

On January 16, 2003, Claimant sustained work-related injuries described as a crush injury to the leg and left ankle. Employer initially denied liability through a Notice of Workers' Compensation Denial dated January 30, 2003; however, Employer later accepted liability through a Notice of Compensation Payable (NCP) dated April 3, 2003, which listed the injury as a contusion to Claimant's lower left leg and ankle. Claimant treated with Stephen J. Lowe, M.D., for three months and returned to work in April 2003. Claimant received temporary total disability benefits pursuant to the NCP for a lower left leg and ankle contusion for the time he was not working, i.e., between January 16, 2003 and April 2003. Upon his return to work, Claimant worked light duty with restrictions and reduced pay; but, apparently, he may have worked again at full duty and full pay at some point in time. Claimant received two total disability checks after he returned to work, which he returned because he was working during the time period covered by the checks. Claimant received no further workers' compensation benefits after he returned the two checks, despite the fact that there remained an open NCP and Employer had not taken any action to terminate, suspend, or otherwise modify the benefits payable for temporary total disability. On March 7, 2005, Claimant left work because his ankle "flared up," (WCJ Decision, Findings of Fact (FOF) ¶ 3(c), December 1, 2008), which ultimately was determined to be the result of non-work-related cellulitis, and Claimant has not returned to work since that date.

On April 12, 2005, Claimant filed both a Claim Petition and a Petition to Reinstate and Review Compensation. On June 17, 2005, he filed a Penalty Petition.²

² Claimant also filed a Petition to Set Aside Receipt in connection with a prior knee injury with a former employer, which the WCJ denied and Claimant has not appealed.

There is some overlap between the Claim Petition, Petition to Reinstate and Review Compensation, and the Penalty Petition (Petitions). The Claim Petition sought temporary partial disability benefits from April 3, 2003, to March 7, 2005, and temporary total disability benefits from March 7, 2005, to the present. The Reinstatement and Review Petition sought to correct the description of Claimant's work-related injury to include: a crush injury to the left leg and left ankle; reflex sympathetic dystrophy (RSD); lumbar radiculopathy; back, left and superficial peroneal neuritis; aggravation of left knee injury; and torn ligaments in the ankle. The Reinstatement and Review Petition also sought to reinstate partial disability benefits between April 3, 2003, and March 6, 2005, as also requested in his Claim Petition. The Penalty Petition alleged a failure to pay partial and total disability benefits on and after April 3, 2003, despite an open NCP with no modification and a failure to pay medical bills causally related to the work injury, particularly medical bills from a spinal stimulator.

The Petitions were consolidated for a hearing wherein the WCJ received testimony from Claimant; Gary Buck, M.D., an anesthesiologist with whom Claimant began treating in 2004; Dr. Lowe, the orthopedic surgeon who had been treating Claimant from January 17, 2003, to the present; and Leonard B. Kamen, D.O., who examined Claimant on behalf of Employer. On July 14, 2006, the WCJ issued a decision and order in which she denied the Claim Petition, granted the Reinstatement and Review Petition, in part, and granted the Penalty Petition, in part. The WCJ denied the Claim Petition because the Reinstatement and Review Petition was the proper procedural method for asserting those claims because Employer had issued an NCP. The WCJ awarded Claimant temporary partial disability benefits for the period

of April 2003 through March 7, 2005; amended the NCP to include left ankle tenosynovitis, but not RSD; and granted fifty percent penalties and unreasonable contest attorney fees to Claimant. (WCJ Decision, Conclusions of Law (COL) ¶¶ 4-6, 9, July 14, 2006.) Claimant appealed this decision to the Board, claiming that the WCJ erred by: not amending the NCP to include RSD; mischaracterizing the testimony of Dr. Buck; unilaterally ceasing payments for Claimant's medical bills, including the treatment by the spinal stimulator; not assessing a penalty for failure to pay for the spinal stimulator; and suspending Claimant's benefits as of March 7, 2005, when there was an open NCP.

On January 25, 2007, the Board affirmed, in part, the WCJ's decision limiting reinstatement to temporary partial disability from April 2003 through March 8, 2005, and remanded the case for reconsideration of Dr. Lowe's testimony regarding his diagnosis of RSD, the basis for acceptance or rejection of Dr. Buck's testimony, and the issue of whether or not the spinal stimulator was related to the work-related ankle injury.

On remand, the WCJ made additional findings regarding the testimony of the medical experts. The WCJ did not credit Dr. Lowe's diagnosis of RSD because it was not included in any of the 2003 records and was offered only when Claimant returned to him for an unrelated condition, and Dr. Buck's diagnosis of RSD because it was only supported by minimal clinical findings and lacked physiological explanation. (WCJ Decision, FOF ¶ 9, December 1, 2008.) Instead, the WCJ accepted Dr. Kamen's opinion that Claimant has not demonstrated signs and symptoms of RSD. (FOF ¶ 9.) She issued an order on December 1, 2008, holding

that the diagnosis of RSD should not be added to the description of Claimant's work-related injury and that the spinal stimulator was not accepted as treatment for the work-related injury. Claimant appealed this decision to the Board, which affirmed. Claimant now petitions this Court for review.³

Claimant asserts that the Board erred in: (1) affirming the WCJ's finding that the spinal stimulator was not recommended treatment for the work-related injury to the left ankle; and (2) failing to reinstate Claimant's benefits at any time after March 7, 2005, or, alternatively, failing to order the payment of benefits up until the date of the WCJ's decision because Employer unilaterally suspended benefits while there was an open NCP.

Claimant argues that the WCJ erred in failing to find that the spinal stimulator was treatment for a work related ankle injury. We disagree. The WCJ found that Claimant's work-related injury was tenosynovitis, for which there was no evidence that a spinal stimulator was a recommended treatment. (WCJ Decision, FOF ¶ 11, December 1, 2008.) In a workers' compensation proceeding, the WCJ is the fact-finder and is entitled to "accept or reject the testimony of any witness, including a medical witness, in whole or in part." Minicozzi v. Workers' Compensation Appeal Board (Industrial Metal Plating, Inc.), 873 A.2d 25, 28 (Pa. Cmwlth. 2005). "The WCJ's authority over questions of credibility, conflicting evidence and evidentiary weight is unquestioned," and this Court is "bound by the WCJ's credibility

³ "This Court's scope of review is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether errors of law were made, or whether constitutional rights were violated." Peters Township School District v. Workers' Compensation Appeal Board (Anthony), 945 A.2d 805, 810 n.8 (Pa. Cmwlth. 2008).

determinations.” Id. at 28-29. We must accept the WCJ’s factual findings as conclusive if they are supported by substantial evidence. Wells-Moore v. Workmen’s Compensation Appeal Board (McNeil Consumer Products Co.), 601 A.2d 879, 881 (Pa. Cmwlth. 1992). “Substantial evidence has been defined as such relevant evidence as a reasonable person might accept as adequate to support the conclusion.” Id. The appellate role is not to reweigh the evidence or review the credibility of witnesses, but to “determine whether, upon consideration of the evidence as a whole, the [WCJ’s] findings have the requisite measure of support in the record.” Bethenergy Mines, Inc. v. Workmen’s Compensation Appeal Board (Skirpan), 531 Pa. 287, 293, 612 A.2d 434, 437 (1992).

Claimant argues that the WCJ should have found that Claimant suffered from RSD, a work-related injury for which the spinal stimulator could be a treatment. However, the WCJ did not find that Claimant suffered from work-related RSD because she did not credit Dr. Buck’s or Dr. Lowe’s testimony in that regard. The WCJ explained that Dr. Lowe conceded he is not an expert in this area, rendering his diagnosis of little weight. (WCJ Decision, FOF ¶ 9(a), December 1, 2008.) She did not credit Dr. Buck’s testimony because he identified “minimal clinical findings to support this diagnosis.” (FOF ¶ 9(b).) Instead, she credited Dr. Kamen’s contrary testimony, which indicated, *inter alia*, that Claimant showed no clinical signs of RSD, had no complaints of burning in the lower extremity, and no edema, which would be signs of RSD for which a spinal stimulator might be prescribed. (Kamen Dep. at 30-31, 46, November 15, 2005, R.R. at 182a-83a, 198a.) Dr. Kamen noted that the EMG analysis and nerve conductor studies were normal. (Kamen Dep. at 18, R.R. at 170a.) Dr. Kamen also testified about Claimant’s numerous preexisting back

and knee problems, including: (1) a lumbar laminectomy in 1992, (Kamen Dep. at 10, 30, R.R. at 162a, 182a); (2) left patella knee discomfort that preexisted Claimant's 2003 work injury, (Kamen Dep. at 14, R.R. at 166a); and (3) a work fall in the 1980s, after which Claimant was hospitalized for three days, (Kamen Dep. at 23, R.R. at 175a). Moreover, Dr. Kamen described his examination of Claimant, stating that Claimant exhibited, *inter alia*, no limp or signs that he had pain when he walked; and the results of the multiple tests he performed on Claimant's left ankle, lower limbs, and sensory responses were normal. (Kamen Dep. at 25-29, R.R. at 177a-81a.) Because Dr. Kamen's testimony constitutes substantial evidence that supports the WCJ's findings that Claimant did not suffer from work-related RSD, and that the spinal stimulator is not recommended treatment for Claimant's work-related tenosynovitis, we reject Claimant's argument that a spinal stimulator was treatment for the work-related ankle injury.

Claimant also argues that the Board erred in affirming the WCJ's failure to reinstate Claimant's benefits at any time after March 7, 2005. Claimant offers two reasons in support of reinstatement: (1) the underlying work-related left leg and ankle injury was still a materially contributing factor to Claimant's disability when he left work due to the non-work-related cellulitis; and (2) the credited medical testimony establishes that, after the non-work-related cellulitis resolved, Claimant remained disabled due to the work-related injury.

Claimant stopped working on March 7, 2005, because his "ankle flared up." (WCJ Decision, FOF ¶ 3(c), December 1, 2008.) The WCJ credited Dr. Lowe's opinion that "that the reason Claimant went out of work [in] March . . . 2005, was

cellulitis, a non-work[-]related condition, which rendered Claimant totally disabled. This condition resolved, and then Claimant returned to his restricted condition, preventing him from climbing or walking on narrow steel beams.” (WCJ Decision, FOF ¶ 15, July 14, 2006.) There is no credited testimony in the record that supports the conclusion that Claimant’s work-related injury materially contributed to the Claimant’s total disability when he left work on March 7, 2005. Claimant had been working in his restricted capacity prior to the onset of the cellulitis, it was the cellulitis that caused his total disability. Therefore, we reject Claimant’s argument that the work-related injury materially contributed to his total disability, and we hold that the WCJ did not err in denying temporary total disability benefits between March 7, 2005, and the date the cellulitis resolved.

Thus, what occurred here was the grant of temporary partial disability benefits for a closed period, April 2003 through March 7, 2005, followed by the proper suspension of those benefits based on Claimant becoming totally disabled as a result of a non-work-related condition. The question now becomes whether, as Claimant asserts, he is entitled to the reinstatement of temporary total benefits following the resolution of his non-work-related condition. The WCJ recognized the importance of this question in the following finding of fact:

The evidence relevant to whether benefits should be reinstated after the resolution of his cellulitis is less concrete, and therefore it is necessary for the undersigned to draw conclusions from the available evidence to issue findings of fact. Claimant testified that he originally returned to restricted duty and eventually returned to full duty and received full pay from McGinny. The full duty return to work is in contrast to the testimony of the two medical experts Claimant presented in this matter, and the history he provided to Dr. Kamen. The undersigned accepts the testimony of Dr. Buck and Dr. Lowe that their respective intentions were that Claimant would return to work at

restricted duty, and the testimony of Dr. Kamen as to the history provided to him. The undersigned could identify no evidence setting forth the date upon which Claimant returned to full duty, if, in fact, he did so. Without medical testimony regarding a release to full duty work, in conjunction with the history Claimant provided to Dr. Kamen, the undersigned determines that the medical intention was for Claimant to remain at restricted work. Pursuant to the credible testimony of Dr. Lowe, Claimant stopped working on March 7, 2005, due to a non-work[-]related condition, cellulitis. *Claimant was disabled as a result of the cellulitis, which resolved at an unidentified time. Thereafter, Claimant was released again to return to the restricted work to which Dr. Lowe had released him before.* As a result, Claimant is not entitled to reinstatement of temporary total disability benefits as a result of his disability from cellulitis.

(WCJ Decision, FOF ¶ 17(b), July 14, 2006 (emphasis added).)⁴ Although the WCJ correctly finds that Claimant is not entitled to benefits as a result of the cellulitis because it was not work related, she never addresses the question of “whether benefits should be reinstated *after the resolution of the cellulitis.*” (FOF ¶ 17(b).) Moreover, the answer to this question depends upon the WCJ’s determination of, *inter alia*, whether Claimant was disabled by his accepted work injury *after* the cellulitis resolved and the date Claimant’s cellulitis resolved, as that would be the date that Claimant’s benefits, if any, would be reinstated. The WCJ fails to resolve these critical questions in either of her opinions. Absent their resolution, and findings of fact to support that resolution, this Court cannot review the question presented by Claimant. Accordingly, we are constrained to remand this matter to the Board to

⁴ Although Claimant argues that the WCJ credited Dr. Lowe’s testimony in whole, (Claimant’s Br. at 11.), upon remand the WCJ credited each doctor’s testimony in part only. (WCJ Decision, FOF ¶ 9, December 1, 2008.)

remand to the WCJ to resolve these issues and to make any necessary findings of fact to support that determination.⁵

We note that our Supreme Court recently has addressed the reinstatement of suspended benefits in Bufford v. Workers' Compensation Appeal Board (North American Telecom), ___ Pa. ___, 2 A.3d 548 (2010). In that case, the Supreme Court reiterated and reaffirmed its prior decisions in Stevens v. Workers' Compensation Appeal Board (Consolidation Coal Co.), 563 Pa. 297, 760 A.2d 369 (2000), and Pieper v. Ametek-Thermox Instruments Division, 526 Pa. 25, 584 A.2d 301 (1990). That standard is as follows. Following the suspension of benefits, a claimant may prove an entitlement to the reinstatement of benefits by showing “that his or her earning power is once again adversely affected by his or her disability, and that such disability is a continuation of that which arose from his or her original claim.” Bufford at ___, 2 A.3d at 558. Once this is satisfied, the burden shifts to the employer to:

show that the claimant's loss in earnings is not caused by the disability arising from the work-related injury. This burden may be met by showing that the claimant's loss of earnings is, in fact, caused by the claimant's bad faith rejection of available work within the relevant required medical restrictions or by some circumstance barring receipt of benefits that is specifically described under provisions of the Act or in this Court's decisional law.

Id.

⁵ Because of our determination regarding this issue, we need not address Claimant’s alternative argument that the WCJ erred in failing to order the payment of benefits up until the date of the decision because Employer unilaterally suspended benefits with an NCP remaining open.

Accordingly, the order of the Board is vacated insofar as it affirms the denial of temporary disability benefits for the open period following the resolution of Claimant's cellulitis. The order is affirmed in all other regards. We remand this matter to the Board to remand to the WCJ for a determination, including the making of the necessary supporting findings of fact, of whether Claimant is entitled to the reinstatement of any disability benefits following the resolution of his cellulitis.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert Scott,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 836 C.D. 2010
	:	
Workers' Compensation Appeal	:	
Board (McGinney Iron Works),	:	
	:	
Respondent	:	

ORDER

NOW, December 29, 2010, the order of the Workers' Compensation Appeal Board (Board) in the above-captioned matter is hereby **VACATED** insofar as it affirms the order of the Workers' Compensation Judge (WCJ) which denied Robert Scott (Petitioner) total disability benefits for an open period following the resolution of Petitioner's non-work-related cellulitis. The Board's order is hereby **AFFIRMED** in all other respects. This matter is **REMANDED** to the Board to remand to the WCJ for a determination as to whether Claimant is entitled to any disability benefits for the period following the resolution of his cellulitis and his release to restricted-duty work.

Jurisdiction relinquished.

RENÉE COHN JUBELIRER, Judge