IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jacquelyn Velykis,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1500 C.D. 2007
	:	
Workers' Compensation Appeal Board (Rothman Institute),	:	Submitted: January 18, 2008
	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: February 28, 2008**

Jacquelyn Velykis (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) that affirmed the Workers' Compensation Judge's (WCJ) decision and order denying Claimant's Claim Petition and Penalty Petition filed against her employer, Rothman Institute (Employer). On appeal, Claimant argues that the Board erred by: (1) denying her Claim Petition; (2) denying her Penalty Petition; and (3) finding Employer's challenge reasonable.

The relevant facts in this case are as follows. Claimant filed a Claim Petition alleging that, on October 4, 2004, she sustained a lower back injury while lifting and pulling heavy carts during the course and scope of her employment with Employer. Employer filed a timely Answer to Claimant's Claim Petition in which it denied the allegations that were made by Claimant and raised a number of affirmative defenses.

Claimant later filed a Penalty Petition alleging that Employer violated Section 406.1 of the Workers' Compensation Act (Act)[1] by failing to file a timely Notice of Compensation Payable (NCP) or Notice of Denial. Employer also filed a timely Answer to Claimant's Penalty Petition in which it denied the allegations that were made by Claimant.

The WCJ held several hearings at which Claimant and Employer were given the opportunity to present evidence in support of or in opposition to the petitions that were filed by Claimant. During these hearings, Claimant submitted her own deposition testimony and the deposition testimony of Peter R. Honig, D.O., in support of her petitions. Employer submitted the deposition testimony of its medical expert, Christian I. Fras, M.D., in opposition to Claimant's petitions.[2]

The WCJ summarized Claimant's deposition testimony as follows. Claimant, age twenty-one, began working for Employer on February 9, 2004,[3] as a general helper, and Claimant later worked for Employer as a file clerk. (WCJ Decision, Findings of Fact (FOF) ¶¶ 1(a), (m).) As a file clerk, Claimant's job duties included

[1] Act of June 2, 1915, P.L. 736, as amended, added by Section 3 of the Act of February 8, 1972, P.L. 25, 77 P.S. § 717.1.

[2] Employer also submitted the deposition testimony of two of its employees in opposition to Claimant's petitions. Kathy Kutufaris, Director of Human Resources, testified that she offered Claimant her pre-injury position with special accommodations for Claimant's medical restrictions and that she asked Claimant to return to work on March 6, 2006. Ms. Kutufaris also testified that Claimant did not return to work. (WCJ Decision, Findings of Fact (FOF) ¶ 6.) Nicole Goffe, Claimant's supervisor at the time of injury, testified that Claimant's position involved pulling x-ray file jackets, using a cart with wheels, and that sometimes Claimant had a partner to perform these tasks. (FOF ¶ 7.) Ms. Goffe also testified that Claimant did not contact her about the job offer. (FOF ¶ 7.)

[3] Claimant's testimony, however, indicated that she began working for Employer on February 9, 2003. (Velykis Dep. at 5.)

gathering x-rays for the next day's appointments and taking them to the appropriate office using a metal cart. (FOF ¶ 1.) Claimant testified that she began having back pain in October 2004 and was sent for x-rays after she notified Employer. (FOF ¶ 1(d).) Claimant testified that Dr. Hopper, who works for Employer, requested a bone scan and sent her to physical therapy for six weeks. (FOF ¶ 1(d).) Claimant testified that she went through a variety of additional tests while continuing to work. (FOF ¶¶ 1(e)-(h).) Claimant testified that she was put on light-duty work in September 2005. (FOF ¶ 1(j).) Claimant's responsibilities were reduced to answering telephones and taking x-rays one by one to the appropriate location. (Claimant Dep. at 16.) Claimant testified that, on October 5, 2005, Dr. Honig, her family physician, excused her from work. (FOF ¶ 1(i).) Claimant testified that she continues to receive treatment for back pain with Dr. Slipman. (FOF ¶ 1(l).) The conclusion of the WCJ's summary provides that "[t]here was no specific incident that occurred at work; [Claimant's] back just started hurting." (FOF ¶ 1(n).)

The WCJ summarized Dr. Honig's testimony as follows. Dr. Honig first saw Claimant regarding the alleged work injury on October 3, 2005. (FOF ¶ 3(b).) "Claimant told him she fell in an x-ray room at work on October 4, 2004 and developed . . . pain in her lower back." (FOF ¶ 3(c).) Dr. Honig diagnosed Claimant with low back pain and degenerative disc disease with possible neuropathic pain syndrome. (FOF ¶ 3(d).) In October 2005, Dr. Honig excused Claimant from work for further evaluation and released her from sedentary work on January 27, 2006. (FOF ¶ 3(k).) Dr. Honig testified that he later changed his diagnosis to include sacroiliac dysfunction after Claimant's consult with Dr. Slipman and further visits. (Honig Dep. at 13.) Dr. Honig specifically testified that, in his opinion, the injury was directly related to the incident on October 4, 2004. (Honig Dep. at 19.) In addition, Dr. Honig found that "[a]ll diagnostic studies done on Claimant are normal." (FOF ¶ 3(i).)

The WCJ summarized Dr. Fras's testimony as follows. Dr. Fras examined Claimant on November 28, 2005. (FOF ¶ 4(c).) After receiving Claimant's history, including Claimant's explanation of her low back pain, Dr. Fras found tenderness in the sacroiliac joints and in the low back and restricted range of motion. (FOF ¶¶ 4(d)-(e).) Dr. Fras testified that he reviewed all of the medical records and found the imaging tests to be normal, including the MRI's of the back, right shoulder and neck, the lumbar x-rays, and the CT scans of the pelvis and abdomen. (FOF ¶¶ 4(g)-(h).) Dr. Fras's diagnosis was that Claimant was suffering from a "chronic back sprain due to the alleged incident," but that Claimant could perform light duty work. (FOF ¶¶ 4(i)-(j).)

After considering the evidence presented, the WCJ issued a decision and order denying Claimant's Claim Petition and Penalty Petition. The WCJ rejected Claimant's testimony as vague, unpersuasive, and not credible. (FOF ¶ 8.) In doing so, the WCJ explained that "Claimant claimed partial disability to October 5, 2005 and her pay stubs show that she earned well in excess of her pre-injury wage." (FOF ¶ 8.) The WCJ also found that Claimant's complaints were not supported by the diagnostic studies, all of which are normal. (FOF ¶ 8.) Claimant did not present the testimony of Dr. Slipman, who is her current treating physician, but instead presented the testimony of Dr. Honig, who "recorded a history of [a] fall at work . . . which Claimant denied." (FOF ¶ 8.) The WCJ did not find Dr. Honig credible because his testimony was based on Claimant's testimony, which had been discredited. (FOF ¶ 9.) The WCJ found the testimony of Dr. Fras credible. (FOF ¶ 10.) Ultimately, the WCJ held that "Claimant . . . failed to show that she suffered a compensable work injury or was disabled as a result." (WCJ Decision, Conclusions of Law (COL) ¶ 2.) Additionally, the WCJ held that "Claimant . . . failed to show that [Employer] violated any section of the Act or rule." (COL ¶ 3.) Accordingly, the WCJ denied Claimant's Claim Petition and Penalty Petition. (COL ¶¶ 2, 3.)

Claimant subsequently appealed to the Board, which affirmed the WCJ's decision and order. The Board determined that the WCJ's decision was supported by substantial evidence and that the WCJ did not err in denying Claimant's Claim Petition and Penalty Petition. Claimant now petitions this Court for review of the Board's determination.[4]

On appeal, Claimant first argues that the WCJ erred in denying her Claim Petition. Specifically, Claimant contends that because her expert, Dr. Honig, and Employer's expert, Dr. Fras, both opined that her injury was caused by a work incident, all of the medical evidence provided establishes that she sustained a work-related injury. Claimant, thus, contends that the WCJ's conclusion that Claimant "failed to show that she suffered a compensable injury" is not supported by the record. However, we disagree.

It is well-settled that, in order to succeed on a claim petition, the burden is on the claimant to establish, through the production of evidence, that: (1) she sustained a work-related injury; and (2) that the work-related injury caused her disability. Ruhl v. Workmen's Compensation Appeal Board (Mac-It Parts, Inc.), 611 A.2d 327, 328-29 (Pa. Cmwlth. 1992); see also Halaski v. Hilton Hotel, 487 Pa. 313, 317-18, 409 A.2d 367, 369 (1979).

[4] This Court's review of the Board's determination is "limited by Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704, to determining whether constitutional rights have been violated, an error of law committed, or whether there is substantial evidence in the record to support the findings of fact." Werner v. Workmen's Compensation Appeal Board (Bernardi Bros., Inc.), 518 A.2d 892, 894 (Pa. Cmwlth. 1986). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Gibson v. Workers' Compensation Appeal Board (Armco Stainless & Alloy Prods.), 580 Pa. 470, 479, 861 A.2d 938, 943 (2004).

The WCJ is the ultimate fact-finder, who is responsible for assessing credibility and determining how much weight should be afforded to the evidence presented. Stiner v. Workmen's Compensation Appeal Board (Harmer Coal Co.), 647 A.2d 981, 984 (Pa. Cmwlth. 1994). The WCJ may "accept or reject the testimony of any witness, including a medical witness, in whole or in part." Kraemer v. Workmen's Compensation Appeal Board (Perkiomen Valley Sch. Dist.), 474 A.2d 1236, 1238 (Pa. Cmwlth. 1984) (quoting Bowes v. Inter-Community Action, Inc., 411 A.2d 1279, 1281 (Pa. Cmwlth. 1980)). Even where an employer's medical expert and a claimant's medical expert provide consistent testimony as to the cause of an injury, a WCJ may reject such testimony if it is premised on the patient history that was provided by the claimant, and the claimant's testimony has been discredited. Vols v. Workmen's Compensation Appeal Board (Alperin, Inc.), 637 A.2d 711, 714-15 (Pa. Cmwlth. 1994).

Here, although Dr. Honig and Dr. Fras both opined that Claimant's injury was caused by a work incident, their testimony was based on the patient history that was provided to them by Claimant. (Honig Dep. at 19; Fras Dep. at 15) Moreover, the WCJ discredited Claimant's testimony.[5] (FOF ¶ 8.) Because the testimony of Dr. Honig and Dr. Fras was based on the patient history that was provided to them by Claimant, and because Claimant's testimony was discredited, the WCJ properly concluded that Claimant "failed to show that she suffered a compensable injury."

[5] The WCJ discredited Claimant's testimony for the following reasons: (1) Claimant alleged that she was partially disabled until October 5, 2005, even though her pay stubs showed that she was earning more than her pre-injury wages; (2) the diagnostic studies that were performed were normal and did not support Claimant's complaints; (3) Claimant failed to present the testimony of her treating physician, Dr. Slipman; and (4) Claimant denied the history of a fall at work on October 4, 2004, that was recorded by Dr. Honig. (FOF ¶ 8.)

Vols, 637 A.2d at 714-15.[6] As the WCJ's decision is supported by the record, we conclude that the WCJ did not err in denying the Claim Petition.

Next, Claimant argues that the Board erred in affirming the WCJ's denial of Claimant's Penalty Petition. Claimant contends that the WCJ erred in failing to impose penalties upon Employer for "failure to promptly investigate a claim and issue either an NCP or Denial notice." (Claimant's Br. at 9.) In opposition, Employer argues that penalties are not assessable because Claimant was not awarded compensation and, furthermore, that penalties are a discretionary matter for the WCJ.

We agree with the Board that, because Claimant was not awarded workers' compensation benefits, she is not entitled to penalties. Section 435 of the Act provides that:

> The department, the board, or any court which may hear any proceedings brought under this act shall have the power to impose penalties . . . for violations of the provisions of this act or such rules and regulations or rules of procedure: (i) Employers and insurers may be penalized a sum not exceeding ten per centum of *the amount awarded . . . .*"

[6] To the extent that Claimant contends that the WCJ's decision is contradicted by the fact that the WCJ found Dr. Fras credible, we disagree. Although, the WCJ generally accepted Dr. Fras's testimony as credible, (See FOF ¶ 10) it seems as though the WCJ was only crediting such testimony to the extent that it differed from the discredited testimony of Dr. Honig. Furthermore, even if the WCJ erred in making an inconsistent finding, it does not alter the outcome of this case. That is, Dr. Fras's testimony is insufficient to meet the Claimant's burden because it was based on the patient history provided by Claimant, and Claimant's testimony was discredited. Vols., 637 A.2d at 714-15. Because the correct reason for the WCJ's denial of the Claim Petition is clear upon the record, we will not disturb the WCJ's ruling. Haney v. Workmen's Compensation Appeal Board, 442 A.2d 1223, 1226 (Pa. Cmwlth. 1982) ("[W]here a court makes a correct ruling, order, decision, judgment, or decree but assigns an erroneous reason for its action, an appellate court will affirm the action below where the correct basis for the ruling, order, decision, judgment, or decree is clear upon the record.")

77 P.S. § 991(d)(i) (emphasis added). Section 435(d)(i), thus, permits imposition of penalties only when the claimant is awarded compensation. Shannon v. Southwark Metal Mfg. Co., 366 A.2d 963, 964 (Pa. Cmwlth. 1976). As this Court explained in Jaskiewicz v. Workmen's Compensation Appeal Board (James D. Morrisey, Inc.), 651 A.2d 623 (Pa. Cmwlth. 1994):

> [T]he words "of the amount awarded" [under Section 435(d)(i)] indicate the legislature's intention to award penalties only when a claimant is awarded benefits. The penalty is based upon the amount awarded which was zero here. Thus, any other interpretation of this section of the Act would lead to arbitrary results, as referees would be left to award penalties based upon unknown numbers.

Id. at 626. Hence, the Board was correct that Claimant may not seek penalties because she did not receive an award of compensation.

Lastly, Claimant argues that Employer's contest was unreasonable and requests attorney's fees because Employer did not present evidence to rebut Claimant's contention that she was injured as a result of her work.[7] Section 440(a) of the Act, 77 P.S. § 996(a), provides that a Claimant who prevails, in whole or in part, is entitled to recover reasonable attorney's fees from the employer unless the employer has satisfied its burden of showing a reasonable basis for contest. McGuire v. Workmen's Compensation Appeal Board (H. B. Deviney Co.), 591 A.2d 372, 374 (Pa. Cmwlth. 1991). Here, Claimant did not prevail in whole or in part and, thus, attorney's fees are not available to Claimant.[8]

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[7] In Claimant's Petition for Review, Claimant only requests attorney's fees, not litigation costs pursuant to Section 440(a) of the Act, 77 P.S. § 996. (Petition for Review, Aug. 9, 2007.)

[8] However, even assuming that Claimant did prevail, she would still not be entitled to attorney's fees because Employer engaged in a reasonable contest. "A reasonable contest is *(Continued…)*

Based on the foregoing reasons, the decision of the Board, denying Claimant's Claim Petition and Penalty Petition, is affirmed.

RENÉE COHN JUBELIRER, Judge

established where the evidence is conflicting or subject to contrary inferences." Lemansky v. Workers' Compensation Appeal Board (Hagan Ice Cream Co.), 738 A.2d 498, 501 (Pa. Cmwlth. 1999). Furthermore, this Court has held that "[t]he question of reasonableness of contest goes beyond the mere finding of facts. It is a legal conclusion that must be arrived at based on the facts as found by the referee, if supported by substantial evidence, and the record." Hartman v. Workmen's Compensation Appeal Board, 333 A.2d 819, 822 (Pa. Cmwlth. 1975). A careful review of the record reveals that there is substantial evidence to support Employer's contest. There was no clear evidence that Claimant's injury was caused by her work, particularly because the WCJ discredited Claimant's and Dr. Honig's testimony. See Oritz v. Workmen's Compensation Appeal Board (Fair Tex Mills, Inc.), 518 A.2d 1305, 1307-08 (Pa. Cmwlth. 1986).

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	:	
Respondent	:	

O R D E R

NOW, February 28, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **affirmed**.

RENÉE COHN JUBELIRER, Judge