IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Evans Devoe,	:	
Petitioner	:	
v.	:	No. 1204 C.D. 2010
	:	Submitted: October 22, 2010
Workers' Compensation Appeal	:	
Board (The LP Group 2, Inc.),	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** February 28, 2011

Petitioner Evans Devoe (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board), dated May 21, 2010. The Board affirmed the order of a Workers' Compensation Judge (WCJ), denying the claim petition of Claimant. We affirm the Board's order.

Claimant filed a claim petition on June 4, 2007, alleging that he was injured on March 22, 2007,[1] while working for The LP Group 2, Inc. (Employer) as a laborer/operator.[2] Employer filed an answer denying Claimant's allegations. Hearings were held before the WCJ.

In support of his claim petition, Claimant testified that around noon on Thursday, March 22, 2007, while he was climbing down off of a backhoe, he

[1] Claimant's claim petition originally listed March 24, 2007, as the date of injury. Before the WCJ, the date of injury was amended from March 24, 2007, to March 22, 2007.

[2] Claimant also filed a penalty petition on June 4, 2007, which was denied by the WCJ. Claimant did not appeal the WCJ's denial of his penalty petition to the Board.

stepped on a rock, slipped, and fell with his backside hitting one of the steps on the backhoe, knocking his left hip out of socket. Claimant also testified that he tore his right biceps and fractured his right shoulder attempting to catch himself during the fall. After his injury, Claimant testified that he sat and gathered himself for about 45 minutes and then went to a nearby store and purchased three Tylenol. Claimant stated that he attempted to call Garnett Littlepage, Employer's Vice President and Construction Manager, to report his injuries, but that Mr. Littlepage did not answer his phone. Claimant did not leave a message. Despite being injured, Claimant testified that he finished his work for the day and drove the backhoe back to Employer's yard around four o'clock. Upon discovering that Mr. Littlepage was not present, Claimant stated that he informed the security guard at Employer's yard that he had been injured. Claimant did not know the security guard's name. Claimant testified that he then left Employer's yard and drove to the emergency room at Temple University Hospital, but he was informed by hospital personnel that he could not be treated without his medical card.[3]

Claimant further testified that he worked the next day, Friday, March 23, 2007, at a different site. Claimant stated that he had an argument with Mr. Littlepage around eleven o'clock over whether he had completed his assigned work for the preceding days, at which time Claimant attempted to notify Mr. Littlepage of his injuries. Claimant explained that Mr. Littlepage would not listen to what he had to say, and that Mr. Littlepage turned off the backhoe and informed Claimant that he would finish Claimant's work for the day, at which point Claimant left the job site. As he was leaving the job site, Claimant testified that Mr. Littlepage commented on his limp and asked if Claimant wished to use his car, which

[3] Claimant testified that he receives medical coverage through his Social Security retirement benefits.

Claimant declined. Notwithstanding the argument with Mr. Littlepage, Claimant testified that he also worked the next day, Saturday, March 24, 2007. Claimant testified that March 24, 2007, was the last day he worked for Employer.[4]

Claimant went on to testify that he went to Employer's yard on Monday, March 26, 2007, to speak with Maxine McIntrye, Employer's President. Claimant testified that he informed Ms. McIntyre that he was injured on March 22, 2007, and inquired whether Employer provided any medical coverage. In response, Claimant stated that Ms. McIntyre told him that it was his problem if he got injured. Ms. McIntyre did not provide Claimant with any paperwork. Claimant explained that the first time he received any medical treatment for his injuries was at Temple University Hospital in late May 2007. Claimant testified that he delayed seeking medical treatment because he was waiting for Employer to respond to his request for medical coverage, and that he sought treatment when he did because the condition of his left hip worsened. Claimant admitted that he had a slight limp before he started working for Employer, which he attributed to his knees. Finally, Claimant stated that he never hurt his left hip or right shoulder before March 22, 2007.

Claimant also presented the deposition testimony of Zohar Stark, M.D., a board certified orthopedic surgeon, who began treating Claimant on August 22, 2007. The WCJ summarized Dr. Stark's testimony as follows:

> Dr. Stark diagnosed sprain and degenerative joint disease of the right shoulder, rupture of the long head of the right biceps, a partial tear of the right rotator cuff muscles, left hip contusion, degenerative joint disease of the left hip,

[4] Although Claimant testified that March 24, 2007, was his last day working for Employer, Claimant testified that he picked up the backhoe from Employer's yard several times during the month of April 2007 and delivered it to his brother, who was still working for Employer.

> which became symptomatic after the work injury, lumbar spine strain and lumbar spine discogenic disc disease, all as a result of the work injury. He reasoned that the degenerative arthritis of Claimant's left hip preexisted the work injury but became worse as a result of the work injury, which aggravated it. Claimant also sustained a fracture of the acetabulum[5] as a result of the work injury. Claimant's underlying degenerative joint disease was aggravated by the work injury. Dr. Stark testified that he believed these diagnoses were caused by the work injury because Claimant was functional and had no pain before the work injury, but after the work injury, he had a problem with his left hip function and markedly reduced motion in his left hip. He also reasoned that because Claimant was using a cane and walking awkwardly with a limp, that probably brought up the pain in his lower back and that Claimant started limping because of the work injury. In the opinion of Dr. Stark, Claimant remains unable to return to his pre-injury job duties as a result of the work injury. He opined that all of the treatment he has rendered to Claimant was caused by the work injury.

(Reproduced Record (R.R.) at 178a.)[6]

In opposition, Employer presented the testimony of Mr. Littlepage. The WCJ allowed Mr. Littlepage's testimony over Claimant's objection.[7] Mr. Littlepage testified that Claimant did not work for Employer on the date of injury,

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[5] The "acetabulum" is "[t]he cup-shaped cavity at the base of the hipbone into which the head of the femur fits." THE AMERICAN HERITAGE COLLEGE DICTIONARY 10 (4th ed.2004).

[6] Dr. Stark performed a total left hip replacement on Claimant on November 12, 2007.

[7] At the August 14, 2007 hearing, the WCJ stated that Employer had until November 14, 2007, to submit any fact witness testimony by deposition and that Employer had until February 14, 2008, to submit its medical evidence. The WCJ further stated that Claimant had until November 14, 2007, to submit its medical evidence and that Claimant had until February 14, 2008, to submit rebuttal depositions or documentary evidence. When Employer attempted to present Mr. Littlepage's testimony on February 26, 2008, Claimant objected to the testimony as untimely. The WCJ allowed Mr. Littlepage's testimony and gave Claimant until March 31, 2008, to submit rebuttal evidence.

Thursday, March 22, 2007, because he fired Claimant the morning of Tuesday, March 20, 2007, for not completing his assigned work the preceding weekend. Mr. Littlepage stated that he saw Claimant dismount the backhoe on March 20, 2007, and that Claimant did not fall or injure himself at any time. As Claimant left the job site, Mr. Littlepage explained that he felt bad and offered to give Claimant a ride, but that Claimant declined and continued walking toward the bus terminal. Mr. Littlepage testified that this was the last time he spoke with Claimant. Mr. Littlepage further testified that Claimant has walked with a limp for as long as he has known him.

After firing Claimant, Mr. Littlepage stated that he called Ms. McIntyre to inform her of Claimant's termination and instructed her to prepare Claimant's last check. Mr. Littlepage then completed Claimant's assigned work for the day and returned to Employer's yard. Upon his return, Mr. Littlepage explained that Ms. McIntyre showed him a letter she had written regarding Claimant's termination.[8] Mr. Littlepage testified that he did not know whether the termination letter was sent to Claimant in the mail, but that a copy of the termination letter was put with Claimant's last check. Mr. Littlepage stated that he personally observed Claimant pick up his last check, but he did not speak with Claimant at that time.

On January 6, 2009, the WCJ issued a decision denying Claimant workers' compensation benefits. The WCJ concluded that Claimant failed to establish that he was injured in the course and scope of his employment for Employer on March 22, 2007, or any other date. In reaching that conclusion, the

[8] The termination letter prepared by Ms. McIntyre was entered into evidence over Claimant's hearsay objection.

WCJ credited the testimony of Mr. Littlepage and rejected the testimony of Claimant and Dr. Stark. Specifically, the WCJ found:

> 28. Claimant's testimony that he was injured at work for this Employer on March 22, 2007 or any other time is not credible. Claimant's testimony is not believable that he sustained such an extensive injury at around noon, finished the workday at 4 p.m., worked the following Friday and Saturday and then did not receive any medical treatment until May 2007, even though he had a medical card through Social Security.
>
> 29. The testimony of Mr. Littlepage is credible that he had terminated Claimant's employment on March 20, 2007, in part because this testimony is corroborated by the March 20, 2007 letter which was with Claimant's final paycheck when he picked it up at work. The testimony of Mr. Littlepage is credible also based upon observation of his demeanor. . . .
>
> 30. The testimony and opinions of Dr. Stark that any of his diagnoses were caused by the work injury is not credible. This is because Claimant's testimony is not credible that he was injured at work on March 24, March 22, March 27, 2007 or any other time. The more credible testimony in this case is that his employment was terminated on March 20, 2007 and, at that time, he was not hurt or injured. Dr. Stark's opinions are not credible also because he was unaware that Claimant limped before March 2007 and he believed Claimant was functioning without any problems prior to March 2007 and the credible evidence in this case is to the contrary.

(R.R. at 179a.) Claimant appealed to the Board, which affirmed the WCJ's decision. This petition for review followed.

On appeal,[9] Claimant argues that (1) the Board erred in finding that Claimant failed to satisfy his burden of proving that he was injured in the course of his employment for Employer, (2) the WCJ erred in allowing Mr. Littlepage's testimony over Claimant's timeliness objection, (3) the WCJ erred in admitting the March 20, 2007 termination letter over Claimant's hearsay objection, and (4) the WCJ failed to issue a reasoned decision because she did not explain why she allowed Mr. Littlepage's testimony and admitted the March 20, 2007 termination letter over Claimant's objections. We address these issues in order.

Claimant argues, first, that the Board erred in finding that he failed to carry his burden of proving that he was injured in the course of his employment for Employer. In a claim petition proceeding, the claimant bears the burden of proving all elements necessary to support an award. *Neidlinger v. Workers' Comp. Appeal Bd. (Quaker Alloy/CMI Int'l)*, 798 A.2d 334, 338 (Pa. Cmwlth. 2002). Pursuant to Section 301(c)(1) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 411(1), an employee's injuries are compensable if they (1) arise in the course of employment and (2) are causally related thereto. *ICT Group v. Workers' Comp. Appeal Bd. (Churchray-Woytunick)*, 995 A.2d 927, 930 (Pa. Cmwlth. 2010).

Here, Claimant sought to establish that he sustained a work-related injury on March 22, 2007, through his own testimony. The WCJ determined, however, that Claimant's testimony was not credible. Claimant's testimony was rejected because the WCJ found that it was not believable that Claimant could sustain such extensive injuries, yet continue to work for the rest of the day, return

[9] This Court's standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. § 704.

to work the two following days, and then put off receiving any medical treatment for approximately two months, despite having medical coverage through Social Security. In addition to rejecting Claimant's and Dr. Stark's testimony, the WCJ also credited Mr. Littlepage's testimony that Claimant was not injured prior to the termination of his employment. As the ultimate finder of fact, the WCJ has exclusive province over questions of witness credibility and evidentiary weight. *Griffiths v. Workers' Comp. Appeal Bd. (Red Lobster)*, 760 A.2d 72, 76 (Pa. Cmwlth. 2000). "The WCJ . . . is free to accept or reject, in whole or in part, the testimony of any witness, including medical witnesses." *Id.* The WCJ's credibility determinations, therefore, are not reviewable on appeal. *Campbell v. Workers' Comp. Appeal Bd. (Pittsburgh Post Gazette)*, 954 A.2d 726, 731 (Pa. Cmwlth. 2008). Accordingly, because the WCJ found Claimant's testimony regarding the occurrence of the alleged work-related injury to be not credible, Claimant failed to demonstrate that he was injured in the course of his employment for Employer.[10]

Next, Claimant contends that the WCJ erred in allowing Mr. Littlepage's testimony over Claimant's timeliness objection. Specifically, Claimant argues that Mr. Littlepage's February 26, 2008 testimony should have been excluded as untimely because the WCJ established November 14, 2007, as

[10] Claimant also attempted to satisfy his burden of proof through the testimony of his medical witness, Dr. Stark. The WCJ determined, however, that Dr. Stark's testimony was also not credible. Having rejected Claimant's testimony regarding the occurrence of the work-related injury, the WCJ in turn rejected Dr. Stark's testimony that Claimant's medical conditions were caused by the work-related injury. *See Chik-fil-A Workers' Comp. Appeal Bd. (Mollick)*, 792 A.2d 678 (Pa. Cmwlth. 2002) (holding when medical expert bases opinion regarding causation of injury on incomplete or inaccurate medical history, his testimony may be deemed incompetent). Additionally, the WCJ rejected Dr. Stark's testimony because Dr. Stark was unaware that Claimant limped prior to March 2007 and diagnosed Claimant under the mistaken belief that Claimant functioned without any problems before March 2007. As stated above, the WCJ's credibility determinations are not reviewable on appeal. *Campbell*, 954 A.2d at 721.

the deadline for Employer to submit fact witness testimony. Claimant further maintains that Mr. Littlepage's testimony was inadmissible under Rule 131.54 of the Special Rules of Administrative Practice and Procedure Before Workers' Compensation Judges (Special Rules), 34 Pa. Code § 131.54(c),[11] because Employer did not identify Mr. Littlepage as a witness prior to the February 26, 2008 hearing. We disagree that the WCJ erred in allowing Mr. Littlepage's testimony.

The admission of evidence in a workers' compensation proceeding is committed to the sound discretion of the WCJ. *Coyne v. Workers' Comp. Appeal Bd. (Villanova Univ.)*, 942 A.2d 939, 950 (Pa. Cmwlth.) (citing *Atkins v. Workers' Comp. Appeal Bd. (Stapley in Germantown)*, 735 A.2d 196, 199 (Pa. Cmwlth. 1999)), *appeal denied*, 599 Pa. 683, 960 A.2d 457 (2008). Moreover, whether to waive or modify any of the Special Rules is also within the sound discretion of the WCJ.[12] *Id*. Absent a showing of an abuse of discretion, this Court will not disturb a WCJ's decision regarding the admission of evidence or the waiver of Special Rules. *Id*; *Atkins*, 735 A.2d at 199. "An abuse of discretion occurs where the WCJ's judgment is manifestly unreasonable, where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will." *Allegis Grp. & Broadspire v. Workers' Comp. Appeal Bd. (Coughenaur)*, 7 A.3d 325, 327 n.3 (Pa. Cmwlth. 2010). In this case, there has been no showing that allowing Mr. Littlepage to testify was an abuse of the WCJ's discretion. Indeed,

[11] Pursuant to Rule 131.54(c) of the Special Rules, "[a] witness whose identity has not been revealed as provided in this chapter may not be permitted to testify on behalf of the defaulting party unless the testimony is allowed within the [WCJ]'s discretion."

[12] Pursuant to Rule 131.3 of the Special Rules, 34 Pa. Code § 131.3, "[t]he [WCJ] may, for good cause, waive or modify a provision of [the Special Rules] . . . upon motion of a party, agreement of the parties or upon the [WCJ]'s own motion."

Claimant was given until March 31, 2008, to submit rebuttal testimony, yet declined to do so. Accordingly, the WCJ did not err in allowing Mr. Littlepage's testimony.

Claimant also argues that the WCJ erred in admitting the March 20, 2007 termination letter over Claimant's hearsay objection.[13] Here, while the WCJ agreed with Claimant that the March 20, 2007 termination letter constitutes hearsay, the WCJ overruled Claimant's hearsay objection on the grounds that the termination letter is corroborative of Mr. Littlepage's testimony. (R.R. at 169a.) This, the WCJ cannot do. Explaining the use of hearsay evidence in workers' compensation proceedings, this Court has stated:

> The rules of evidence are relaxed in workers' compensation proceedings, and hearsay evidence may be admissible and support findings of fact in certain circumstances. However, it is axiomatic that: (1) *hearsay evidence, properly objected to, is not competent evidence to support a finding; and (2) hearsay evidence admitted without objection may support a finding of fact if corroborated by competent evidence in the record*, but a finding of fact based solely on hearsay cannot stand.

Graves v. Workers' Comp. Appeal Bd. (Phila. Hous. Auth.), 983 A.2d 241, 245 (Pa. Cmwlth. 2009) (emphasis added) (citations omitted), *appeal denied*, ___ Pa. ___, 8 A.3d 347 (2010). Whether or not a challenged piece of evidence is corroborated by other competent evidence in the record, therefore, is irrelevant where there has been a valid hearsay objection. Accordingly, because Claimant objected to the March 20, 2007 termination as hearsay, the WCJ erred in holding that the corroborative nature of the termination letter justified its admission. *Id*.

[13] Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *Six L's Packing Co. v. Workers' Comp. Appeal Bd. (Williamson)*, 2 A.3d 1268, 1275 (Pa. Cmwlth. 2010). It is undisputed that the March 20, 2007 termination letter constitutes hearsay.

Although the WCJ's stated basis for admitting the March 20, 2007 termination letter was improper, this Court may affirm the ruling of a lower tribunal on alternative grounds if the basis for our decision is clear on the record. *See Warner-Vaught v. Fawn Twp.*, 958 A.2d 1104, 1108 n.4 (Pa. Cmwlth. 2008). Employer argues, as it did before the WCJ, that the March 20, 2007 termination letter was admissible under the business records exception to the hearsay rule, set forth in Section 6108 of the Judicial Code, 42 Pa. C.S. § 6108.[14] Explaining this section, our Supreme Court has stated:

> The purport of [Section 6108] is to merely require that the basic integrity of the record keeping is established. Where it can be shown that the entries were made with sufficient contemporaneousness to assure accuracy and that they were made pursuant to the business practices and not influenced by the litigation in which they are being introduced, a sufficient indicia of reliability is provided to overcome their hearsay nature. Every exception to the hearsay rule is based upon (1) the necessity for such evidence, and (2) the circumstantial probability of its trustworthiness. In the case of records kept in the regular course of business *the circumstantial guarantee of trustworthiness arises from the regularity with which they are kept.*
>
> As long as the authenticating witness can provide sufficient information relating to the preparation and maintenance of the records to justify a presumption of trustworthiness for the business records of a company, a

[14] Section 6108 of the Judicial Code provides, in pertinent part:

> A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission.

> sufficient basis is provided to offset the hearsay character of the evidence.

In re Indyk's Estate, 488 Pa. 567, 572-73, 413 A.2d 371, 373-74 (1979) (emphasis in original) (citations and quotations omitted). The moving party must also show that the challenged records were made in the regular course of business and that it is a regular practice of the business to keep records of the type offered into evidence. *Ganster v. W. Pa. Water Co.*, 504 A.2d 186, 190 (Pa. Super. 1985).

Here, the following excerpt from the February 26, 2008 hearing represents Employer's attempt to admit the March 20, 2007 termination letter as a business record:

> Counsel: Mr. Littlepage, you indicated for the record that you are familiar with this document; is that correct?
>
> Mr. Littlepage: Yes.
>
> Counsel: Do you know where this document came from?
>
> Mr. Littlepage: Came from our office at 2233 West Allegheny.
>
> Counsel: Do you maintain certain records, certain documents with respect to your employers and with respect to the projects that [Employer] has?
>
> Mr. Littlepage: Yes, ma'am.
>
> Counsel: Mr. Littlepage, is this document kept within your office?
>
> Mr. Littlepage: Yes, it is.
>
> Counsel: Within the normal course of business for the LP Group?
>
> Mr. Littlepage: Yes.

(R.R. at 140a-41a.) This testimony fails to provide a sufficient foundation to admit the March 20, 2007 termination letter under the business records exception. Mr. Littlepage's testimony provided no information relating to the preparation and maintenance of Employer's records to justify a presumption of trustworthiness,

such as to overcome the hearsay nature of the March 20, 2007 termination letter. Mr. Littlepage's testimony also did not indicate whether it was a regular practice of Employer to keep records similar to the March 20, 2007 termination letter. If merely stating that a challenged record is kept at an employer's office in the normal course of business, without more, were sufficient to satisfy the business records exception, the prohibition against hearsay would be rendered meaningless. Accordingly, the WCJ erred in admitting the March 20, 2007 termination letter.

Notwithstanding, the WCJ's admission of the March 20, 2007 termination letter was harmless error for two reasons. First, Mr. Littlepage's testimony alone is sufficient to support the WCJ's finding that Claimant was terminated on March 20, 2007. *See Nabisco, Inc. v. Workers' Comp. Appeal Bd. (Cummings)*, 651 A.2d 716, 718-19 (Pa. Cmwlth. 1994) (holding that the improper admission of hearsay evidence is harmless error where other competent evidence, standing alone, exists in the record to support the WCJ's findings). Although the WCJ's credibility determination of Mr. Littlepage was based, in part, on the corroboration of the March 20, 2007 termination letter, the WCJ's credibility determination was also based on observation of Mr. Littlepage's demeanor. Second, the date of termination (as arguably established by the termination letter) was irrelevant to the WCJ's ultimate conclusion that Claimant failed to establish that he was injured in the course and scope of his employment for Employer on March 22, 2007, or any other date in March.

We now address Claimant's contention that the WCJ failed to issue a reasoned decision because she did not explain why she admitted Mr. Littlepage's testimony and the termination letter over Claimant's objections. Section 422(a) of the Act, 77 P.S. § 834, entitles parties in a workers' compensation case to a

"reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached." In *Daniels v. Workers' Compensation Appeal Board (Tristate Transport)*, 574 Pa. 61, 76, 828 A.2d 1043, 1052 (2003), our Supreme Court held that "a decision is 'reasoned' for purposes of Section 422(a) [of the Act] if it allows for adequate review by the [Board] without further elucidation and if it allows for adequate review by the appellate courts under applicable review standards." Here, the WCJ's decision is "reasoned" in that she summarized the pertinent testimony, made necessary credibility determinations, and explained the basis for those determinations. *See Visteon Sys. v. Workers' Comp. Appeal Bd. (Steglik)*, 938 A.2d 547, 553 (Pa. Cmwlth. 2007). Claimant cites no legal authority in support of the proposition that a WCJ must explain the grounds for evidentiary rulings in order to satisfy Section 422(a) of the Act's "reasoned decision" requirement.

Accordingly, we affirm the decision of the Board.

P. KEVIN BROBSON, Judge

Judge Cohn Jubelirer did not participate in the decision in this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Evans Devoe,	:	
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	:	
Workers' Compensation Appeal	:	
Board (The LP Group 2, Inc.),	:	
Respondent	:	

O R D E R

AND NOW, this 28th day of February, 2011, the order of the Workers' Compensation Appeal Board (Board), dated May 21, 2010, is hereby AFFIRMED.

P. KEVIN BROBSON, Judge