



On January 15, 2005, Claimant filed the Petition alleging that he sustained an injury to his lower back on October 13, 2004 while lifting a mig-welder in the course and scope of his employment with Fisher Tank Company (Employer). Employer denied the allegations, and the matter was assigned to the WCJ for hearings.

Claimant testified before the WCJ about the events of October 13, 2004, his pre-existing low-back problems, his medical treatment for those problems, and his inability to perform his pre-injury work duties. Claimant testified that he developed pain in his back and legs while lifting a mig-welder on October 13, 2004. (WCJ Hr'g Tr. at 13-20, August 10, 2005, R.R. at 56a-63a.) Claimant indicated that he attempted to continue working on October 13<sup>th</sup>, but could not do so and had to leave. (WCJ Hr'g Tr. at 17-18, R.R. at 60a-61a.) Claimant testified that, due to his pain and inability to walk, he saw his family physician, Raphael Kon, D.O., on October 14<sup>th</sup> and that Dr. Kon admitted Claimant to the local hospital for three days. (WCJ Hr'g Tr. at 20-22, R.R. at 63a-65a.) Claimant testified that he underwent back surgery on June 8, 2005, but that the surgery did not improve his symptoms and that he has not been back to work. (WCJ Hr'g Tr. at 26, R.R. at 69a.) Claimant testified that he has suffered from, and received treatment for, chronic low-back pain and leg pain since before 1999. (WCJ Hr'g Tr. at 32, 35, R.R. at 75a, 78a.) Claimant stated that his medical treatment for his pre-existing low-back problems has included epidural injections, a TENS unit, OxyContin, which he was taking at the time of the work incident, and other pain medications. (WCJ Hr'g Tr. at 36-38, R.R. at 79a-81a.) Claimant testified that, despite the seriousness of his pre-existing back problems, he was able to work four, ten hour days until the October 13, 2004 incident and that,

after the work incident, he has been unable to work or perform daily tasks.<sup>1</sup> (WCJ Hr’g Tr. at 11, 27-29, 45, R.R. at 54a, 70a-72a, 88a.)

Claimant also presented the deposition testimony of Dr. Kon, who has been Claimant’s family physician since April 2001. (Kon Dep. at 8, R.R. at 137a.) Dr. Kon testified that, despite suffering from chronic back pain, Claimant has been able to work as long as he treated with appropriate medications. (Kon Dep. at 9-10, R.R. at 138a-39a.) Dr. Kon stated that Claimant came to his office on October 14, 2004 with complaints of excruciating pain and neurological weakness in his legs, which Claimant related to the work incident, and that he sent Claimant to the local hospital for in-patient treatment. (Kon Dep. at 11, R.R. at 140a.) Dr. Kon testified that he saw Claimant again on November 9, 2004, at which time Claimant still experienced lower back pain and radiculopathy. (Kon Dep. at 15-17, R.R. at 144a-46a.) Dr. Kon indicated that an MRI taken after the October 13th incident revealed that Claimant had “progressive disc desiccation, progressive canal stenosis, [and] broad based progressive right paraspinal extrusion L5-S1 with right lateral bulging annulus.” (Kon Dep. at 17, R.R. at 146a; see also, Kon Ex. 3, R.R. at 202a.) Dr. Kon opined that the October 13th work incident caused a material aggravation of Claimant’s pre-existing back problems. (Kon Dep. at 18-19, R.R. at 147a-48a.) Dr. Kon testified

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<sup>1</sup> Claimant’s wife also testified before the WCJ. She corroborated Claimant’s testimony that, prior to October 13, 2004, Claimant was able to work and do things around the house, but he was now incapacitated. (WCJ Hr’g Tr. at 49-50, 55, August 10, 2005, R.R. at 92a-93a, 98a.) She testified that, when Claimant returned home on October 13, 2004, she had to help him into their home because Claimant was in so much pain. (WCJ Hr’g Tr. at 51, R.R. at 94a.) She also indicated that she may have assisted in filling out certain medical forms and may have inadvertently failed to indicate that Claimant’s current symptoms were the result of the October 13th incident. (WCJ Hr’g Tr. at 53-54, 56, R.R. at 96a-97a, 99a.)

that Claimant had decompression at L3 to S1 with laminectomies at the L4-5 level on June 8, 2005, and he opined that Claimant could not return to work at this time. (Kon Dep. at 25-27, R.R. at 154a-56a.)

On cross-examination, Dr. Kon conceded that: (1) he has treated Claimant for degenerative disc disease at the L4-5 level with bilateral radiculopathy since April 2001; (2) he treated Claimant's pre-existing low-back problems with increasing levels of pain medications, seeing Claimant approximately every four to six weeks; and (3) he would not prescribe OxyContin to patients with mild or moderate back problems. (Kon Dep. at 30-34, 53, R.R. at 159a-63a, 182a.) Dr. Kon admitted that there was nothing in Claimant's medical records regarding a specific work injury of October 13, 2004 and that the records indicated only that Claimant was suffering from severe degenerative disc disease. (Kon Dep. at 35-36, 38-39, R.R. at 164a-65a, 167a-68a.) Dr. Kon acknowledged that he later added a hand-written comment in Claimant's medical records relating Claimant's hospital stay to the work incident. (Kon Dep. at 13, 41-42, R.R. at 142a, 170a-71a.) Dr. Kon agreed that one of Claimant's hospital records indicates that: Claimant had experienced increasing back pain for two weeks; the onset of Claimant's pain was gradual; Claimant gave a history of degenerative disc disease and chronic low-back pain; and the discharge diagnosis was degenerative disc disease. (Kon Dep. at 37-39, R.R. at 166a-68a.) Dr. Kon indicated that he did not observe any cuts, bruises, or abrasions in his physical examination of Claimant. (Kon Dep. at 46, R.R. at 175a.)

Employer offered the deposition testimony of Patrick Fricchione, M.D., who performed an independent medical evaluation of Claimant on October 24, 2005.

(Fricchione Dep. at 5, R.R. at 209a.) Dr. Fricchione testified that Claimant provided him with a history of his current complaints, indicating that Claimant had heard a “pop” in his lower back when he lifted the mig-welder on October 13, 2004. (Fricchione Dep. at 5, R.R. at 209a.) As a part of his evaluation and examination, Dr. Fricchione reviewed Claimant’s medical records, from both before and after the work incident, and he noted that Claimant’s hospital records from October 14, 2004 indicate that Claimant was discharged with a diagnosis of degenerative disc disease. (Fricchione Dep. at 5-6, 8-9, R.R. at 209a-10a, 212a-13a.) Dr. Fricchione further noted that there was no specific work injury or significant trauma mentioned in the hospital records as an explanation for Claimant’s condition. (Fricchione Dep. at 7, R.R. at 211a.) Dr. Fricchione indicated that the MRI scans performed before and after the October 13th incident revealed no significant or traumatic change in Claimant’s back condition. (Fricchione Dep. at 8-9, 11, R.R. at 212a-13a, 215a.) Dr. Fricchione testified that Claimant’s past medical history of chronic low-back pain was very significant and that the use of OxyContin was for severe pain, not mild to moderate pain. (Fricchione Dep. at 13-15, R.R. at 217a-19a.) Based on his examination of Claimant and his review of Claimant’s medical records, Dr. Fricchione opined that Claimant did not sustain a disabling work injury on October 13, 2004. (Fricchione Dep. at 20-21, R.R. at 224a-25a.)

After considering the evidence presented, the WCJ found that “there is no question that the Claimant suffers from significant back problems but the evidence does not support that on October 13, 2004, a specific incident at work either caused, aggravated or exacerbated his underlying back problems.” (WCJ Decision, September 21, 2006, Findings of Fact (FOF) ¶ 10.) The WCJ noted, *inter alia*, that

Claimant's medical records indicate that the onset of Claimant's symptoms was gradual, not sudden, and that Claimant's discharge diagnosis from the local hospital was degenerative disc disease. (FOF ¶ 8.) Accordingly, the WCJ held that Claimant failed to satisfy his burden of proving a work-related injury and denied the Petition. (WCJ Decision, Conclusions of Law (COL) ¶ 2.) Claimant appealed to the Board, which remanded the matter to the WCJ to provide explanations regarding his credibility determinations.

On remand, the WCJ provided further explanation for his credibility determinations. In rejecting Dr. Kon's opinion that Claimant's disability was work-related, the WCJ pointed to Dr. Kon's testimony that: (1) he would not have prescribed chronic pain medication to Claimant unless Claimant had a significant disease; (2) Claimant had always suffered from chronic back pain, at times worse than others, with pain radiating into his extremities at times with numbness in his right and left leg associated with muscle spasms from chronic pain; (3) when he admitted Claimant to the hospital on October 14th, the history given at that time indicated that Claimant suffered from degenerative disc disease and no specific injury was mentioned; (4) the hospital records indicated that Claimant reported increased back pain for the past two weeks; and (5) his October 14th examination revealed no cuts, bruises or abrasions on Claimant's body evidencing specific trauma. (WCJ Remand Decision, October 30, 2008, FOF ¶¶ 2-3.) The WCJ also noted that, when asked why he related Claimant's disability to the work incident, Dr. Kon responded:

because, first of all, [Claimant] wants to work. He needs to work. Alright? He needs the money. He wants to take care of his family. He doesn't want to be on disability. He knows he has low back pain. He lives with it. Alright? If he could work today, he would be out there working. Alright? And, it's related to the events where moving that

welder, either being hurt and falling [sic]. From that event it really disabled him to the point that he cannot work despite all medical therapies that we tried to the max.

(FOF ¶ 2 (quoting Kon Dep. at 18-19, R.R. at 147a-48a).) The WCJ did not accept this response as an unequivocal or credible medical opinion on causation. (FOF ¶ 2.) The WCJ indicated that Dr. Kon attempted to play down Claimant's pre-existing conditions by stating or implying that Claimant's condition was not that bad, despite Claimant's need to rely on OxyContin to go to work in the morning. (FOF ¶ 4.) Additionally, the WCJ explained that he accepted Dr. Fricchione's opinion that Claimant did not suffer any significant trauma on October 13, 2004 as credible because Dr. Fricchione's testimony seemed to track Claimant's medical treatment leading up to October 14, 2004 better than the testimony of Dr. Kon. (FOF ¶ 4.) Moreover, the WCJ noted that Dr. Fricchione's opinion was supported by Claimant's MRI scans, taken before and after October 13, 2004, that reveal degeneration, but no particular evidence of injury on or about October 13, 2004. (FOF ¶¶ 4-5.)

Based on these determinations, the WCJ found that Claimant's pre-existing low-back condition was not improving, but was growing progressively worse over time to the point where he required medication to go to work. (FOF ¶ 5.) The WCJ again found that nothing significant happened on October 13, 2004 to cause a work-related injury. (FOF ¶¶ 5-6.) Accordingly, the WCJ again denied the Petition. Claimant appealed to the Board, which affirmed. Claimant now petitions this Court for review.

On appeal,<sup>2</sup> Claimant first argues that the WCJ's decision is not reasoned because the WCJ did not explain his reasons for rejecting Claimant's uncontradicted testimony and evidence that Claimant sustained a work-related injury on October 13, 2004. Essentially, Claimant asserts that, because no one disputes that *something* occurred at work or that he experienced pain on October 13, 2004, the WCJ erred in finding Claimant ineligible for benefits. We disagree.

A decision is "reasoned for purposes of section 422(a) [of the Workers' Compensation Act (Act)<sup>3</sup>] 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." Daniels v. Workers' Compensation Appeal Board (Tristate Transport), 574 Pa. 61, 76, 828 A.2d 1043, 1052 (2003). Where the WCJ has the advantage of seeing witnesses testify and assessing the demeanor of the witnesses, the "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.'" Id. at 77, 828 A.2d at 1053. However, in the absence of viewing a witness testifying such that the credibility assessment is tied to an inherently subjective determination regarding the witness's demeanor, "some articulation of actual objective basis for the credibility determination must be offered

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<sup>2</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. Allied Products and Services v. Workers' Compensation Appeal Board (Click), 823 A.2d 284, 287 n.5 (Pa. Cmwlth. 2003).

<sup>3</sup> Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 834.



for the decision to be a ‘reasoned’ one which facilitates effective appellate review.” Id. at 78, 828 A.2d at 1053.

Here, the WCJ did not doubt the testimony of Claimant and his wife that Claimant experienced pain in his lower back on October 13, 2004, implicitly crediting that testimony. (WCJ Remand Decision, FOF ¶ 1.) However, there was conflicting evidence as to whether that pain, and Claimant’s subsequent disability, was caused by Claimant’s work duties of October 13th or by Claimant’s pre-existing, severe low-back problems. After considering that conflicting evidence, the WCJ gave more weight and credibility to Employer’s evidence.<sup>4</sup> Based on those credibility determinations and findings of fact, the WCJ held that nothing specific happened on October 13th to cause, aggravate, or exacerbate Claimant’s underlying back problems and that Claimant did not sustain a work-related injury on that day. (WCJ Decision, FOF ¶ 10; WCJ Remand Decision, FOF ¶ 6.) In rendering this decision, the WCJ summarized the testimony presented, explained why he credited Employer’s evidence over the evidence of Claimant, and made the necessary findings of fact to support his determination. As such, the WCJ’s decisions adequately facilitate appellate review of the matter presently before us. Accordingly, we conclude that the WCJ’s decision was reasoned under Section 422(a) of the Act. Daniels.

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<sup>4</sup> In a workers’ compensation proceeding, the WCJ is the fact finder and is entitled to “accept or reject the testimony of any witness . . . in whole or in part.” Minicozzi v. Workers’ Compensation Appeal Board (Industrial Metal Plating, Inc.), 873 A.2d 25, 28 (Pa. Cmwlth. 2005). “The WCJ’s authority over questions of credibility, conflicting evidence and evidentiary weight is unquestioned,” and this Court is “bound by the WCJ’s credibility determinations.” Id. at 28-29.

Claimant next asserts that he is entitled to benefits because his testimony and Dr. Kon's testimony support the conclusion that the October 13, 2004 incident materially aggravated or caused a recurrence of his pre-existing low-back problems. Thus, Claimant contends that the WCJ erred in failing to grant the Petition. Again, we disagree.

“In a claim petition proceeding, the claimant bears the burden of proving that he suffers from a work-related injury that occurred in the course and scope of his employment and that the injury results in a loss of earning power.” Locher v. Workers' Compensation Appeal Board (City of Johnstown), 782 A.2d 35, 38 (Pa. Cmwlth. 2001). “[A] work-related aggravation of a pre-existing, non-work related injury or medical condition” is an injury for the purposes of Section 301(c)(1) of the Act, 77 P.S. § 411(1). Id. However, the work incident “must materially contribute to a claimant's disability in order for that incident to be classified as an ‘aggravation.’” Id. (citing SKF USA, Inc. v. Workers' Compensation Appeal Board (Smalls), 728 A.2d 385, 387 (Pa. Cmwlth. 1999)). If the claimant's disability is the result of the natural progression of the non-work related condition, the claimant is not entitled to compensation under the Act. Id. Consequently, where, as here, a claimant suffers from a pre-existing condition that affects the same body part that the claimant alleges was injured at work, the claimant has the burden of presenting unequivocal medical testimony to establish the causal relationship between a work incident and the claimant's disability. Moyer v. Workers' Compensation Appeal Board (Pocono Mountain School District), 976 A.2d 597, 599 n.3 (Pa. Cmwlth. 2009). This is because, under these circumstances, the causal connection between the work injury and the disability is not obvious. Id.

Due to Claimant's long history of low-back problems, including pain and radiculopathy, the causal connection between Claimant's current injury and disability and the work-related incident is not obvious. Thus, Claimant had to present unequivocal medical testimony to prove that causal relationship, which he attempted to do by offering Dr. Kon's testimony. However, the WCJ rejected Dr. Kon's testimony as not credible, choosing instead to believe Dr. Fricchione's testimony that Claimant's injury was not work related. This Court is bound by the WCJ's credibility determinations. Minicozzi v. Workers' Compensation Appeal Board (Industrial Metal Plating, Inc.), 873 A.2d 25, 28-29 (Pa. Cmwlth. 2005). The WCJ gave numerous reasons why he rejected Dr. Kon's opinions and found that Dr. Kon's opinion on causation was not "an unequivocal or credible medical opinion." (WCJ Remand Decision, FOF ¶ 2 (quoting Kon Dep. at 18-19, R.R. at 147a-48a).) Because the WCJ did not credit Claimant's medical testimony regarding causation, Claimant could not satisfy his burden of proving an entitlement to workers' compensation benefits under the Act. Moyer; Locher.

Finally, Claimant argues that Dr. Fricchione's testimony was equivocal because he did not accept that Claimant sustained a work-related injury on October 13, 2004, which was the accepted fact of record. According to Claimant, Dr. Fricchione's records included an "Employer's Report of Injury" from the State of New York (Injury Report), which indicated that Claimant sustained a work injury on October 13, 2004, (Injury Report, Claimant's Ex. 1), and corroborated the history given by Claimant during Dr. Fricchione's examination. Claimant maintains that, in order for Dr. Fricchione's testimony to be unequivocal, Dr. Fricchione must accept that Claimant sustained a work-related injury on October 13, 2004, and his testimony

questioning the existence of a work-related injury based on the lack of reference to such injury in Claimant's medical records is irrelevant.<sup>5</sup> (Claimant's Br. at 24.)

However, Claimant's assertions are based on *his* reading of the evidence in the record. Claimant is correct that Dr. Fricchione's records included the Injury Report, dated December 6, 2004, and Claimant's explanation for how he was injured. However, those records also included: medical records that did *not* give a work injury or specific injury as the cause of Claimant's low-back problems and described the onset of Claimant's pain as "gradual" and occurring over a two-week period; discharge records that diagnosed Claimant with degenerative disc disease; and MRIs that revealed Claimant's injuries as "*progressive* disc desiccation, *progressive* canal stenosis, [and] broad-based *progressive* right paraspinal extrusion L5-S1 with right lateral bulging annulus." (Kon Dep. at 17, R.R. at 146a; see Kon Ex. 3, R.R. at 202a (emphasis added).) Thus, contrary to Claimant's assertions, it was not uncontroverted that a "work injury" took place on October 13, 2004. Moreover, Claimant's argument that Dr. Fricchione's testimony is equivocal because it is against the established facts of the record is based on a standard not applicable here. Rather, that standard is used in cases where there has been a finding of fact by a workers' compensation judge or by agreement of the parties. See Williams v. Workers'

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<sup>5</sup> Claimant further asserts that "[t]he sheer timing of events supports a finding of a work-related injury of October 13, 2004 which led to [Claimant's] hospitalization, disability and the need for surgery." (Claimant's Br. at 27.) However, it is well-settled that the mere temporal relationship between an event and an injury is not legally sufficient to establish causation. See Moyer, 976 A.2d at 599 (stating that "[t]estimony is equivocal[, i.e., not legally sufficient,] when the medical expert merely assumes that an injury is work-related based on the temporal proximity to a work event") (citing Lewis v. Workmen's Compensation Appeal Board (Pittsburgh Board of Education), 508 Pa. 360, 498 A.2d 800 (1985)).

Compensation Appeal Board (Hahnemann University Hospital), 834 A.2d 679, 684-85 (Pa. Cmwlth. 2003) (finding the testimony of a physician and vocational expert that the claimant could not perform a job offered by the employer not competent because the testimony was contrary to the workers' compensation judge's finding in an earlier proceeding that the claimant could perform that position).

Medical evidence is unequivocal so long as the medical expert, after providing a foundation, testifies in his professional opinion that he believes or thinks the facts exist. Cerro Metal Products v. Workers' Compensation Appeal Board (Plewa), 855 A.2d 932, 937 (Pa. Cmwlth. 2004). Based on Claimant's medical records and MRIs performed before and after the October 13, 2004, Dr. Fricchione opined that Claimant's injury was not caused by anything that happened on October 13, 2004. Taken as a whole, we conclude that there is nothing vague or doubtful about Dr. Fricchione's testimony and, therefore, that testimony is unequivocal, Reinforced Molding Corporation v. Workers' Compensation Appeal Board (Haney), 717 A.2d 1096, 1098 (Pa. Cmwlth. 1998), and supports the WCJ's finding that Claimant's injuries and disability are not work related. Consequently, we conclude that the Board did not err in upholding the WCJ's denial of the Petition.

Accordingly, we affirm.

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**RENÉE COHN JUBELIRER, Judge**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Robert Zacharias,	:	
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Petitioner	:	
	:	
v.	:	No. 1637 C.D. 2009
	:	
Workers' Compensation Appeal	:	
Board (Fisher Tank Company),	:	
	:	
Respondent	:	

**ORDER**

**NOW**, March 5, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED**.

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**RENÉE COHN JUBELIRER, Judge**