IN THE COMMONWEALTH COURT OF PENNSYLVANIA

James Conn, Petitioner	:	
v.	:	No. 1153 C.D. 2008
Workers' Compensation Appeal Board (A F Cost & Sons), Respondent	:	Submitted: September 19, 2008

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: November 12, 2008

James Conn (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board), which affirmed the decision of a workers' compensation judge (WCJ) denying Claimant's Claim Petition. We affirm.

Claimant filed a Claim Petition alleging that he sustained a work-related injury while working for A. F. Cost & Sons (Employer). In response, Employer filed an answer denying the material allegations contained therein. A hearing on the Claim Petition then ensued before the WCJ.

Before the WCJ, Claimant testified and offered the medical report of Elaine Gelb, M.D., dated March 16, 2007. Employer presented the testimony of Frank A. Cost, Employer's president, and offered the medical report of Paul Liefeld, M.D., dated February 21, 2007, and copies of Claimant's records of treatment at the

VA hospital. The WCJ summarized the relevant testimony and evidence presented as follows:

Claimant testified that while installing a furnace for Employer on July 7, 2006, he felt a pop in his back. He did not finish work that day, but returned to the office and notified the owner that he had done something to his back. A few days later Claimant sought medical treatment at the emergency room at UPMC-Braddock and subsequently came under the care of Dr. Gelb. Claimant treated with Dr. Gelb for one and a half months. Claimant also sought treatment from the VA hospital; although Claimant was not examined, the doctor prescribed a muscle relaxer for him.

Claimant testified that approximately five years prior to the July 7, 2006, injury, he suffered a herniated disc, which was surgically repaired. Claimant denied seeking any treatment for his low back prior to the work injury for two or three years. Claimant denied an ability to return to his regular job, although he acknowledged that he returned to the same type of work with a different employer over one month following the work injury.

While Claimant denied that Employer offered him light-duty work on direct examination, Claimant admitted receiving a letter from Employer offering him light-duty work. Claimant testified that he returned to work on January 9, 2007, for a different employer and is currently working as a stationary engineer.

The report of Dr. Gelb, dated March 16, 2007, states that she first saw Claimant on August 4, 2006, at which time Claimant reported severe back pain radiating into his right leg. Claimant provided Dr. Gelb with a history of the alleged work injury on July 7, 2006. Dr. Gelb reported that Claimant's past medical history was significant for a work-related left-side L4-5 disc herniation, which resulted in chronic low back pain and residual tingling in Claimant's left toes.

Dr. Gelb also reported that in the seven months prior to his injury, Claimant recounted that his low back pain had become more severe and he received treatment at the VA hospital. Dr. Gelb noted that an MRI scan revealed mild degenerative disc disease, with a disc bulge at L5-S1 without any encroachment into the neural foramina; on the right, there was a small disc bulge and osteophyte at the L4-5, but not encroaching on the foramen.

Dr. Gelb released Claimant to work with a twenty-pound weight restriction on August 28, 2006. Based upon the information available to her, Dr. Gelb opined that Claimant had suffered an acute low back strain, with possibly some nerve root irritation which was resolving when she last saw Claimant on August 28, 2006. Dr. Gelb expected Claimant to make a full and complete recovery and return to his pre-injury capabilities. Dr. Gelb emphasized that Claimant did admit to chronic low back pain prior to July 7, 2006.

In opposition to the Claim Petition, Employer presented a report prepared by its medical expert, Dr. Liefeld, dated February 21, 2007. Based upon his review of the records and the history of the injury as provided to him by Claimant, Dr. Liefeld opined that Claimant experienced a lumbar strain injury on July 7, 2006, but that he had made a full recovery as of the date of his evaluation. Dr. Liefeld also noted that Claimant had a preexisting low back condition, relating to an injury which occurred in April 2001, but that condition does not prevent him from returning to work.

Employer also presented copies of records of treatment at the VA hospital, many of which predate the work injury. These records reflect that Claimant complained of low back pain as early as January 19, 2005. In March 2005 Claimant sustained an injury to his low back. Claimant continued to be treated for various conditions, including low back pain and degenerative arthritis of the spine through

February 2006. On July 10, 2006, the same date that Claimant reported to the emergency room for treatment, Claimant reported to the VA hospital with a history of chronic back pain and requested a 90-day supply of medication which had been previously prescribed for him.

Based upon the testimony and evidence presented, the WCJ made the following relevant findings. The WCJ rejected the testimony of Claimant because it was inconsistent with documentary evidence of record. The WCJ found that when Claimant sought treatment at the emergency room and at the VA hospital on July 10, 2006, the records clearly reflect that he was seeking medication, which had been previously prescribed for his chronic low back condition. Although Claimant acknowledged that he had previously undergone surgery, Claimant denied receiving ongoing medical care and treatment for a low back condition prior to the work injury, which was refuted by the VA hospital's records and the records of Dr. Gelb. Claimant had reported to all physicians that he had prior chronic low back pain. Due to the inconsistencies between Claimant's testimony and the medical records, the WCJ discredited Claimant's testimony that the work incident, which was not witnessed by anyone, actually occurred.

The WCJ found that Dr. Gelb's opinion relating Claimant's low back condition to the alleged work incident was based solely upon the history provided to her by Claimant, which was found not credible. The WCJ accepted as credible and convincing Dr. Liefeld's opinion that Claimant has fully recovered from any alleged injury and that Claimant had a preexisting low back problem.

Ultimately, the WCJ concluded that Claimant did not sustain a work-related injury, as alleged, on July 7, 2006. By order dated October 3, 2007, the WCJ denied and dismissed Claimant's Claim Petition. From this decision, Claimant filed

an appeal with the Board, which affirmed. This appeal now follows.[1] Claimant raises the following issues for our review:

1. Whether the Board erred in affirming the decision of the WCJ that denied Claimant's Claim Petition for workers' compensation benefits by finding that the decision was supported by substantial evidence.

2. Whether the Board erred in affirming the decision of the WCJ that failed to find Employer's contest of the work injury unreasonable, even though the injury was confirmed by the panel provider and IME physician.

First, Claimant contends that the WCJ's decision denying Claimant's Claim Petition is not supported by substantial evidence. We disagree.

The WCJ, as fact finder, has exclusive province over questions of credibility and evidentiary weight, and the WCJ's findings will not be disturbed when they are supported by substantial, competent evidence. Northeastern Hospital v. Workmen's Compensation Appeal Board (Turiano), 578 A.2d 83 (Pa. Cmwlth. 1990). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Mrs. Smith's Frozen Foods Co. v. Workmen's Compensation Appeal Board (Clouser), 539 A.2d 11 (Pa. Cmwlth. 1988). The WCJ 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 Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), petition for allowance of appeal denied, 529 Pa. 626, 600 A.2d 541 (1991).

[1] This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of appeal board procedures, and whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

It is not the function of this Court to reweigh evidence and to substitute its judgment for that of the WCJ. Vitelli v. Workmen's Compensation Appeal Board (St. Johnsbury Trucking Co.), 630 A.2d 923 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 537 Pa. 627, 641 A.2d 591 (1994). Rather, the function of the Board and this Court is to determine, upon consideration of the evidence as a whole, whether the WCJ's findings have the requisite measure of support in the record. Bethenergy Mines v. Workmen's Compensation Appeal Board (Skirpan), 531 Pa. 287, 612 A.2d 434 (1992). Testimony and evidence found not credible by a WCJ are irrelevant for purposes of an appeal. Hoffmaster v. Workers' Compensation Appeal Board (Senco Products), 721 A.2d 1152 (Pa. Cmwlth. 1998).

With respect to a claim petition, a claimant bears the burden of establishing a right to compensation and proving all necessary elements to support an award. Inglis House v. Workmen's Compensation Appeal Board (Reedy), 535 Pa. 135, 634 A.2d 592 (1993). This includes a claimant's burden of proving that his injury arose in the course of employment and was related thereto. Krawchuk v. Philadelphia Electric Co., 497 Pa. 115, 439 A.2d 627 (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, 498 A.2d 800 (1985).

A personal history given by a claimant may provide a sufficient foundation upon which to premise a competent expert medical opinion. Sewell v. Workers' Compensation Appeal Board (City of Philadelphia), 772 A.2d 93 (Pa. Cmwlth.), petition for allowance of appeal denied, 567 Pa. 769, 790 A.2d 1021 (2001); Whiteside v. Workmen's Compensation Appeal Board (Unisys Corp.), 650 A.2d 1202 (Pa. Cmwlth. 1994), petition for allowance of

appeal denied, 544 Pa. 650, 664 A.2d 978 (1995). Expert medical testimony is not rendered incompetent merely because it is premised upon the expert's assumption of the truthfulness of information provided, unless that information is not proven by competent evidence or is rejected by the WCJ. Sewell; Somerset Welding and Steel v. Workmen's Compensation Appeal Board (Lee), 650 A.2d 114 (Pa. Cmwlth. 1994), petition for allowance of appeal denied, 540 Pa. 652, 659 A.2d 990 (1995).

Here, the WCJ discredited Claimant's testimony in its entirety, including Claimant's testimony that he sustained a work injury on July 7, 2006. While Claimant points out that both medical experts expressed opinions that Claimant had suffered an injury on July 7, 2006, these opinions were based solely upon Claimant's discredited history of the incident and are, therefore, not competent on the issue of causation. Claimant's challenge before us is nothing more than an attempt to challenge the WCJ's credibility determinations, which is beyond our review. As Claimant failed to present any credible evidence to support his Claim Petition, we conclude that the WCJ did not err in denying Claimant's Claim Petition.

Claimant also contends that the WCJ erred by failing to find Employer's contest of the work injury unreasonable, even though the injury was confirmed by the panel provider and IME physician. We disagree.

Pursuant to Section 440(a) of the Act, 77 P.S. §996(a), ***a claimant who prevails***, in whole or in part, is entitled to recover reasonable attorney's fees from the employer unless the employer satisfies its burden of establishing a reasonable basis for the contest. Schachter v. Workers' Comp. Appeal Board (SPS Technologies), 910 A.2d 742 (Pa. Cmwlth. 2006). In 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. White v. Workmen's Compensation Appeal Board (Gateway Coal Company), 520 A.2d 555 (Pa. Cmwlth. 1987). A reasonable contest exists when medical evidence is conflicting or is susceptible to contrary inferences, and there is no evidence that the employer's contest was frivolous. Schachter. Where the employer produces no contradictory evidence as to injury or disability, the employer may, nonetheless, establish a reasonable basis for contesting a claim solely by evidence adduced on cross-examination. White; Cavanaugh v. Workmen's Compensation Appeal Board, 413 A.2d 442 (Pa. Cmwlth. 1980). Whether or not an employer's contest has a reasonable basis is a question of law. White.

As discussed above, Claimant did not prevail because he failed to present substantial, credible evidence in support of his Claim Petition. As a result, the burden never shifted to Employer to establish a reasonable basis for the contest. We, therefore, conclude that the WCJ did not err by denying attorney fees.

Accordingly, the order of the Board is affirmed.

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JAMES R. KELLEY, Senior Judge

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O R D E R

AND NOW, this 12th day of November, 2008, the order of the Workers' Compensation Appeal Board, at No. A07-2132, dated June 13, 2008, is AFFIRMED.

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JAMES R. KELLEY, Senior Judge