeal Bd. (Pittsburgh Post Gazette), 954 A.2d 726 (Pa. Cmwlth. 2008); Joy Global, Inc. v. Workers' Comp. Appeal Bd. (Hogue), 876 A.2d 1098 (Pa. Cmwlth. 2005).

The WCJ here rejected Claimant's account of her injury that formed the basis for Orthopedist's opinion. Therefore, even if the WCJ incorrectly described Orthopedist's opinion

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Based on the foregoing, we affirm.

ROBERT SIMPSON, Judge

(continued…)

as "equivocal," rather than incompetent or incredible, it is of no moment as Orthopedist's opinion was properly rejected on the ground that it was based on an inaccurate history provided by Claimant. Sewell.

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O R D E R

AND NOW, this 19th day May, 2011, the order of the Workers' Compensation Appeal Board is **AFFIRMED**.

ROBERT SIMPSON, Judge