

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Bryan Garner,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1559 C.D. 2007
	:	
Workers' Compensation Appeal	:	Submitted: December 21, 2007
Board (Southeastern Pennsylvania	:	
Transportation Authority (SEPTA)),	:	
	:	
Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge  
HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE COHN JUBELIRER**

**FILED: February 25, 2008**

Bryan Garner (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board), which reversed the Workers' Compensation Judge's (WCJ) decision granting Claimant's Petition to Set Aside Final Receipt under Section 434 of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 1001.<sup>1</sup> Claimant argues that the Board erred in sua sponte

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<sup>1</sup>Section 434 of the Act provides that:

*(Continued...)*

raising the issue of whether the testimony of Claimant's expert was equivocal because Southeastern Pennsylvania Transportation Authority (Employer) failed to preserve this issue before the Board. Alternatively, Claimant argues that the Board erred in concluding that his expert was equivocal.<sup>2</sup>

The relevant facts of this case are as follows. Claimant suffered a lower back strain injury while working as a bus driver for Employer on February 5, 2000, when his bus seat fell backwards. Employer accepted the injury as compensable and issued a Notice of Temporary Compensation Payable (NTCP). Employer filed a full Notice of Compensation Payable (NCP) on April 28, 2000, with the same injury description. In August 2000, Claimant returned to his "regular occupation, full duty, [with] regular pay." (WCJ Decision, Findings of Fact (FOF) ¶ 6.iii.) Shortly thereafter, Employer and Claimant issued an Agreement to Stop Weekly Workers' Compensation Payments (Final Receipt), dated September 13, 2000.

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A final receipt, given by an employe or dependent entitled to compensation under a compensation agreement notice or award, shall be prima facie evidence of the termination of the employer's liability to pay compensation under such agreement notice or award: Provided, however, That a referee designated by the department may, at any time within two years from the date to which payments have been made, set aside a final receipt, upon petition filed with the department, or on the department's own motion, if it be shown that all disability due to the injury in fact had not terminated.

77 P.S. § 1001.

<sup>2</sup> The WCJ had initially issued a decision in this case, dismissing Claimant's petition, that was essentially an order with no findings of fact, conclusions of law, or discussion. This first WCJ decision was appealed to the Board, and the Board remanded the matter for the WCJ to issue a decision providing the requisite degree of findings and discussion.

On May 2, 2003, Claimant filed a Petition to Reinstate Compensation Benefits and Set Aside Final Receipt (Petition). In his Petition, Claimant averred that he became disabled again, on July 28, 2002, as a result of his original injury. Employer denied the averments that were made by Claimant in the Petition.

The WCJ conducted hearings on the Petition. In support of his Petition, Claimant testified on his own behalf. Claimant testified that he is presently disabled because of an enlarged liver, and he maintains that this condition was caused by medicine that was prescribed to him to treat his work-place injury. Claimant also testified that he suffered from sleep apnea. Claimant also presented reports from Joel H. Jaffe, D.O.<sup>3</sup> Employer filed a Motion to Dismiss Claimant's Petition. The WCJ filed an order granting Employer's motion and dismissed the Petition, but offered no explanation for his decision. Claimant appealed. The Board sustained the appeal, vacated the WCJ Order, and remanded the case to the WCJ. In doing so the Board noted that it was agreed by Claimant and Employer that the remand was necessary to allow Claimant the opportunity to respond to Employer's motion and to possibly amend Claimant's Petition.

On remand, the WCJ conducted additional hearings on the Petition. Claimant offered additional medical records and reports from his treating physician, Dr. Jaffe, most notably, a handwritten note from Dr. Jaffe dated May 2004. Attached to this note were printouts from the CVS Online Pharmacy Store Internet webpage, which

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<sup>3</sup> As discussed later, the "reports", identified as Claimant's Exhibit 2, consisted of: (1) a Letter from Dr. Jaffe to G. Lawrence DeMarco, Esq., dated December 16, 2003; (2) a handwritten note from Dr. Jaffe dated January 30, 2004; and (3) a letter from Dr. Jaffe to G. Lawrence DeMarco, Esq., dated February 5, 2004.

provided the applicable uses and side effects for five different medications. (This note and the corresponding printouts from the CVS webpage were entered into evidence collectively as “C-5”). Based on the materials from Dr. Jaffe that Claimant offered initially and on remand, the WCJ characterized Dr. Jaffe’s opinion as being that “non-steroidal, anti-inflammatory drugs that Claimant was prescribed to treat his back strain caused his liver disease.” (FOF ¶ 9.)

Employer submitted the expert report of Michael I. Greenberg, M.D., M.P.H., who is board-certified in occupational/environmental medicine and medical toxicology. Dr. Greenberg reviewed the medical records that Claimant submitted and concluded that Claimant is morbidly obese. Dr. Greenberg opined that non-alcohol related fatty liver disease, such as the kind from which Claimant suffers, is most commonly caused by obesity. Dr. Greenberg further opined that it was Claimant’s obesity that caused the liver disease and that the medication which Claimant was prescribed to treat his back strain neither caused, nor aggravated, the disease.<sup>4</sup>

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<sup>4</sup> Dr. Greenberg, after noting that Claimant was morbidly obese and suffered from sleep apnea, opined that:

My medical and toxicological opinions, which I hold to a reasonable degree of medical and toxicological certainty regarding this question, are as follows:

1. Chronic alcohol intake is the most common toxicologically related cause for fatty liver. However, in this case, the claimant denies being an alcohol user.
2. Non-alcohol related fatty liver is most commonly caused by obesity. The claimant in this case is noted to be “morbidly obese”, and according to the records at one time weighing nearly 400 pounds. It is a virtual certainty that the claimant’s condition of morbid obesity was the primary contributing factor for the development of Mr. Garner’s condition of fatty liver. Certain drugs taken at excessive doses and certain chemicals absorbed at high doses for prolonged durations have indeed been associated with the development of fatty liver in some patients. These

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Employer also presented the expert report of Jeffrey N. Retig, M.D., who is Board Certified in Gastrointestinal and Liver Disease. Dr. Retig reviewed the medical records, Dr. Jaffe's reports, and Claimant's testimony. Dr. Retig opined that non-steroidal medications, such as those that Claimant had been taking, are not a cause of fatty liver, although they could cause gastrointestinal problems. Dr. Retig further opined that obesity, diabetes, and alcohol use were the major risk factors for fatty liver.<sup>5</sup>

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drugs and chemicals are listed below and do not include any NSAIDs nor Parafon Forte (1,2,3):

[list of 12 types of drugs]

It is important to note that, according to the records I reviewed, Mr. Garner has not taken any of the listed drugs and has not had exposure to any of the chemicals listed.

3. A careful search of the medical literature reveals only two cases that may have been associated with the development of fatty liver possibly associated with non-steroidal medication [both of which involved pregnant women taking aspirin, with pregnancy itself, being a risk factor for developing fatty liver].

4. It is my medical opinion that NSAID drugs (other than aspirin in pregnant females) taken in therapeutic doses have never been associated with the development of fatty liver. Mr. Garner does indeed have a condition that has been clearly associated with the development of fatty liver. That condition is morbid obesity. It is my medical and toxicological opinion that Mr. Garner's fatty liver has been caused by his condition of obesity and was not in any way caused by or aggravated by taking Relefon or Parafon Forte or any other drug in therapeutic doses.

(Letter from Dr. Greenberg to William J. McKee, Esq. (May 11, 2005) at 3-4.)

<sup>5</sup> Dr. Retig, in his report, recounted Claimant's medical history and Claimant's testimony from his deposition before giving his opinion as to Claimant's condition and its causes. After noting that Claimant was morbidly obese, weighing 398 pounds, Dr. Retig opined that:

The non-steroidal anti-inflammatory drugs have a significant toxicity profile which includes gastrointestinal ulcer disease usually affecting the stomach

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Based on the evidence and testimony presented, the WCJ made the following relevant finding:

This [WCJ] has carefully reviewed the medical testimony and finds the records and reports of Dr. Jaffe to be more credible and convincing than [sic] the reports of Drs. Greenberg and Retig on the issue of causal connection. Of importance is the fact that Dr. Jaffe is [Claimant's] treating physician, is more familiar with [Claimant], and has had the opportunity to monitor Claimant over an extended period of time. In addition, it is also of significance that the defense doctors never actually examined [Claimant] himself, rather, they only reviewed his medical records. It is also significant that the pharmaceutical literature on medications support the premise that medications cause liver disease.

(FOF ¶ 14.) The WCJ also found Claimant's testimony to be credible. (FOF ¶ 13.) Accordingly, the WCJ concluded that Claimant suffered from a disability that was related to the medications he had been taking for his February 2000 work injury. The WCJ awarded weekly benefits from July 28, 2002, through July 28, 2003, at the rate of \$385.73. Employer appealed to the Board.

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or duodenum, but also occasionally the small intestines or colon. There is also nephrotoxicity (kidney problems) seen as the result of this class of medications. However, these drugs, including Relafen and ibuprofen, are not felt to be toxic to the liver. In addition, while there are a number of medications including corticosteroids and estrogen that can predispose to fatty liver, non-steroidal anti-inflammatory drugs have not been reported to cause this problem. Rather, it is quite clear that this man's fatty liver is related to his morbid obesity. Obesity along with diabetes, hyperlipidemia, and alcohol use are the major risk factors for fatty liver. It is in fact the most common etiology for abnormal liver enzymes in this country. The treatment is weight loss.

(Letter from Dr. Retig to William J. McKee, Esq. (September 1, 2005) at 3.)

On appeal, Employer argued that Dr. Jaffe's opinion was not competent to prove causation.<sup>6</sup> The Board agreed, reasoning that:

In reaching our determination, we first note that Dr. Jaffe did not explain the mechanism by which the medications which Claimant took in 2000 resulted in the development of fatty liver, discovered one and one-half years after he had stopped taking the medication. Further Dr. Jaffe never discussed the factor of Claimant's obesity, which is undisputed as the leading cause of fatty liver.

Most importantly, however, the pharmaceutical literature upon which Dr. Jaffe based his opinion does not provide a clear foundation for an opinion of causal relationship. The literature pertains to five medications, specifically, Celebrex, a non-steroidal anti-inflammatory, Relafen, a non-steroidal anti-inflammatory, Chlorzoxazone, a pain medication, Hydrocodone, a pain medication, and Protonix, a proton pump inhibitor used to treat stomach acid. Upon review, although the pharmaceutical literature (particularly that discussing Celebrex, Chlorzoxazone and Hydrocodone) refers to liver disease or liver problems as a possible side effect, none of it references the condition of fatty liver. We do not believe that generic warnings on pharmaceutical literature about the possibility of liver disease constitute an adequate foundation for the doctor to conclude that there was a causal connection between Claimant's use of medications in 2000 and his specific condition of fatty liver.

In the absence of any demonstrated foundation for Dr. Jaffe's opinion of causal relationship, we conclude that the opinion was unsupported by a factual basis and thus was incompetent. Further Claimant presented no other medical opinion to establish a causal relationship. Without competent medical evidence, Claimant could not meet his burden of proof.

(Board Op. at 8-9 (citations omitted).) Accordingly, the Board reversed the award of benefits. Claimant now petitions this Court for review.

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<sup>6</sup> The Board also notes that Employer argued that "the WCJ erred in reinstating benefits since Claimant did not file a review petition and did not prove timely notice of his liver condition." (Board Op. at 3.)

Before this Court, Claimant raises two arguments. Claimant argues that the Board erred in, sua sponte, raising the issue of whether the testimony of Claimant's expert was equivocal because Employer failed to preserve this issue before the Board. Alternatively, Claimant argues that the Board erred in concluding that his expert was equivocal.<sup>7</sup>

Preliminarily, we note that a final receipt may be set aside where a claimant establishes that all disability resulting from the work injury did not, in fact, terminate at the time he executed the final receipt. Johnson v. Workers' Compensation Appeal Board (Abington Mem'l Hosp.), 816 A.2d 1262, 1265-66 (Pa. Cmwlth. 2003); Cont'l Baking Co. v. Workmen's Compensation Appeal Board (Hunt), 688 A.2d 740, 743 (Pa. Cmwlth. 1997). Additionally, we note that a claimant bears the burden of proof in a case where an injury, other than the recognized injury, is asserted as compensable. City of Philadelphia v. Workers' Compensation Appeal Board (Smith), 860 A.2d 215, 223 (Pa. Cmwlth. 2004).

Claimant first argues that the Board should not have raised the equivocal issue sua sponte because Employer failed to preserve the issue before the Board. Claimant

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<sup>7</sup> This Court's "standard of review is limited to determining whether there has been a violation of constitutional rights, an error of law or whether necessary findings of fact are supported by substantial evidence." Bailey v. Workers' Compensation Appeal Board (US Airways), 865 A.2d 319, 322 n.2 (Pa. Cmwlth. 2005). The WCJ, as the finder of fact, is solely empowered to make credibility determinations and resolve conflicts in the evidence. Hoffmaster v. Workers' Compensation Appeal Board (Senco Products, Inc.), 721 A.2d 1152, 1155-56 (Pa. Cmwlth. 1998). Although it is solely the role of the WCJ to assess credibility and resolve conflicts in the evidence, the question of the competency of the evidence is one of law and fully subject to our review. Cramer v. Workmen's Compensation Appeal Board (Uni-Marts & PMA Group), 627 A.2d 231, 233 (Pa. Cmwlth. 1993).



argues that Employer's memorandum before the Board failed to address this issue and, therefore, the issue was waived. In response, Employer argues that it did raise the issue before the Board, directing the Court's attention to the Appeal from Judge's Findings of Fact and Conclusions of Law (Appeal Document), in which Employer raised four errors of law, the last one being that "[t]he opinion of Dr. Jaffe, upon which the WCJ relied, is legally incompetent, since it does not show the scientific basis for opining that the drugs taken by claimant could cause his specific liver condition." (Appeal Document at 3.) Employer also argues that Claimant fails to cite to any authority in support of his waiver argument.

Employer is correct that raising the issue in the Appeal Document was, itself, sufficient to preserve the issue before the Board, even if the issue was not subsequently briefed before the Board. McGaffin v. Workers' Compensation Appeal Board (Manatron, Inc.), 903 A.2d 94, 101 (Pa. Cmwlth. 2006); Sheridan v. Workers' Compensation Appeal Board (Anzon, Inc.), 713 A.2d 182 (Pa. Cmwlth. 1998). In McGaffin, 903 A.2d at 101, we referenced several cases that required issues to be raised in the appeal documents to preserve them, Matticks v. Workers' Compensation Appeal Board (Thomas J. O'Hora Co.), 872 A.2d 196, 202 (Pa. Cmwlth. 2005) and Jonathan Sheppard Stables v. Workers' Compensation Appeal Board (Wyatt), 739 A.2d 1084, 1089 (Pa. Cmwlth. 1999). We also referenced Sheridan v. Workers' Compensation Appeal Board (Anzon, Inc.), 713 A.2d 182 (Pa. Cmwlth. 1998) "in which we concluded that an issue may be preserved for review if it is raised in the appeal documents before the Board, even if it is not subsequently briefed before the Board." McGaffin, 903 A.2d at 101. Employer correctly notes that Claimant offers no contrary authority to this precedent. In the absence of such authority, we must

adhere to our prior case law and find that Employer's identification of this issue in the Appeal Document was sufficient to preserve it.<sup>8</sup> Accordingly, we find against Claimant as to this first issue.

Claimant next argues that the Board erred in concluding that his expert was equivocal. Claimant, citing to McCabe v. Workers' Compensation Appeal Board (Department of Revenue), 806 A.2d 512 (Pa. Cmwlth. 2002), argues that it is solely within the prerogative of the WCJ to weigh conflicting evidence and that the WCJ appropriately exercised his discretion in this case by weighing the differing expert opinions and finding Dr. Jaffe's more credible. In response, Employer argues that Dr. Jaffe's testimony lacked an adequate foundation and, thus, was equivocal and incompetent, in particular because:

Dr. Jaffe never gave a history of what drugs claimant took, what dosages he took, for how long he took the drugs, or even when he stopped taking the drugs. He never even mentioned what class of drugs claimant was taking. He never discussed how the drugs that he took could cause the type of liver problem that claimant has, and he cited to general drug warnings that fail to make any mention of the specific liver problem that claimant has, and he failed to rule out the most common reason for claimant's problem, morbid obesity.

(Employer's Br. at 6.)

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<sup>8</sup> We note that Employer also raised this issue before the WCJ. When Claimant offered the materials from Dr. Jaffe into evidence, Employer objected to their admission, arguing that "[Dr. Jaffe's reports], are expert opinion which do not site [sic] the data or facts upon which the opinions are based. They are purely conclusary [sic]. And I don't think that they are legally sufficient to support the expert's opinion." (WCJ Hr'g Tr. at 4, March 11, 2004.)

Where there is no obvious causal connection between an injury and the alleged work-related cause, that cause must be established by unequivocal medical evidence. Housing Auth. of the City of Pittsburgh v. Workmen’s Compensation Appeal Board (Sheffield), 646 A.2d 686, 688 (Pa. Cmwlth. 1994). Whether the testimony of an expert medical witness as to causation is equivocal is a question of law reviewable by this Court. Id. at 689. Medical testimony will be considered unequivocal “if the medical expert, *after providing a foundation*, testifies that in his belief the facts exist.” Id. (quoting Corcoran v. Workmen’s Compensation Appeal Board (Stuart Painting Co.), 601 A.2d 887, 891 (Pa. Cmwlth. 1992)).

In this case the Board, in its decision, and Employer, in its brief before this Court, both point out the absence of a factual or scientific foundation for Dr. Jaffe’s opinion. Our review of Dr. Jaffe’s opinion supports the Board’s conclusions and Employer’s argument. Dr. Jaffe’s report consists of the following paragraphs:

In my opinion:

1. [Claimant] is not able to perform his pre-injury employment as a bus driver as a result of his enlarged liver independent from his sleep apnea.
2. [Claimant’s] enlarged liver is directly related to the medications he took for his work related lower back injury.

(Letter from Dr. Jaffe to G. Lawrence DeMarco, Esq. (December 16, 2003).) In a handwritten note, dated January 30, 2004, Dr. Jaffe opined that Claimant’s “enlarged liver is directly related to medication he took for his work related lower back injury.” (Handwritten note from Dr. Jaffe (January 30, 2004).) The note offered no explanation for this conclusion. In a subsequent correspondence, Dr. Jaffe similarly wrote that Claimant’s “enlarged liver is directly related to medications he took for his

work related lower back injury.” (Letter from Dr. Jaffe to G. Lawrence DeMarco, Esq. (February 5, 2004).) Furthermore, in another handwritten note, Dr. Jaffe wrote:

[Claimant] was prescribed many medicines in 2000 from the [doctors] that he was sent to by Septa. After research on his part, and in conjunction with the CVS website to get side-effects of the medicine, it was discovered 4 of the 5 medicines ... could cause liver disease. (Chlorozezone [sic] definitely does cause liver disease).

(Handwritten note from Dr. Jaffe (May 2004).) Attached to this note were printouts from the CVS Online Pharmacy Store Internet webpage, which provided the applicable uses and side effects for five different medications.

We agree with the Board’s characterization and discussion of Dr. Jaffe’s opinions. Dr. Jaffe’s opinions are conclusory at best, offering no rationale for the conclusions that were reached. Moreover, it is important to note that, in the last note mentioned above, Dr. Jaffe does not appear to be expressing an opinion based on his own research and review of Claimant’s medical records but, rather, appears to be relying on Claimant’s own research. Dr. Jaffe does not opine that these drugs would cause the problem but, rather, merely states that “it was discovered”; in other words, that Claimant’s research found that these drugs *could* impact his liver. We agree with the Board’s statement that “[w]e do not believe that generic warnings on pharmaceutical literature about the possibility of liver disease constitute an adequate foundation . . . .” (Board Op. at 8.) Additionally, reading all of the reports and documentation from Dr. Jaffe together, the deficiencies in Dr. Jaffe’s opinion, as set forth by the Board, remain — there is simply no factual or scientific basis given for

Dr. Jaffe's opinion.<sup>9</sup> In the absence of such an explanation, Dr. Jaffe's opinion lacks the requisite foundation.

Accordingly, the Board correctly concluded that Dr. Jaffe's opinion, in its present form, is equivocal. Since it is Claimant's burden to establish that a final receipt should be set aside, we find no error in the Board's determination that Claimant failed to meet his burden with the evidence presented.

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<sup>9</sup> Dr. Greenberg explicitly critiqued Dr. Jaffe's opinion: "I disagree completely with this opinion. Dr. Jaffe is not a medical toxicologist and is indeed misinformed regarding this issue. He has offered no literature support for his opinion and has completely ignored the fact that obesity is a primary cause for fatty liver." (Letter from Dr. Greenberg to William J. McKee, Esq. (May 11, 2005) at 4.) While the weighing of expert witness testimony is within the province of the WCJ, we note that Dr. Greenberg's criticism is consistent with the Board's analysis and with our own. In the present case, Claimant's expert opinion lacks the requisite foundation for the WCJ to properly rely on it. Had such a proper foundation been established, the WCJ would have been within his discretion to weigh the conflicting expert testimony.

Accordingly, the order of the Board is affirmed.

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**RENÉE COHN JUBELIRER, Judge**

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Bryan Garner,	:
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Petitioner	:
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v.	: No. 1559 C.D. 2007
	:
Workers' Compensation Appeal	:
Board (Southeastern Pennsylvania	:
Transportation Authority (SEPTA)),	:
	:
Respondent	:

**ORDER**

**NOW**, February 25, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **affirmed**.

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**RENÉE COHN JUBELIRER, Judge**