

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Lawrence, :
 :
 : Petitioner :
 :
 : v. : No. 420 C.D. 2010
 : SUBMITTED: July 16, 2010
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 Workers' Compensation Appeal :
 Board (Genco), :
 : Respondent :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: October 14, 2010

Claimant John Lawrence petitions for review of the order of the Workers' Compensation Appeal Board (Board) that affirmed the order of the Workers' Compensation Judge (WCJ) granting Employer Genco's Termination Petition. For the reasons that follow, we affirm.

Claimant suffered a work-related back injury in 2006, and Employer filed a Notice of Temporary Compensation Payable acknowledging that Claimant sustained a work-related right-side lumbar strain. In October 2007, Claimant filed a Review Petition, alleging that the description of the injury should be expanded to include an annular tear of the L5-S1 disc. While Claimant's petition was still pending before the WCJ, Employer filed a Petition to Terminate Compensation

Benefits on March 31, 2008, alleging that Claimant had fully recovered. Employer's allegation of recovery was based on the March 5, 2008 examination of Dr. William Prebola. In June, 2008, the WCJ granted Claimant's Review Petition and expanded the description of the injury to include an annular tear. In March 2009, Dr. Prebola, at Employer's request, performed an Impairment Rating Evaluation (IRE) on Claimant and found that Claimant was 6% impaired. However, in July 2009, the WCJ granted Employer's termination petition, finding that Claimant was able to return to work without restrictions, and that he had reached a full "functional recovery," and suffered "no functional impairment."¹ Reproduced Record (R.R.) at 321. Claimant appealed to the Board, which affirmed the WCJ's decision to terminate benefits. An appeal to this court followed.

Before this court, Claimant raises three arguments for reversal of the Board's decision. However, only one of those issues has been properly preserved for our consideration. In his brief, Claimant argues that Dr. Prebola's testimony was improperly considered for three reasons: first, Dr. Prebola's analysis failed to acknowledge the newly expanded nature of Claimant's injury; second, Dr. Prebola's analysis ignored medical facts, including Claimant's complaints of pain; and third, Dr. Prebola's analysis was contradicted by his subsequent IRE, in which he found Claimant 6% impaired. However, in his appeal to the Board, Claimant requested only that "the WCJ decision be remanded for rehearing based upon the subsequent IRE opinion of Dr. Prebola." R.R. at 323. Similarly, Claimant's Petition for Review filed with this court has two entries in the section devoted to

¹ The WCJ found that Claimant continued to suffer some pain. However, Claimant has not argued that this finding precludes a termination of benefits, so we will not address that issue.

alleged errors of the Board, both of which are related to the IRE. Failure to raise an issue before the Board and failure to include an issue in the Petition for Review are both grounds for waiver. *McGaffin v. Workers' Comp. Appeal Bd. (Manatron, Inc.)*, 903 A.2d 94 (Pa. Cmwlth. 2006); *Associated Town "N" Country Builders, Inc. v. Workers' Comp. Appeal Bd. (Marabito)*, 505 A.2d 1358 (Pa. Cmwlth. 1986). Neither the appeal to the Board nor the Petition for Review filed with this court contain any reference to Dr. Prebola's alleged failures to recognize the expanded injury or to respond to medical facts. Therefore, Claimant's first two issues are waived.²

² Even without waiver, Claimant was unlikely to succeed on the first two issues raised. In support of his first argument, Claimant asserts that Dr. Prebola "never acknowledged" that Claimant's injury included an annular tear, a component of the injury which was recognized by the WCJ only after Dr. Prebola had conducted his exam. Claimant's Brief at 12. In fact, Dr. Prebola testified at the hearing about the annular tear, and concluded that Claimant had fully recovered from it. Supplemental Record (S.R.) at 9-11. This testimony was noted by the WCJ in Finding of Fact No. 39, and was accepted as credible. There is simply no veracity to Claimant's allegation that Dr. Prebola never acknowledged the annular tear.

Claimant's second argument, that Dr. Prebola ignored medical facts including Claimant's reports of pain, is similarly meritless. In fact, Dr. Prebola considered Claimant's complaints and concluded that there was "some symptom magnification" with "high symptom exaggeration scores with the pain questionnaires." S.R. at 17. This testimony was noted by the WCJ in Finding of Fact No. 36, and was later found credible. More generally, Claimant in this argument is trying to re-litigate the WCJ's determination that Dr. Prebola's opinion was more credible and persuasive than that of Dr. Mauthe, Claimant's expert. Credibility determinations are the province of the WCJ, and will not be disturbed on appeal. *Clear Channel Broad. v. Workers' Comp. Appeal Bd. (Perry)*, 938 A.2d 1150 (Pa. Cmwlth. 2007). Claimant argues that the WCJ's treatment of the testimony on pain and other medical evidence constitutes capricious disregard of evidence, but a judge's express consideration and rejection of evidence is not capricious disregard. *Williams v. Workers' Comp. Appeal Bd. (USX Corp. – Fairless Works)*, 862 A.2d 137 (Pa. Cmwlth. 2004). The WCJ's consideration of the pain evidence in Finding of Fact No. 36, and exhaustive comparison of the testimony of the two doctors in Finding of Fact No. 57 make it clear that there was no capricious disregard in this case.

Employer argues that Claimant's final issue, regarding the IRE, is waived as well, because it was not raised before the WCJ. Generally, all issues not raised before the WCJ are waived; however, there is no waiver when the petitioner had no opportunity to raise the issue before the WCJ. *See Ass'n of Retarded Citizens v. Workers' Comp. Appeal Bd. (Golden)*, 640 A.2d 1387 (Pa. Cmwlth. 1994). In this case, the WCJ closed the record on January 30, 2009, and ordered that briefs be submitted by March 16, 2009. The IRE determination at issue was circulated on March 13, 2009, and Claimant submitted his brief, which made no mention of the IRE, on April 2, 2009. On July 10, 2009, the WCJ issued his opinion, granting the Termination Petition. On appeal, the Board ruled that the issue should have been raised before the WCJ.

We agree with the Board. Claimant had ample opportunity to raise the issue before the WCJ by either including it in his brief, or petitioning the WCJ to reopen the record in light of new evidence. There was time for Claimant to pursue either of these options, as the IRE results were known for nearly three weeks before Claimant submitted his brief, and almost four months before the WCJ issued his opinion. For that reason, the Board properly found this issue to be waived.

For all the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

