

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Arvil Henry, :  
Petitioner :  
v. : No. 1578 C.D. 2010  
Workers' Compensation Appeal : SUBMITTED: October 29, 2010  
Board (Quebecor World), :  
Respondent :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE DAN PELLEGRINI, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge**

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
PRESIDENT JUDGE LEADBETTER**

**FILED: February 17, 2011**

Arvil Henry (Claimant) petitions this court for review of the decision of the Workers' Compensation Appeal Board (Board) which affirmed a decision of the Workers' Compensation Judge (WCJ) granting his claim and penalty petitions and terminating his benefits as of July 21, 2008. After review, we affirm.

Claimant was employed by Quebecor World (Employer) as a utility worker responsible for the maintenance of press machines and stacking bundles. On or about August 24, 2007, while on his shift that carried over to August 25, Claimant and a co-worker were performing maintenance on a printing press machine when the equipment got stuck causing all of the weight to fall toward Claimant. Claimant felt pain in his back and his left rib area. Claimant did not

report the incident to a supervisor until the next day, when he called out sick. Claimant was treated at the emergency room and then instructed by Employer to report to Occupational Health. In mid-September, Claimant was released to sedentary duty and continued to work until he stopped working, complaining of increased pain. Claimant returned to light-duty work on a part-time basis in mid-November, but went out of work again on December 29, 2007. Claimant filed a claim petition on October 15, 2007, alleging that he suffered a work-related rib injury on August 24, 2007, seeking disability benefits from the date of injury, medical bills and counsel fees. On that same date, Claimant also filed a penalty petition alleging that Employer failed to timely issue either a Notice of Compensation Payable or a Notice of Compensation Denial, as required under Section 406.1 of the Workers' Compensation Act (Act), 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.

Hearings were held before the Workers' Compensation Judge (WCJ) on December 3, 2007, January 30, 2008, May 14, 2008, June 4, 2008 and September 17, 2008. Claimant testified and submitted the deposition testimony of his treating physician, Dr. Ira Weiner, as well as supporting documents. Employer presented the testimony of Mr. Thomas Hayes, a private investigator who provided video surveillance of Claimant; Mr. Ralph Simmonds, its Human Resources Representative; Mr. Ryan Simmons, a coworker of Claimant's; and Dr. Karl Rosenfeld, a board certified orthopedist who conducted an independent medical examination (IME) of Claimant.

Claimant testified that while he and a coworker were pulling a roller out, "[h]is end got caught on the very edge, and mine came out all the way, so I got

all the weight and the force pulling forward. And I felt pain going into my rib and my back immediately.” Hearing of January 30, 2008, Notes of Testimony (N.T.) at 12. Claimant testified further that when he initially returned to work in September he was assigned sedentary duty doing “some computer work and sweep[ing] floors . . . .” *Id.* at 16. Claimant testified that his supervisor had him sweeping the walls and at one point, after reaching up to do so, he felt “some pop in my back and got a pain that goes straight up to my neck.” *Id.* Claimant went out of work again until mid-November, when his family physician returned him to modified duty work. Claimant continued in the modified duty job until December 29, 2007, until he was advised by Dr. Weiner to stop working. *Id.* at 22. Finally, Claimant testified that he was involved in two motor vehicle accidents, one in 2003 which resulted in injury to his back, and another in January 2007, which did not result in any injuries. *Id.* at 27 and 29.

Claimant submitted the deposition testimony of Dr. Ira Weiner, board-certified in family and general practice medicine. Dr. Weiner first examined Claimant for his work injury on December 12, 2007. After taking Claimant’s medical history and performing a physical examination of Claimant, Dr. Weiner diagnosed him with “acute post traumatic thoracic spine sprain and strain . . . [a]cute post traumatic lumbosacral spine sprain and strain with aggravation of pre-existing herniated disc and acute post traumatic subluxation thoracic lumbar and rib articulations.” Deposition of Dr. Weiner, at 20-21. Dr. Weiner further opined that Claimant’s injuries were a result of the incident at work on August 24, 2007 and that he remained completely unable to work, even on a light-duty basis.

Employer presented the report of video surveillance taken by its private investigator, Thomas Hayes, as well as the compact disc of the

surveillance. The parties stipulated that the surveillance report and disc admitted at the hearing before the WCJ were authentic and that the individual portrayed in the video playing pool on May 1, 2008, was Claimant. *See* Hearing of September 17, 2008, at 18-19; Deposition of Thomas Hayes, at 6. Employer also presented the deposition testimony of Dr. Karl Rosenfeld, board certified in orthopedic surgery, who conducted the IME of Claimant on July 20, 2008. Dr. Rosenfeld testified that he took a medical history from Claimant and that he performed a physical examination of him, which was normal. Dr. Rosenfeld testified that Claimant had a normal gait, could bend to 90 degrees, that Claimant tested negative in both the straight-leg and supine testing, that his deep tendon reflexes were normal, that there was no evidence of hip or extensor weakness in either of Claimant's legs, and that his reflexes were intact. Dr. Rosenfeld opined that Claimant "bruised his chest, sprained his back, thoracic spine." Deposition of Dr. Rosenfeld, at 42. Dr. Rosenfeld further opined that as of July 20, 2008, Claimant had fully recovered and that he could return to work without restrictions.

By decision dated April 28, 2009, the WCJ found that Claimant had met his burden of proving a work-related injury on August 24-25, 2007, and awarded Claimant either total or partial disability benefits from August 26, 2007 until July 20, 2008, based upon Claimant's wages submitted at the hearing. The WCJ then terminated Claimant's benefits as of July 21, 2008, based upon the Affidavit of Recovery of Dr. Rosenfeld, who opined Claimant had fully recovered from his work-related injury as of July 21, 2008. Finally, although the WCJ found that Employer presented a reasonable contest, he also concluded that Employer's failure to either accept or deny the injury as required by Section 406.1 of the Act

was a violation. Accordingly, the WCJ exercised his discretion and assessed a 25% penalty.

Both Claimant and Employer appealed the WCJ's decision, which was affirmed by the Board. The Board, after careful review of the record, concluded that the WCJ's findings were supported by substantial, competent evidence in the form of Dr. Rosenfeld's testimony; that Claimant was fully recovered and could return to work without restrictions as of July 21, 2008; that the WCJ issued a reasoned decision; and that, with respect to Employer's appeal from the granting of the penalty petition, the WCJ correctly determined that Claimant proved a violation of the Act and that the WCJ did not abuse his discretion in assessing a 25% penalty. Claimant now appeals to this court.<sup>1</sup>

On appeal, Claimant presents the following issues for review: 1) whether the Board erred in failing to exercise its appellate function by comparing the WCJ's findings of fact and credibility determinations with the actual evidence of record; 2) whether the WCJ failed to issue a reasoned decision pursuant to Section 422 (a) of the Act, 77 P.S. § 834, because he gave no reason for rejecting portions of Claimant's testimony and because the WCJ's purported reasons for finding Employer's medical expert, Dr. Rosenfeld, credible are not supported by the evidence; 3) whether the WCJ should have drawn an adverse inference from Employer's failure or refusal to schedule an additional diagnostic study Dr. Rosenfeld recommended; and 4) whether the WCJ erred in failing to set forth any reason for rejecting the testimony of Dr. Weiner.

It is well established that the WCJ, as fact finder, has exclusive province over questions of credibility and evidentiary weight, and the WCJ's

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<sup>1</sup> Employer did not appeal the Board's decision.

findings will not be disturbed on appeal when they are supported by substantial, competent evidence. *Ne. Hosp. v. Workmen's Comp. Appeal Bd. (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 Comp. Appeal Bd. (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. *Gen. Elec. Co. v. Workmen's Comp. Appeal Bd. (Valsamaki)*, 593 A.2d 921 (Pa. Cmwlth. 1991). Moreover, it is not the function of this court to reweigh the evidence and to substitute its judgment for that of the WCJ. *Vitelli v. Workmen's Comp. Appeal Bd. (St. Johnsbury Trucking Co.)*, 630 A.2d 923 (Pa. Cmwlth. 1993). We note that the WCJ's prerogative to determine the credibility of witnesses and the weight to be accorded evidence has not been diminished by Section 422 (a) of the Act, and therefore a party is not permitted to challenge or second-guess the WCJ's reasons for his or her credibility determinations. *Kasper v. Workers' Comp. Appeal Bd. (Perloff Bros.)*, 769 A.2d 1243 (Pa. Cmwlth. 2001). Such determinations are binding on appeal unless made arbitrarily or capriciously. *Id.*

Claimant's first issue is based on an apparent misapprehension of both the Board's and this court's role when reviewing a decision of the WCJ. Claimant argues that the Board did not exercise its appellate function because it accepted the findings and credibility determinations made by the WCJ at face value and it did not compare these findings with the "actual evidence presented." Claimant's Brief, at 13. Employer contends that this is a "thinly veiled invitation for the Court to usurp the role of the WCJ," and make new findings of fact based on the evidence of record. Employer's Brief, at 10. This we decline to do. It is well established

that the Board's function is primarily appellate in nature; thus, where the Board has taken no additional testimony, it is required to accept the facts found by the referee if they are supported by substantial evidence. *Bethenergy Mines, Inc. v. Workmen's Comp. Appeal Bd. (Skirpan)*, 531 Pa. 287, 612 A.2d 434 (1992). It is irrelevant whether the record contains evidence to support findings other than those made by the WCJ; the critical inquiry is whether there is evidence to support the findings actually made. *Delaware County v. Workers' Comp. Appeal Bd. (Baxter Coles)*, 808 A.2d 965 (Pa. Cmwlth. 2002).

Claimant next argues that the WCJ's decision to terminate his benefits fails to meet the "reasoned decision" requirement of Section 422 (a) of the Act. In particular, Claimant challenges the reasons given by the WCJ for rejecting portions of his testimony and the reasons given in support of finding Employer's witness, Dr. Rosenfeld, credible. First, Claimant contends that while the WCJ found his testimony credible as it supports a finding that he suffered a work related injury on or about August 24-25, 2007, resulting in a closed period of disability, the WCJ offered no reason for rejecting other portions of his testimony, which arguably would support his claim of continuing disability. Specifically, with respect to the surveillance evidence submitted by Employer, Claimant argues that since he stipulated that he was the person who was portrayed in the video playing pool and that the video does not show him engaging in activity that is inconsistent with the restrictions and limitations place upon him by his treating physician, it actually supports his credibility. Second, Claimant contends that the only reason offered by the WCJ for rejecting portions of his testimony was the WCJ's determination that Dr. Rosenfeld's testimony was credible and persuasive. According to Claimant, this is not a sufficient reason for rejecting his testimony, because the underlying

reasons given by the WCJ for accepting Dr. Rosenfeld's testimony are inconsistent with the other testimony and evidence of record.<sup>2</sup>

Section 422 (a) of the Act states that:

All parties to an adjudicatory proceeding are entitled 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. The [WCJ] shall specify the evidence upon which the [WCJ] relies and state the reasons for accepting it in conformity with this section. When faced with conflicting evidence, the [WCJ] must adequately explain the reasons for rejecting or discrediting competent evidence . . . .

77 P.S. § 834. In order to constitute a reasoned decision within the meaning of Section 422 (a), the WCJ's decision must permit adequate appellate review. *Daniels v. Workers' Comp. Appeal Bd. (Tristate Transp.)*, 574 Pa. 61, 828 A.2d 1043 (2003). This does not mean that the WCJ is required to discuss all of the evidence presented, only that the WCJ is required to make the findings necessary to resolve the issues raised by the evidence and relevant to the decision.

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<sup>2</sup> Claimant argues that Dr. Rosenfeld testified that his opinions were supported by an objective diagnostic study, an MRI, which allegedly shows abnormalities of Claimant's spine. Claimant argues that because Dr. Rosenfeld admitted that these abnormalities were inconsistent with his own clinical findings from the IME, it undermines the WCJ's reason for finding Dr. Rosenfeld credible in the first place. We reject Claimant's argument and decline to reassess the credibility determinations of the WCJ. Our review of the record reveals that there were two MRI studies done of the Claimant's lumbar and thoracic spine on which the medical experts had conflicting opinions. Moreover, the MRI was not the sole basis for Dr. Rosenfeld's opinion as to Claimant's full recovery in any event, as can be seen by Finding of Fact No. 3, more fully discussed in this opinion. It was within the WCJ's prerogative to resolve the conflicts in favor of the Employer's expert, Dr. Rosenfeld, and as such, it constitutes substantial evidence to support his findings.



*Montgomery Tank Lines v. Workers' Comp. Appeal Bd. (Humphries)*, 792 A.2d 6 (Pa. Cmwlth. 2002). *See also Acme Markets, Inc. v. Workers' Comp. Appeal Bd. (Brown)*, 890 A.2d 21 (Pa. Cmwlth. 2006) (a reasoned decision does not require the WCJ to give a line-by-line analysis of each statement by each witness explaining how a particular statement affected the ultimate decision).

The WCJ, after first finding that the Claimant's testimony was credible to the extent it supported his work-related injury, further found that Employer was entitled to a termination of benefits based on the credible testimony of Dr. Rosenfeld. In that finding, set forth below, the WCJ more than adequately articulated an "actual objective basis" for crediting Dr. Rosenfeld's testimony, and further, in rejecting that portion of Claimant's testimony that conflicted with Dr. Rosenfeld. In particular, the WCJ found:

As of July 21, 2008, Claimant fully recovered from any work injury sustained. The Defendant is entitled to relief as of that date. In this connection, the testimony and opinions of Dr. Rosenfeld, board certified orthopedist, are found credible and are accepted. As a board certified orthopedist he was particularly well-positioned to express opinions about the Claimant even though he made but one examination of the Claimant. He reviewed various medical records. Most importantly, he found that by objective measures Claimant's clinical examination was normal. It was his opinion, and here found, that the work injury was limited to an injury to the chest, lumbar spine, and thoracic spine; Dr. Rosenfeld presented a Physician's Affidavit of Recovery as to these conditions. The opinions of Dr. Rosenfeld were balanced and well explained. In reaching his conclusions, Dr. Rosenfeld considered that Claimant may have injured his lower back while performing overhead chores when he returned to work following the work injury. It is of note also that while Dr. Rosenfeld had suggested that further studies be made following his evaluation, he was clear in his deposition that his opinion as to Claimant's full recovery

did not rest upon such further medical studies. Dr. Rosenfeld further found that Claimant's activities as a pool player (as found by surveillance) raised some question as to Claimant's complaints.

WCJ's Decision, Finding of Fact No. 3. Dr. Rosenfeld testified as to the basis for his opinions, including his clinical examination of Claimant which was normal. He reviewed various medical records of Claimant's including a whole body scan done at Brandywine Hospital on September 20, 2007, the MRI report of Claimant's thoracic spine done September 27, 2007, the notes of Dr. Verna, Claimant's chiropractor, Dr. Riccardo, Claimant's family physician, and Dr. Weiner, his treating physician. In addition, Dr. Rosenfeld read the surveillance report and watched the surveillance video sent to him by Employer. He testified that:

It would seem unlikely to me that a person in significant pain as he professes, would endeavor in this kind of activity that would require him bending over . . . if your back is hurting, I don't think you're looking to play pool. I'll make it as simple as that. Plus he flew to Las Vegas. Remember he said, at least in the office, he couldn't sit still for five minutes . . . So, again, if you've got a bad back, to sit on a plane doesn't make sense and pool just adds to it.

Deposition of Dr. Rosenfeld, N.T. at 39-40.

Finally, we note that the WCJ had the opportunity to observe the Claimant in person and assess his demeanor when Claimant testified at the hearing. Where, as here, "the fact-finder has had the advantage of seeing the witnesses testify and assessing their demeanor, a mere conclusion as to which witness was deemed credible, in the absence of some special circumstance, could be sufficient

to render the decision adequately ‘reasoned.’” *Daniels*, 574 Pa. at 77, 828 A.2d at 1053. In any event, the WCJ gave further explanation of his reasons for rejecting, in part, Claimant’s testimony. The WCJ stated:

It is noted also that the surveillance report and video of the Claimant shows that in May 2008 Claimant was able to play pool; outwardly at least, the video shows the Claimant moving freely and without any overt signs of any back problem. The video, of course, is at best a snapshot of the Claimant over a short period of time; at the same time however, it in measure lends support to the conclusions reached by Dr. Rosenfeld as to a full recovery some two months thereafter.

WCJ’s Decision, Finding of Fact No. 4, at 2. Here, the WCJ issued detailed findings which clearly and concisely explained his determinations of the credibility of the fact witnesses, and we conclude that the WCJ rendered a reasoned decision.

Next, we consider whether the WCJ erred in not drawing an adverse inference from the fact that Employer failed or refused to schedule a diagnostic study that its’ own medical witness, Dr. Rosenfeld, recommended. Specifically, Claimant is referring to Dr. Rosenfeld’s report, in which he recommended that Claimant undergo a SPECT scan to rule out the remote possibility that he suffered a stress fracture as a result of the work-related incident. Claimant further asserts that because this test was never scheduled by Employer despite his stated willingness to undergo such a procedure, the WCJ should have drawn an adverse inference based on Employer’s failure to schedule the test.

The adverse inference rule has questionable applicability here. In general, “an adverse inference is permissible only where [an] uncalled witness is peculiarly within the reach and knowledge of only one of the parties.” *William*

*Penn School Dist. v. Workers' Comp. Appeal Bd. (Westerman)*, 717 A.2d 589, 592 (Pa. Cmwlth. 1998). Even if applicable to a test which was not undertaken, rather than to a witness who was not called, Claimant himself could have arranged for the test, so no “adverse inference” would have been appropriate. Furthermore, Dr. Rosenfeld was deposed and Claimant’s counsel had the opportunity to cross-examine him on his stated opinions and the basis for them. In that regard, Dr. Rosenfeld testified that he did not believe that Claimant had a stress fracture but that he had suggested that Claimant undergo a SPECT scan to rule one out. However, Dr. Rosenfeld further explained:

I had asked for the spec scan just for the absolute, absolute, absolute last possible test that makes sense to be sure he didn't have a stress fracture, knowing subsequent of this visit of the pool activities. I don't believe he had a stress fracture because, once again, to sit on a plane for five hours with a fracture in your back and furthermore, then to endeavor pool just doesn't make sense to me.

Dr. Rosenfeld’s Deposition, N.T. at 42. The fact that the test was not undertaken was simply a factor for the WCJ to consider in weighing the evidence.

Finally, we address Claimant’s last issue, whether the WCJ erred in failing to give a reason for rejecting the testimony of his treating physician, Dr. Ira Weiner. Claimant argues that because the WCJ granted his claim petition in the first place, the implication is that the WCJ based his award of benefits in part on the credible testimony of Dr. Weiner. Claimant also asserts that because Dr. Rosenfeld testified that he reviewed Dr. Weiner’s notes in reaching his opinions, and Dr. Rosenfeld was determined to be credible, it follows that the opinions expressed by Dr. Weiner in his notes are therefore credible. We reject Claimant’s

circular reasoning and disagree that the WCJ failed to give a reason for rejecting Dr. Weiner's testimony.

Our review of the record reveals that the WCJ based his award of benefits specifically on Claimant's testimony, which the WCJ "found credible to the extent that it supports, and it is here found, that he [Claimant] sustained a work-related injury . . . ." Finding of Fact No. 2. In addition, the WCJ accepted and found credible the testimony of Dr. Rosenfeld, who opined that Claimant was fully recovered as of July 21, 2008. In his finding, the WCJ stated explicitly that he was accepting Dr. Rosenfeld's opinions over that of Dr. Weiner, "as there is a conflict." The WCJ further noted that, "[i]n making this determination, the undersigned is mindful that Dr. Weiner was a treating physician, and had seen the Claimant over a period of time including after the examination by Dr. Rosenfeld . . . ." Finding of Fact No. 4, at 2.

It is abundantly clear that the WCJ considered the record as a whole and provided express reasons for resolving conflicts as he did, and accordingly, has fully complied with Section 422 (a) of the Act and issued a reasoned decision. Therefore, for all of the foregoing reasons, we affirm the order of the Board.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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**ORDER**

AND NOW, this 17th day of February 2011, the order of the Workers' Compensation Appeal Board in the above captioned matter is hereby AFFIRMED.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge