IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anthony Sylvester,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 358 C.D. 2011
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Workers' Compensation Appeal Board (Home Health & Support Services),	:	Submitted: June 3, 2011
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: October 11, 2011**

Anthony Sylvester (Claimant) petitions for review of the Order of the Workers' Compensation Appeal Board (Board) that affirmed a Workers' Compensation Judge's (WCJ) decision denying Claimant's Petition to Review Compensation Benefits (Review Petition I) filed December 15, 2008, and granting in part, Claimant's second Petition to Review Compensation Benefits (Review Petition II) filed June 2, 2009. On appeal, Claimant argues that the WCJ erred in denying his Review Petition I in its entirety and his Review Petition II (jointly, Review Petitions) in part, because: Claimant's own testimony clearly demonstrated a direct nexus

between his work-related injury and cauda equina syndrome[1] and myocardial infarction;[2] the WCJ capriciously disregarded competent evidence which clearly established that the cauda equina syndrome and the myocardial infarction were related to Claimant's work injury and that Claimant's ischemia[3] never returned to baseline; the WCJ improperly relied upon the incompetent testimony of Home Health & Support Services' (Employer) medical expert, Jeffrey S. Weisman, D.O., in finding that Claimant did not suffer a myocardial infarction; and the WCJ erroneously found Dr. Weisman more credible than Claimant's medical expert, Soli F. Tavaria, M.D. Claimant also argues that the WCJ should have ordered Employer to pay all of his litigation costs since he was successful on one of the two Review Petitions and

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[1] Claimant's medical expert, Philip G. Perkins, M.D., explained a cauda equina as:

> the nerves that come off the spinal cord at the level of L1 where the spinal cord ends in the human being. It's the only mammal where that happens. And so the spinal cord ends but the nerves coming off of that point go down the rest of the spine down to S1, and then there's the cauda equina. And the most important part of those nerves is arguably the S2-S3-S4 levels because they control the bowel and bladder function . . . .

(Perkins Dep. at 8, Reproduced Record (R.R.) at 69A.) Cauda equina syndrome occurs when the cauda equina nerves are compressed resulting in significant loss of normal bladder and bowel activities. (Perkins Dep. at 9, R.R. at 70A.) See also Stedman's Medical Dictionary 260 (25th ed. 1990) ("equina, the bundles of spinal nerve roots arising from the lumbar enlargement and conus medullaris and running through the lower part of the subarachnoid space within the vertebral canal below the first lumbar vertebra; it comprises the roots of all the spinal nerves below the first lumbar.").

[2] Myocardial infarction is defined as an infarction "of an area of the heart muscle, usually as a result of occlusion of a coronary artery." Id. at 780.

[3] Ischemia is defined as "[l]ocal anemia due to mechanical obstruction (mainly arterial narrowing) of the blood supply." Id. at 803.

awarded attorney's fees because Employer failed to prove that it had a reasonable basis to contest the Review Petitions.

On March 13, 2007, Claimant sustained an injury to his lumbar spine in the course and scope of his employment with Employer. (WCJ Decision, April 20, 2010 (April 2010 Decision) Findings of Fact (April 2010 FOF) ¶ 2.) Claimant's injury was described in the March 24, 2008 Decision[4] granting Claimant's Claim Petition as a protrusion of Claimant's disc at the L5-S1 level of the lumbar spine resulting in radiculopathy. (April 2010 FOF ¶ 2.) Claimant was awarded total disability benefits for the period from March 15, 2007, through and including July 18, 2007, and partial disability benefits beginning July 19, 2007, as a result of his work-related injury. (WCJ Decision, March 24, 2008, FOF ¶ 16 Employer's Ex. 1 to April 2010 Decision, R.R. at 36A.)

On December 15, 2008, Claimant filed Review Petition I alleging that "Claimant's condition has progressed to cauda equina syndrome. He is in need of a fusion, is unable to perform any work activity whatsoever and recognition of the above is requested." (April 2010 Decision; Review Petition I, Certified Record (C.R.).) Employer filed an Answer denying the material allegations contained in Review Petition I. (April 2010 Decision at 1.) On June 2, 2009, Claimant filed Review Petition II alleging that "[b]y reason of the cauda equina syndrome and the

[4] The WCJ incorrectly states in finding of fact 2 that this decision was circulated on May 24, 2008. (April 2010 FOF ¶ 2.) However, the copy of this decision submitted by Employer and contained in the certified record shows that the correct date of that decision is March 24, 2008, as found in the WCJ's finding of fact 3. (April 2010 FOF ¶ 3; Employer Exh. 1, R.R. 30A.)

attempted fusion, Claimant suffered a myocardial infarction during surgery which is incorporated and review to include this is requested." (April 2010 Decision at 1; Review Petition II, R.R. at 2A.) Employer filed an Answer denying the material allegations contained in Review Petition II. (April 2010 Decision at 1.) The Review Petitions were consolidated and hearings were held before the WCJ on January 22, 2009 and June 29, 2009.

In support of the Review Petitions, Claimant testified before the WCJ at both hearings. (April 2010 FOF ¶ 4.) Claimant testified that: he received two injections in his back during September and October 2008; at the time of his second injection, he was "supposed to be knocked out," but felt pain; and subsequent to the injection, he had "uncontrolled bowels and bladder problems." (April 2010 FOF ¶ 4.) Claimant acknowledged that, prior to the injection, he had uncontrolled bowel and bladder problems to a mild degree, but nothing like the condition became after the injection. (April 2010 FOF ¶ 4a.) Claimant testified that he did not have this type of problem before his work-related injury. (April 2010 FOF ¶ 4a.) When Claimant testified on January 22, 2009, he indicated that he felt "like a 90-year-old man." (April 2010 FOF ¶ 4c.) Specifically, Claimant testified that he could not move as well as he used to, it bothered him to stand, and he was having problems with his left leg. (April 2010 FOF ¶ 4c.) Claimant indicated that he did not have this degree of difficulty prior to the second injection and his condition was getting worse. (April 2010 FOF ¶ 4c.)

Claimant testified that he was referred to Philip G. Perkins, M.D., by his primary care doctor in connection with the bowel and bladder problem. (April 2010

FOF ¶ 4b.) After ruling out any urological problem, Dr. Perkins scheduled Claimant for spinal fusion surgery on March 23, 2009. (April 2010 FOF ¶ 4b.) Claimant testified that, on March 23, 2009, Dr. Perkins began the surgical procedure, during which Claimant understood that he had a "mild heart attack" and that the surgery did not proceed past opening him up. (April 2010 FOF ¶ 4d, R.R. at 273A.) Claimant was treated by Berks Cardiology for the "heart attack" and remained under its care for a short time. (April 2010 FOF ¶ 4e.) Claimant then began treating with Dr. Tavaria, an internist with whom Claimant had treated previously for high blood pressure. (April 2010 FOF ¶ 4e-f.) Claimant testified that Dr. Tavaria provided him with medications and that his cardiac condition has not progressed well. (April 2010 FOF ¶ 4.) Claimant indicated that when he underwent a stress test in preparation for a second surgery by Dr. Perkins, he again ended up in the hospital due to heart problems. (April 2010 FOF ¶ 4e.) Finally, Claimant testified that until March 23, 2009, he had smoked a half a pack of cigarettes per day. (April 2010 FOF ¶ 4f.)

Claimant also submitted the deposition testimony of Dr. Perkins, who is board certified in orthopedic and spinal surgery. (April 2010 FOF ¶ 5.) Dr. Perkins testified that he first examined Claimant by referral on October 30, 2008. (April 2010 FOF ¶ 5a.) Based on a pain diagram and assessment questionnaire completed by Claimant, Dr. Perkins learned that Claimant had a backache going down his left leg and the doctor graded the pain anywhere from eight to nine out of ten with a disability index of sixty-eight percent. (April 2010 FOF ¶ 5a.) Dr. Perkins also recorded a history from which he learned that Claimant had been working as a home health care aide when he slipped on a wet floor and injured his back in March of 2007. (April 2010 FOF ¶ 5a.) Based on Claimant's history and his physical

examination, Dr. Perkins opined that Claimant had a herniated disc at the L5-S1 level with a high intensity zone, which was a tear in the disc, and that Claimant had damage to his cauda equina. (April 2010 FOF ¶ 5b.) Dr. Perkins opined that Claimant's cauda equina syndrome was not reversible and was caused by a combination of Claimant's disc herniation and the volume of the epidural injection that Claimant received three weeks before his October 30, 2008 examination. (April 2010 FOF ¶ 5b.)

Dr. Perkins testified that during the March 23, 2009 fusion surgery, Claimant's blood pressure was lowered after which Claimant's heart started showing evidence of lack of oxygen and the EKG showed a raised ST segment. (April 2010 FOF ¶ 5c.) Dr. Perkins explained that this meant that the heart was lacking oxygen and, as a result, the surgical procedure was abandoned. (April 2010 FOF ¶ 5c.) Dr. Perkins explained that Claimant did not have a heart attack or myocardial infarction on the operating table but, rather, had what is called an ischemia, which required Claimant to undergo an immediate heart catheterization. (April 2010 FOF ¶ 5c.) According to Dr. Perkins, the catheterization confirmed that Claimant had a completely-blocked right coronary artery, and a half-blocked left coronary artery, which Dr. Perkins indicated had occurred months or years earlier. (April 2010 FOF ¶ 5e.) Dr. Perkins stated that he saw Claimant five times between October 30, 2008 and May 13, 2009. (April 2010 FOF ¶ 5e.) He opined that Claimant still has cauda equina syndrome, Claimant's condition has not changed, and Claimant is unable to return to work. (April 2010 FOF ¶ 5e.) Dr. Perkins diagnosed Claimant's work-related injury as "an L5-S1 disc herniation with an annular tear, and secondly, cauda equina syndrome." (April 2010 FOF ¶ 5e.)

Claimant also presented the deposition testimony of Dr. Tavaria, who is board certified in internal medicine and electrocardiography. (April 2010 FOF ¶ 6.) Dr. Tavaria testified that he previously had treated Claimant in August 2003 for high blood pressure and placed Claimant on medication. (April 2010 FOF ¶ 6a.) Dr. Tavaria stated that Claimant did not have any heart problems prior to March 2009. (April 2010 FOF ¶ 6a.) Dr. Tavaria evaluated Claimant on March 31, 2009, at which time Claimant informed the doctor about the events that occurred during the spinal fusion surgery on March 23, 2009, including Claimant's belief that he suffered a heart attack during that procedure, and the fact that he was transferred to a cardiac unit. (April 2010 FOF ¶ 6b.) Claimant also told Dr. Tavaria that he had a feeling like crushing in his chest and a similar feeling in his stomach, as well as some palpitations. (April 2010 FOF ¶ 6b.) However, upon examination, Claimant's breathing was normal. (April 2010 FOF ¶ 6b.)

Dr. Tavaria explained that he reviewed Claimant's hospital records to learn what occurred during Claimant's surgical procedure and indicated that, when Claimant's blood pressure was reduced during surgery, his cardiogram started changing, the surgery was stopped, and Claimant was transferred to the cardiac unit. (April 2010 FOF ¶ 6d.) Dr. Tavaria testified that Claimant's heart catheterization showed multi-vessel coronary artery disease. (April 2010 FOF ¶ 6d.) Dr. Tavaria opined that lowering Claimant's blood pressure is what brought on the symptoms, but Claimant already had the disease before the surgery. (April 2010 FOF ¶ 6d.) Dr. Tavaria testified that there was no documentation of a heart attack prior to the surgery but, when directly asked if Claimant had one at the time of surgery, Dr. Tavaria testified that "[a]fter the surgery when he had [the] heart catheterization done, it

showed that he had a heart attack in the past. Whether that was before surgery, [or at the] time of surgery, we are not able to differentiate." (April 2010 FOF ¶ 6d; Tavaria Dep. at 12, R.R. at 118A.)

Dr. Tavaria examined Claimant again on April 28, 2009,[5] at which time Claimant was mainly complaining of fatigue and muscle pains, which he believed were due to medication. (April 2010 FOF ¶ 6e.) According to Dr. Tavaria, in May 2009, Claimant underwent a Persantine Cardiolite study that showed that he was not getting an adequate blood supply to his heart, a result Dr. Tavaria stated was due to a complete blockage in one artery, a fifty percent blockage of another artery, and an eighty percent blockage in a third, smaller artery. (April 2010 FOF ¶ 6e.) Dr. Tavaria examined Claimant again in June 2009 and finally on August 28, 2009. (April 2010 FOF ¶¶ 6f-g.) Dr. Tavaria noted that, on August 28, 2009, Claimant had some soreness in his chest and residual chest pain, but his breathing was normal and there were no palpitations. (April 2010 FOF ¶ 6f-g.) Dr. Tavaria's final diagnosis was multi-vessel coronary artery disease with an old myocardial infarction and residual angina, which Dr. Tavaria opined was precipitated by the March 23, 2009 surgery, and he stated that Claimant's prognosis was fair. (April 2010 FOF ¶ 6g.)

During cross-examination, Dr. Tavaria reviewed a medical report from another doctor and acknowledged that the record indicated that, on September 26, 2006, Claimant was complaining of intermittent chest pain, as well as headaches from time

[5] The WCJ erroneously states in Finding of Fact 6e that Dr. Tavaria saw Claimant again after the March 31, 2009 visit on March 29, 2009; however, the correct date is April 28, 2009. (Tavaria Dep. at 12, R.R. at 118A).

to time. (April 2010 FOF ¶ 6h.) Dr. Tavaria also agreed that headaches can be associated with high blood pressure. (April 2010 FOF ¶ 6h.) Dr. Tavaria further acknowledged that a March 23, 2009 medical report by Gui Piegari, M.D., memorialized the fact that Claimant had multiple risk factors for developing coronary artery disease. (April 2010 FOF ¶ 6i.) Dr. Tavaria acknowledged that after the attempted March 23, 2009 spinal fusion surgery, Claimant's cardiovascular exam was noted to be normal, Claimant's cardiovascular exam on April 1, 2009 was noted to be normal, and on each of Dr. Tavaria's visits with Claimant from March 2009 until the day he testified on September 10, 2009, Claimant's cardiovascular examinations were normal. (April 2010 FOF ¶ 6i.)

In opposition to the Review Petitions, Employer presented the deposition testimony of Kenneth W. Gentilezza, M.D., who is board certified in physical medicine, rehabilitation, and pain medicine. (April 2010 FOF ¶ 7.) Dr. Gentilezza is also a board certified independent medical evaluator. (April 2010 FOF ¶ 7.) Dr. Gentilezza initially examined Claimant on July 12, 2007 with respect to Claimant's March 13, 2007 work-related injury, during which he obtained a history of how that injury occurred. (April 2010 FOF ¶ 7a.) Based on the July 12, 2007 examination, Dr. Gentilezza opined that Claimant's symptoms were consistent with an L5-S1 herniated disc with active radiculopathy. (April 2010 FOF ¶ 7e.)

Dr. Gentilezza examined Claimant a second time on May 21, 2009, at which time Claimant provided an additional history and informed him that Dr. Perkins had admitted Claimant for a surgical procedure; however, the procedure never took place due to the fact that Claimant had developed acute coronary syndrome. (April 2010

FOF ¶¶ 7b-c.) Dr. Gentilezza testified that Claimant still continues to have problems at the L5-S1 disc, the disc was more recently chronically injured, and it was the L5-S1 disc that was causing Claimant's symptoms. (April 2010 FOF ¶ 7g.) Following the May 21, 2009 physical examination, Claimant completed an Illness Behavior Profile that indicated a high level of symptom exaggeration. (April 2010 FOF ¶ 7h.) Based on the May 21, 2009 examination, Dr. Gentilezza opined that Claimant's work-related injury involved an L5-S1 herniated disc and that this was causing nerve root encroachment producing what was consistent with radiculitis, i.e., irritation of the nerve root, but no damage.[6] (April 2010 FOF ¶ 7i.)

Dr. Gentilezza disagreed with Dr. Perkins' opinion that Claimant suffered from cauda equina syndrome noting that there was no medical proof of this condition. (April 2010 FOF ¶ 7i.) In doing so, Dr. Gentilezza pointed to the facts that: there was a normal EMG/nerve conduction study; there was no saddle anesthesia;[7] there was no rectal examination performed showing loss of sphincter tone; and there was no documentation of bowel and bladder hyporeflexia based upon a CMG or EMG. (April 2010 FOF ¶ 7i.) Dr. Gentilezza noted that a history of urinary incontinence or having a history of voiding issues does not denote cauda equina syndrome. (April 2010 FOF ¶ 7i.) Dr. Gentilezza testified that the presentation of this condition would,

[6] Dr. Gentilezza also reviewed numerous medical records in conjunction with his 2007 and 2009 evaluations of Claimant. (April 2010 FOF ¶ 7d.) This review included the actual films from an MRI of the lumbar spine performed in 2007, as well as one performed in 2008. (April 2010 FOF ¶ 7d.)

[7] Dr. Gentilezza testified that saddle anesthesia is the inability to feel that one is sitting down. (Gentilezza Dep. at 30, R.R. at 189A.)

subjectively, include severe pain, neurological findings of numbness, tingling and paresthesias (usually in both legs), saddle anesthesia, as well as incontinent bowel movements. (April 2010 FOF ¶ 7i.) Dr. Gentilezza testified that, with cauda equina syndrome, there is consistent urinary and bowel incontinence that does not fluctuate. (April 2010 FOF ¶ 7i.) Dr. Gentilezza opined that Dr. Perkins did not perform the type of examination needed to diagnose Claimant with cauda equina syndrome. (April 2010 FOF ¶ 7i.)

Employer also presented the deposition testimony of Dr. Weisman, who is board certified in internal medicine and cardiovascular disease and is certified by the Society of Computed Cardiovascular Tomography and Cardiovascular Computed Tomography. (April 2010 FOF ¶ 8.) Dr. Weisman performed an independent medical evaluation of Claimant on October 5, 2009, during which he obtained a history from Claimant regarding his work-related injury and the events that occurred on March 23, 2009 with respect to the attempted spinal fusion surgery. (April 2010 FOF ¶¶ 8a-b.) Dr. Weisman also reviewed numerous medical records, including those of Dr. Tavaria and Berks Cardiology. (April 2010 FOF ¶ 8a.) According to Dr. Weisman, Claimant stated that: he had previous disc problems in his back that required surgery in 1990; since his discharge from the hospital in March 2009, he continues to experience chest tightness and pressure, which occurs while walking and is relieved by rest and/or nitroglycerin; and stress precipitates similar episodes of chest pain and dyspnea. (April 2010 FOF ¶ 8b.) Claimant denied any other symptoms. (April 2010 FOF ¶ 8b.)

Based upon his physical examination and a review of the medical records, Dr. Weisman opined that Claimant had coronary artery disease, status post myocardial infarction, and recurring angina pectoris. (April 2010 FOF ¶ 8e.) Additionally, Dr. Weisman indicated that Claimant had borderline hypertensive cardiovascular disease, hyperlipidemia, exogenous obesity, possible chronic obstructive lung disease secondary to cigarette smoking, and degenerative disc disease status post laminectomy. (April 2010 FOF ¶ 8e.) Dr. Weisman opined that the hypertension, hyperlipidemia, obesity, obstructive airway disease from cigarette smoking, and the disc problems for which Claimant had surgery in 1990 all pre-existed March 23, 2009. (April 2010 FOF ¶ 8e.) Dr. Weisman explained that the coronary artery disease was present for years and pointed to the cardiac catheterization and coronary arteriogram, both of which indicated an old, totally occluded right coronary artery. (April 2010 FOF ¶ 8e.) Dr. Weisman testified that Claimant's coronary artery disease was not caused by the 2007 work-related back injury. (April 2010 FOF ¶ 8e.) Although Dr. Weisman noted that Claimant had an episode of acute ischemia following anesthesia induction on March 23, 2009, he testified that there was no lasting damage to Claimant as a result of this event. (April 2010 FOF ¶ 8e.) When asked whether Claimant had returned to his baseline condition as of the date he evaluated Claimant, Dr. Weisman testified "[i]t appears that that would be the case." (April 2010 FOF ¶ 8e; Weisman Dep. at 20, R.R. at 249A.) Although Dr. Weisman would place restrictions upon Claimant of not performing any heavy lifting or pushing and avoidance of any severely stressful environment, those restrictions would not be related to the events of March 23, 2009. (April 2010 FOF ¶ 8e.)

Based upon a careful review of the testimony, the WCJ made the following credibility determinations. The WCJ found Claimant's testimony credible with respect to the chronology of his treatment, as he recalled it, and the symptoms from which he suffers. (April 2010 FOF ¶ 9a.) However, the WCJ found that this credibility determination was not dispositive as to the ultimate issue in this case, i.e., whether Claimant suffered from the medical diagnosis of cauda equina syndrome and/or whether Claimant suffered a myocardial infarction during surgery as pled in the Review Petitions. (April 2010 FOF ¶ 9a.) The WCJ viewed the issues as primarily medical issues, which the WCJ determined would be resolved based upon the testimony of the medical experts presented in this case. (April 2010 FOF ¶ 9a.)

The WCJ found Dr. Perkins' testimony to be competent, but less than credible and/or persuasive with respect to the diagnosis of cauda equina syndrome. (April 2010 FOF ¶ 9b.) In making this credibility determination, the WCJ noted that Dr. Perkins' initial clinical evaluation on October 30, 2008 was somewhat sparse in its findings. (April 2010 FOF ¶ 9b.) The WCJ found that, by contrast, Dr. Gentilezza's evaluation was clearly more detailed, and his explanation regarding his disagreement with the diagnosis of cauda equina syndrome was more persuasive and convincing, particularly with respect to what the clinical presentation should have been had Claimant suffered from cauda equina syndrome. (April 2010 FOF ¶ 9b.) To the extent the testimony and opinions of Dr. Perkins differed in any material respect to that of Dr. Gentilezza, the WCJ rejected Dr. Perkins' opinions. (April 2010 FOF ¶ 9b.) The WCJ found the testimony, explanations, and reasoning of Dr. Gentilezza concerning the issue of whether Claimant suffered from cauda equina syndrome to be more persuasive and credible. (April 2010 FOF ¶ 9b.) As such, the WCJ adopted Dr.

Gentilezza's testimony on this issue as the medical facts of this case. (April 2010 FOF ¶ 9b.)

The WCJ found Dr. Tavaria's testimony to be competent, but less than credible and persuasive. (April 2010 FOF ¶ 9c.) Specifically, the WCJ pointed out that Dr. Tavaria testified that Claimant has multi-vessel coronary artery disease, an old myocardial infarction, and residual angina, which he indicated was precipitated by the March 23, 2009 surgery. (April 2010 FOF ¶ 9c.) Dr. Tavaria also provided an initial diagnosis, on March 31, 2009, of coronary artery disease with angina, hyperlipidemia, and high blood pressure. (April 2010 FOF ¶ 9c.) However, the WCJ noted that Dr. Tavaria had seen Claimant in August 2003, at which time Claimant already had high blood pressure for which the doctor provided medication. (April 2010 FOF ¶ 9c.) In addition, the WCJ noted that Dr. Tavaria reviewed the catheterization notes, which showed a heart attack in the past, but the doctor was not able to say whether that had occurred before surgery or at the time of surgery. (April 2010 FOF ¶ 9c.) Finally, the WCJ noted that, although Dr. Tavaria attributed the ongoing angina to the March 23, 2009 surgery, when confronted during cross-examination with a September 27, 2006 record, he acknowledged that Claimant was, in 2006, complaining of intermittent chest pains, as well as headaches from time to time. (April 2010 FOF ¶ 9c.) The WCJ found further that at the time of Dr. Piegari's evaluation on March 23, 2009 indicating that Claimant had multiple risk factors for developing coronary artery disease, Dr. Tavaria acknowledged that Claimant's cardiovascular exam was noted to be normal, a result that was consistent with Dr. Tavaria's cardiovascular examinations of Claimant which had always been normal. (April 2010 FOF ¶ 9c.) Although the WCJ found it credible that Claimant suffered

ischemia on March 23, 2009 when Dr. Perkins began surgery, the WCJ did not find, as a credible fact, that Claimant had any ongoing or lasting effect from the ischemia given his subsequent normal cardiovascular evaluations and his significant prior pre-existing cardiovascular disease. (April 2010 FOF ¶ 9c.) To the extent that the opinions of Dr. Tavaria differed in any material respect to those proffered by Dr. Weisman, the WCJ rejected Dr. Tavaria's contrary opinions. (April 2010 FOF ¶ 9c.)

The WCJ found Dr. Weisman's testimony to be competent, credible, and persuasive in its entirety, noting that Dr. Weisman's testimony was logical and not shaken upon cross-examination. (April 2010 FOF ¶ 9d.) The WCJ specifically found Dr. Weisman more credible than Dr. Tavaria, especially given Claimant's significant history of coronary artery disease, which included: hypertension; hyperlipidemia; obesity; obstructive airway disease; and a one hundred percent occlusion of the right coronary artery, an eighty percent stenosis of the smaller branch of the right coronary artery, and a fifty percent stenosis in the left coronary artery. (April 2010 FOF ¶ 9d.) Finally, the WCJ found that, although the medical evidence demonstrated that Claimant had ischemia at the time of the March 23, 2009 surgery, Dr. Weisman credibly testified that Claimant has, in fact, returned to baseline, especially given Claimant's significant pre-existing coronary artery disease. (April 2010 FOF ¶ 9d.) To the extent the testimony of Dr. Weisman differed in any material respect from Dr. Tavaria's testimony, the WCJ accepted Dr. Weisman's testimony as the medical facts in this case as it pertained to Claimant's cardiac/cardiovascular condition. (April 2010 FOF ¶ 9d.)

Accordingly, the WCJ found, based upon the foregoing credibility determinations, that: (1) Claimant did not suffer from cauda equina syndrome, but rather, Claimant's work-related injury is to be described consistent with the testimony of Dr. Gentilezza, i.e., a L5-S1 herniated disc with radiculitis; (2) Claimant suffered from ischemia on March 23, 2009 as a result of medical treatment that was necessitated by Claimant's work-related back injury; (3) the subsequent cardiac care that Claimant received from Berks Cardiology was related to the ischemia that Claimant suffered on March 23, 2009, and Employer was liable for such treatment; (4) as of October 5, 2009, the date of Dr. Weisman's examination of Claimant, Claimant had returned to his baseline condition, which included significant pre-existing coronary artery disease, hypertension, and hyperlipidemia, none of which were caused by, or related to, Claimant's work injury; and (5) any medical treatment on or after October 5, 2009 would be related to Claimant's pre-existing conditions, not related to the ischemia Claimant had during the March 23, 2009 surgery and, therefore, not related to the work injury in this case. (April 2010 FOF ¶¶ 10-11.) With respect to litigation costs, the WCJ concluded that Employer was responsible for reimbursement of litigation expenses/costs as they pertained to Review Petition II. (April 2010 Decision, Conclusions of Law (April 2010 COL) ¶ 5.) However, since Claimant did not prevail in whole or in part with respect to Review Petition I, the WCJ concluded that Employer was not liable for the cost of Dr. Perkins' deposition. (April 2010 COL ¶ 5.) Finally, the WCJ concluded that Employer had, at all times, a reasonable basis for contesting Claimant's Review Petitions as Employer provided competent, credible, and persuasive medical evidence to controvert the allegations set forth in the Review Petitions. (April 2010 COL ¶ 4.)

Thus, the WCJ denied Review Petition I, granted Review Petition II in part, and awarded Claimant partial litigation costs. Claimant appealed to the Board. Upon review, the Board affirmed the WCJ's decision.[8] Claimant now petitions this Court for review.[9]

Herein, Claimant first argues that his uncontradicted testimony in this case clearly demonstrated a direct nexus between his work-related injury and the cauda equina syndrome and myocardial infarction. Therefore, since the connection between the foregoing conditions and his work-related injury are obvious, Claimant contends that he was not required to present medical testimony to prove the causal relationship between the injury and his disability. We disagree.

"When a claimant sustains additional injuries that result from the original harm, a timely petition must be filed to add the injuries to those for which the employer is already responsible." Westinghouse Electric Corporation/CBS v. Workers' Compensation Appeal Board (Korach), 584 Pa. 411, 432, 883 A.2d 579, 592 (2005) (citing Section 413 of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 771, 772, 773.) "When such a petition is filed, the WCJ

[8] Although Claimant raised the issue of reasonable contest, the Board did not address the issue.

[9] This Court's scope of review is set forth in Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704, which provides that the Court shall affirm unless it determines that the adjudication is in violation of the claimant's constitutional rights, that it is not in accordance with law, that provisions relating to practice and procedure of the Board have been violated, or that any necessary findings of fact are not supported by substantial evidence. See Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 327, 652 A.2d 797, 799 (1995).

must treat the respective burdens of the parties as if the review petition were an original claim petition." Id. With respect to a claim petition, the claimant bears the burden of proving that his or her injury arose in the course of employment and was related thereto. Krawchuk v. Philadelphia Electric Co., 497 Pa. 115, 121, 439 A.2d 627, 630 (1981). Generally, if there is no obvious relationship between the disability and the work-related cause, unequivocal medical testimony is required to meet this burden of proof. Lewis v. Commonwealth, 508 Pa. 360, 365, 498 A.2d 800, 802 (1985).

As correctly stated by the Board, an obvious injury "is one that immediately manifests itself while a claimant is in the act of doing the kind of work which can cause such an injury." Giant Eagle, Inc. v. Workers' Compensation Appeal Board (Thomas), 725 A.2d 873, 876 (Pa. Cmwlth. 1999). In addition, even "where the work-related nature of the initial injury is obvious, but its relation to ongoing disability may not be, there is a need for more than lay evidence, i.e., for medical evidence." Cromie v. Workmen's Compensation Appeal Board (Anchor Hocking Corp.), 600 A.2d 677, 679 (Pa. Cmwlth. 1991).

Based on the facts found by the WCJ and the medical testimony presented by both parties in this matter, it is clear that the conditions of cauda equina syndrome, which allegedly occurred after an epidural injection, and myocardial infarction, which allegedly occurred under anesthesia, are not obviously related to Claimant's work-related injury in the nature of a herniated disc at L5-S1 and radiculitis. As such, Claimant had to establish the causal connection between the alleged disability and his work injury through unequivocal medical evidence. Fotta v. Workmen's Compensation

Appeal Board (U.S. Steel/USX Corp. Maple Creek Mine), 534 Pa. 191, 195, 626 A.2d 1144, 1146 (1993).

Next, Claimant argues that the WCJ capriciously disregarded credible, undisputed evidence which clearly established that the cauda equina syndrome and the myocardial infarction were related to his March 13, 2007 work-related injury and that Claimant's ischemia never returned to base line. Claimant contends that no evidence was offered to establish that the cauda equina syndrome or the myocardial infarction were related to any other work injury. Moreover, with respect to the myocardial infarction, Employer's medical expert, Dr. Gentilezza admitted that he indicated, following his May 2009 examination, that the cardiology report indicated that Claimant developed acute coronary artery syndrome due to aggravation of a previous right coronary artery occlusion caused by the stress of the anesthesia and hypertension during the perioperative period and was responsible for the cardiac issues that developed thereafter. Claimant contends further that Dr. Weisman also admitted a relationship between Claimant's cardiac issues and his work-related injury. Claimant states that Dr. Weisman admitted that the anesthesia was definitely involved in the production of acute coronary syndrome at the time of the surgery.

An adjudication cannot be in accordance with the law if it is not decided on the basis of law and facts properly adduced; therefore, appellate review for the capricious disregard of material, competent evidence is an appropriate component of appellate consideration if such disregard is properly before the reviewing court. Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 203, 812 A.2d 478, 487 (2002). When determining whether the fact finder capriciously

disregarded the evidence, the Court must decide if the fact finder deliberately disregarded competent evidence that a person of ordinary intelligence could not conceivably have avoided in reaching a particular result, or stated another way, if the fact finder willfully or deliberately ignored evidence that any reasonable person would have considered to be important. Id. at 203 n.12, 812 A.2d at 487 n.12.

Upon review of the testimony by Drs. Gentilezza and Weisman which Claimant relies upon to support his contention that the WCJ capriciously disregarded credible undisputed evidence, we note that the testimony was elicited on cross-examination. It is well settled that answers given on cross-examination do not, as a matter of law, destroy the effectiveness of previous opinions by a physician. Hannigan v. Workmen's Compensation Appeal Board (Asplundh Tree Expert Company), 616 A.2d 764, 767 (Pa. Cmwlth. 1992). The evidence is to be assessed as a whole in determining the weight to be given to the expert opinion. Id. Moreover, Claimant has taken the testimony out of context.

Dr. Gentilezza testified on cross-examination with respect to a report he prepared after his May 21, 2009 examination of Claimant. Dr. Gentilezza acknowledged that, on page nine of his report, he concluded that Claimant "developed acute coronary artery syndrome due to aggravation of a previous right coronary artery occlusion caused by the stress of the anesthesia and hypertension during the perioperative period and was responsible for the cardiac issues that developed thereafter." (Gentilezza Dep. at 46, R.R. at 205A.) However, Dr. Gentilezza testified further that he got the conclusion from the cardiology report and that he agreed with it, "[b]ut the perioperative period means it could have happened before as well. It doesn't necessarily mean the operative

period. At least that's my understanding of perioperative." (Gentilezza Dep. at 47, R.R. at 206A.) On redirect, Dr. Gentilezza testified that he was not changing any of his opinions or conclusions rendered during direct examination as a result of cross-examination. (Gentilezza Dep. at 47-48, R.R. at 206A-07A.)

Dr. Weisman was asked on cross-examination if he agreed with Dr. Gentilezza's testimony on cross at pages 46 through 47 of the Dr. Gentilezza's deposition that caused Dr. Gentilezza to conclude that the anesthesia precipitated the problem. (Weisman Dep. at 29-30, R.R. at 258-59A.) Dr. Weisman answered "[w]ell, I mean, the anesthesia definitely was involved in the production of the acute coronary syndrome at the time of surgery." (Weisman Dep. at 30-31, R.R. at 259A-60A.) On re-direct, Dr. Weisman testified that he would not change his testimony and opinions as to whether or not Claimant suffered any work-related cardiac condition resulting from the March 13, 2007 work-related injury or treatment therefor, including the March 23, 2009 treatment, as a result of the questions posed to him on cross-examination. (Weisman Dep. at 31, R.R. at 260A.)

Here, the WCJ set forth extensive and detailed findings of fact and conclusions of law in the April 2010 Decision demonstrating that the WCJ did not willfully or deliberately ignore evidence that any reasonable person would have considered to be important. To the contrary, the WCJ assessed the evidence as a whole in determining that the testimony and opinions of Dr. Gentilezza and Dr. Weisman were more credible and persuasive than the testimony and opinions of Claimant's medical experts. The selective portions of Dr. Gentilezza's and Dr. Weisman's testimony on cross-examination do not support Claimant's assertion that the WCJ capriciously

disregarded credible undisputed evidence. In short, we do not find support in the record for Claimant's assertion.

Next, Claimant argues that the WCJ erred in relying on Dr. Weisman's testimony as competent because the doctor never reviewed Claimant's cardiac care chart and testing compiled after Claimant's March 23, 2009, spinal fusion surgery.[10] Claimant contends that Dr. Weisman never reviewed prior testing which clearly shows that Claimant had clean cardiac testing in 2000, 2003, and 2007. Claimant contends further that Dr. Weisman admitted in his testimony on cross-examination that there is nothing in Claimant's medical records that indicates that he had any coronary symptoms in the weeks prior to undergoing the March 23, 2009, surgery. Claimant also argues that the record evidence does not support the WCJ's finding that Dr. Weisman was more credible than Dr. Tavaria, Claimant's medical expert, regarding causation of Claimant's cardiac issues.

Claimant's arguments with respect to Dr. Weisman's testimony go the weight of the testimony, not the competency. The WCJ, as the ultimate fact finder in workers' compensation cases, has exclusive province over questions of credibility and evidentiary weight, and is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part. General Electric Co. v. Workmen's

[10] It is well established that an expert's opinion cannot be based upon assumptions which are contrary to the established facts in a workers' compensation proceeding. City of Butler v. Workers' Compensation Appeal Board (Botsis), 708 A.2d 1306, 1310 (Pa. Cmwlth. 1998). Thus, in workers' compensation proceedings, a physician's testimony may be deemed to be incompetent as a matter of law where it is based upon an inaccurate or incomplete medical history. Newcomer v. Workmen's Compensation Appeal Board (Ward Trucking Corp.), 547 Pa. 639, 647, 692 A.2d 1062, 1066 (1997).

Compensation Appeal Board (Valsamaki), 593 A.2d 921, 924 (Pa. Cmwlth. 1991). The WCJ chose to accept the testimony and opinions of Dr. Weisman as more persuasive and credible than those of Dr. Tavaria with respect to the issue of whether Claimant suffered a myocardial infarction during the spinal fusion surgery on March 23, 2009. This credibility determination was well within the province of the WCJ and determinations as to witness credibility and evidentiary weight are not subject to appellate review. Hayden v. Workmen's Compensation Appeal Board (Wheeling Pittsburgh Steel Corp.), 479 A.2d 631, 635 (Pa. Cmwlth. 1984).

Finally, Claimant argues that he should have been awarded all of his litigation costs since one of his two Review Petitions was granted. Claimant contends that he was successful in part; therefore, Employer should have been ordered to pay Claimant's counsel's litigation costs. Claimant argues further that Employer's contest of the Review Petitions was unreasonable and, therefore, Employer is obligated to pay his attorney's fees in accordance with Section 440(a) of the Act.[11] Section 440(a) of the Act provides, in pertinent part, as follows:

> (a) In any contested case where the insurer has contested liability in whole or in part, . . . the employe . . . in whose favor the matter at issue has been finally determined in whole or in part shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred for attorney's fee, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend the proceedings: Provided, That cost for attorney fees may be excluded when a reasonable basis for the contest has been established by the employer or the insurer.

77 P.S. § 996(a).

[11] Added by Section 3 of the Act of February 8, 1972, P.L. 25, as amended, 77 P.S. § 996(a).

Herein, Claimant filed two separate and distinct Review Petitions. Claimant was successful in part with respect to Review Petition II, but unsuccessful with respect to Review Petition I. Accordingly, the WCJ ordered Employer to reimburse Claimant's counsel for all litigation expenses/costs except for the cost of Dr. Perkins' deposition. Dr. Perkins testified on Claimant's behalf with respect to Review Petition I. The WCJ determined that Claimant failed to prove that he was disabled due to cauda equina syndrome arising out of his original work-related injury. Therefore, the WCJ did not err by not ordering Employer to reimburse Claimant's counsel for the cost of Dr. Perkins' deposition as Review Petition I was not resolved in Claimant's favor "in whole or in part". Section 440(a) of the Act, 77 P.S. § 996(a).

We also disagree with Claimant's assertion that Employer's contest of the Review Petitions was unreasonable. Pursuant to Section 440 of the Act, "a denial of attorney's fees is proper only when the employer has a reasonable basis for contesting the claim." White v. Workmen's Compensation Appeal Board (Gateway Coal Company), 520 A.2d 555, 556 (Pa. Cmwlth. 1987). "[W]hether or not an employer's contest has a reasonable basis is a question of law." Id. at 557. "[I]n determining the reasonableness of an employer's contest, the primary question is whether or not the contest was brought to resolve a genuinely disputed issue or merely for purposes of harassment." Id. Claimant's arguments in support of this issue are based on his previous arguments that Dr. Gentilezza's and Dr. Weisman's testimony on cross-examination supports a finding that Claimant's myocardial infarction was caused by the anesthesia used during his spinal fusion surgery. As we have not agreed with Claimant's arguments in this regard, we find that the WCJ properly concluded that Employer's contest was reasonable due to Employer's presentation of competent,

credible, and persuasive medical evidence to controvert the allegations set forth in the Review Petitions. (April 2010 COL ¶ 4).

Accordingly, the Board's Order is affirmed.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anthony Sylvester,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 358 C.D. 2011
	:	
Workers' Compensation Appeal Board (Home Health & Support Services),	:	
	:	
Respondent	:	

O R D E R

NOW, October 11, 2011, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED.**

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RENÉE COHN JUBELIRER, Judge