

Reproduced Record (R.R.) at 3a. Claimant asserted that Decedent's death resulted from "complications developing from infections of muscles surrounding prosthesis of hip and infections of the hip joint." Fatal Claim Petition at 1; R.R. at 3a. Employer denied Claimant's allegations, pending a medical records review, and a hearing was held before the WCJ. Defendant's Answer to Claim Petition; R.R. at 6a-8a.

Both parties offered the autopsy report as a joint exhibit. Joint Exb. 1 at 1-8; R.R. at 245a-252a. The Correlative Summary contained an opinion as to Decedent's cause of death:

(continued...)

1992, (1992 arthroplasty). Decision of the WCJ (WCJ Decision), January 22, 2007, Findings of Fact (F.F.) No. 5 at 1. Decedent had filed a claim petition in 1993 and WCJ Ada Guyton determined that Decedent did suffer a work-related injury on November 14, 1991, specifically a fracture and aseptic necrosis of the right hip, and, therefore, granted Decedent's claim petition. Decision of the WCJ (1993 WCJ Decision), August 11, 1993, F.F. No. 10 at 5; R.R. at 259a.

In 2003, Decedent experienced persistent pain in his right hip prosthesis because the 1992 arthroplasty had loosened, specifically the femoral implant and the vertical cuff attachment. WCJ Decision, F.F. No. 5 at 1. On March 31, 2003, Decedent underwent a revision arthroplasty performed by Gregory Lauro, M.D. (Dr. Lauro), at Latrobe Area Hospital (2003 arthroplasty). Approximately two years after the revision surgery, Decedent experienced pain, which worsened by May 2005. WCJ Decision, F.F. No. 5 at 2. In May 2005, Dr. Lauro took an aspirant from Decedent's hip joint, which confirmed that the joint was infected with staphylococcus epidermidis; consequently, Decedent was given an intravenous antibiotic. On June 13, 2005, Decedent was admitted to Latrobe Area Hospital due to increasing pain in his right leg. Again, Decedent received antibiotics, his condition improved and he was discharged on June 18, 2005. On June 20, 2005, Decedent collapsed at home and was brought to Latrobe Area Hospital where he was pronounced dead on arrival. WCJ Decision, F.F. No. 5 at 2. An autopsy was performed at Latrobe Area Hospital by Dr. J. Conrad Bures, M.D. (Dr. Bures) on June 20, 2005, which indicated that the most likely cause of death was myocardial failure.

³ The WCJ determined that there was no Bureau documentation reflecting a hip injury on March 31, 2003. The only injury referenced in Bureau documents relates to the Claimant's work-related injury of November 14, 1991.

Immediate anatomic cause of death was not identified at autopsy. The most likely cause of death in this patient was due to cardio respiratory arrest secondary to cardiac arrhythmia. Findings that support this cause of death include biventricular cardiomegaly with moderate coronary atherosclerosis. In addition, on microscopic review of the myocardium, “wavy” fibers were identified with associated scattered inflammatory cells. “Wavy” fibers may be associated with early acute ischemic change. Postmortem evaluation of the patient’s serum revealed a Troponin T level of 12.11 ng/ml (normal Troponin T is less than .1). This finding is problematic (biochemical changes surrounding dying and death are not well documented). The patient also received cardiorespiratory resuscitation when arriving at the Emergency Room. Myocardial damage at death and/or resuscitation cannot be excluded. However, the microscopic findings of changes suggestive of acute ischemia and elevated troponin T may be compatible with myocardial damage. These findings may have led to fatal cardiac arrhythmia. (emphasis added).

Joint Exb. 1 at 2; R.R. at 246a.

In support of the fatal claim petition, Claimant submitted the deposition testimony of Cyril Wecht, M.D. (Dr. Wecht), a board-certified forensic pathologist. Deposition of Dr. Cyril Wecht, M.D. (Dr. Wecht Deposition), July 18, 2006, at 6; R.R. at 44a. Dr. Wecht reviewed the autopsy slides and discovered excessive numbers of leukocytes, which are present during the “infectious process,” were found “in most of the [Decedent’s] major body organs and tissues.” Dr. Wecht Deposition at 19, 26-27; R.R. at 57a, 64a-65a. Dr. Wecht concluded Decedent’s multi-organ system was significantly compromised by the “severe, lingering infectious process”, as shown by the autopsy slides, and therefore,

Decedent's principal cause of death was "due to septic complications of an infected hip prosthesis."⁴ Dr. Wecht Deposition at 23-26; R.R. at 61a-64a.; Dr. Wecht Medical Report (Dr. Wecht Medical Report), May 9, 2006, at 6; R.R. at 175a.

In opposition to the fatal claim petition, Employer presented the August 21, 2006, deposition testimony of Dr. Mark Duca, M.D. (Dr. Duca), who was board-certified in internal medicine. Deposition of Mark Duca, M.D. (Dr. Duca Deposition), August 21, 2006, at 8; R.R. at 200a. Dr. Duca opined that Decedent's cause of death was cardiopulmonary arrest, likely secondary to a cardiac arrhythmia and moderate coronary atherosclerosis.⁵ Dr. Duca Deposition at 19; R.R. at 211a. Dr. Duca testified that Decedent, according to medical reports, was predisposed to develop coronary artery disease and suffer cardiac arrest based on several risk factors, including hypertension, high cholesterol, morbid obesity and type II diabetes. Dr. Duca Deposition at 20; R.R. at 212a.

The WCJ issued a decision and order circulated on January 22, 2007, which concluded Claimant failed to sustain her burden of proving Decedent's death was a direct result of the work injury he sustained on November 14, 1991.⁶

⁴ Dr. Wecht conducted a records review of the Decedent's treatment following his 1991 injury through the date of his death in 2005, which included the autopsy report and slides. Dr. Wecht Deposition at 9-11; R.R. at 47a-49a; WCJ Decision, F.F. No. 5 at 2.

⁵ Dr. Duca conducted a records review of the Decedent's treatment following his 1991 work injury through his date of death, which included the autopsy report. Dr. Duca Deposition at 14-15; R.R. at 206a-207a; WCJ Decision, F.F. No. 6 at 3.

⁶ The parties agreed that the 1991 work-injury and 1992 arthroplasty were directly and causally related to the 2003 arthroplasty, which resulted in the delayed infection in Decedent's hip joint diagnosed in May 2005; however, the medical opinions differed as to Decedent's cause **(Footnote continued on next page...)**

WCJ's Decision, Conclusion of Law No. 2 at 6. Consistent with the testimony of Employer's medical witness, Dr. Duca, and the autopsy report, the WCJ found Decedent's death resulted from causes unrelated to the work-injury. WCJ Decision, F.F. Nos. 7-8 at 4-5. The WCJ accepted Dr. Duca's testimony and opinions as more credible and persuasive than Dr. Wecht in regards to Decedent's cause of death. The WCJ found:

8. Regarding the issue of whether the decedent's death was a direct result of the work injury he sustained on November 14, 1991, this Judge accepts as more credible and persuasive the testimony and opinions of the employers [sic] medical witness, Dr. Duca, over that of the claimant's medical witness, Dr. Wecht. In reviewing the evidence of record, it is clear that the cause of death listed in the death certificate, and more importantly, the cause of death set forth in the autopsy report are more supportive of Dr. Duca's opinion that the cause of death was a cardiac event rather than directly caused by the infection suffered by the decedent prior to his death. The death certificate sets forth acute myocardial infarction and coronary artery death as the likely cause of death. In the autopsy report, Dr. Bures indicates that the most likely cause of death was due to respiratory arrest secondary to cardiac arrhythmia. He then sets forth the various factors which he found to support this cause of death. There is nothing in the autopsy report which would indicate that Dr. Bures found the infection suffered by the decedent prior to his death to be a direct cause. Furthermore, although Dr. Wecht was of the opinion that the primary cause of death was the lingering infection suffered by the decedent, he acknowledged that the studies that were performed during the autopsy revealed some changes in the heart fibers which can

(continued...)

of death. Dr. Wecht Deposition at 14-21; R.R. at 52a-55a; Dr. Duca Deposition at 16, 36; R.R. at 208a, 228a.

occur when someone is beginning to have a terminal cardiac event, and that the troponin T test was slightly elevated, which can be evidence of an insipient cardiac event in someone that is developing a heart attack. As such, this Judge finds that the decedent's death was not a direct result of the work injury he sustained on November 14, 1991, but was rather a result of other causes unrelated to his work injury.

WCJ's Decision, F.F. No. 8 at 5. Claimant appealed to the Board, which affirmed the WCJ's decision.⁷

Claimant contends⁸ the Board committed an error of law when it found no error in the WCJ's reliance on the testimony of Dr. Duca and the opinions contained the autopsy report as to Decedent's cause of death. Claimant also contends that the WCJ's denial of fatal claim benefits was not supported by substantial evidence.⁹

⁷ It is undisputed that Claimant was the widow of Decedent and entitled to benefits if she met her burden of proof. WCJ's Decision, F.F. No. 4 at 6.

⁸ This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact were supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

⁹ The Claimant also requests that this case be remanded for the appointment of an impartial physician in accordance with Section 420 of the Act, 77 P.S. § 831. This Court notes that the authority of the WCJ and the Board to appoint an impartial physician is discretionary. Wingert v. Workmen's Compensation Appeal Board (Getty Refining & Marketing Co.), 468 A.2d 526 (Pa. Cmwlth. 1984). The WCJ's failure to exercise his discretion to appoint an impartial examiner does not constitute reversible error where the Judge chooses to base his decision on testimony of one of the parties' medical experts. Lamanna v. Workmen's Compensation Appeal Board (Canterbury Coal Co.), 437 A.2d 465 (Pa. Cmwlth. 1981). Moreover, the Claimant's request was waived inasmuch as the Claimant did not make such a request earlier in the proceedings before the WCJ or Board. This request is denied because there is no evidence that the Board committed a manifest abuse of discretion.

It is the claimant's burden to prove that a decedent's death was causally related to a work injury. Whelan v. Workmen's Compensation Appeal Board (F.H. Sparks Co. of Pennsylvania), 532 A.2d 65 (Pa. Cmwlth. 1987). Where there is no obvious causal connection between the employment and the decedent's death, the claimant has the burden of establishing the connection through unequivocal medical testimony. Dobash v. Workers' Compensation Appeal Board (PG Energy), 836 A.2d 1085 (Pa. Cmwlth. 2003). In light of this burden, the Claimant offered the certificate of death (Claimant's Exb. 3; R.R. at 37a), the autopsy report, and Dr. Wecht's testimony. The WCJ found Dr. Duca's testimony to be credible and persuasive, and discredited Dr. Wecht's testimony to the extent his opinion as to the cause of death contradicted Dr. Duca's opinion.

The WCJ, as the ultimate fact finder in workers' compensation cases, has exclusive province over questions of credibility and evidentiary weight, including a medical witness, in whole or in part. Greenwich Collieries v. Workmen's Compensation Appeal Board (Buck), 664 A.2d 703, 706 (Pa. Cmwlth. 1995). The WCJ, acted within his discretion, when he determined Dr. Wecht's testimony was inconsistent and incredible given that Dr. Wecht contradicted his own medical opinion when he testified that there were "wavy" fibers and elevated Troponin T enzyme levels¹⁰, which evidenced a heart attack.¹¹ Since the WCJ found Claimant's own medical testimony neither credible nor persuasive, the

¹⁰ Elevated troponin T levels may be evidence of an incipient cardiac event; however, Dr. Wecht reasoned that these elevated levels were "nonspecific" and also occur in people who are dying. Dr. Wecht Deposition at 22; R.R. at 60a; WCJ Decision, F.F. No. 5 at 1

¹¹ Despite this concession, Dr. Wecht maintained that the autopsy report revealed "no gross evidence of myocardial infarction." Dr. Wecht Deposition at 18; R.R. at 56a.

WCJ's decision must be affirmed because Claimant failed to meet her burden of proof through unequivocal, credited expert testimony.

Notwithstanding her burden, Claimant raises three arguments on appeal. First, Claimant argues that Dr. Duca's opinion is legally incompetent, therefore, the WCJ committed an error of law when he credited his testimony. Claimant contends Dr. Duca's testimony was incompetent because he primarily relied on a non-testifying doctor's opinion in the autopsy report to form his own opinion as to Decedent's cause of death.¹² Claimant contends that while a doctor may rely in part upon reports of others in rendering his or her opinions, Pistella v. Workmen's Compensation Appeal Board (Samson Buick Body Shop), 633 A.2d 230 (Pa. Cmwlth. 1993), a doctor whose testimony is based primarily upon the report of a non-testifying expert is not competent testimony. Foster v. McKeesport Hospital, 394 A.2d 1031 (Pa. Super. 1978).

Claimant points to Foster to argue that Dr. Duca's testimony was incompetent because he did not render his own independent opinion, but merely adopted the non-testifying expert's assessment in the autopsy report. In Foster, Paul Foster's (Foster) principal expert witness (Dr. McKee) had died prior to trial.

¹² Claimant also finds fault with Dr. Duca's opinion inasmuch as he was not a pathologist, like Dr. Wecht, and did not perform autopsies. Dr. Duca Deposition at 11; R.R. 203a. This fact does not render his testimony incompetent, but rather goes to the weight to be assigned to his testimony by the fact finder. Generally, a physician is competent to testify in specialized areas of medicine, even though the physician is neither a specialist in nor certified in those fields. Wood v. Workers' Compensation Appeal Board (Country Care Private Nursing), 915 A.2d 181 (Pa. Cmwlth. 2007).

Foster then offered the testimony of another doctor (Dr. Reel), who formed an opinion as to the cause of the Foster's cataracts. In reaching his opinion, Dr. Reel relied upon the pretrial report of the deceased Dr. McKee and testified that he believed Dr. McKee's diagnosis was accurate because he knew him to be a competent ophthalmologist. The trial court excluded portions of Dr. Reel's testimony that dealt with the causation of Foster's cataracts because Dr. Reel relied upon the deceased expert's report. Foster appealed. On appeal, it was held Dr. Reel's testimony was properly excluded.

Claimant erroneously relies upon Foster. Dr. Reel's causation opinion was incompetent because it was based on his opinion of the expertise of the deceased ophthalmologist, and not, as Claimant argues, because he relied on the opinions of a non-testifying witness. Foster, 394 A.2d at 1033. In Foster, Dr. Reel's testimony was excluded because he testified that Dr. McKee "had been a good doctor and that his conclusions were probably accurate" Id. Here, there was no misuse of expert testimony because Dr. Duca made no comment on the competency of Dr. Bures, nor did he comment on the competency of any physician who treated Decedent. On cross-examination Dr. Duca succinctly stated that he was not even familiar with Dr. Bures' qualifications and therefore, was not able to credit his expertise:

Q. Do you know Dr. Bures?

A. I do not.

Q. Do you know what his qualifications are?

A. I do not.

Dr. Duca Deposition at 26; R.R. at 218a. Dr. Duca's testimony is competent because he applied his own medical judgment in rendering his opinion of causation. He did not adopt Dr. Bures' opinion simply because he presupposed that Dr. Bures was competent and known to make accurate medical observations.

Claimant also argues that Dr. Duca primarily relied on a non-testifying doctor's opinion, and points to, *inter alia*, Dr. Duca's admission during cross-examination that he principally relied on the autopsy report authored by Dr. Bures in formulating his opinion. Dr. Duca Deposition at 24-25; R.R. at 216a-217a. Contrary to Claimant's position, however, Dr. Duca did not render his opinion based almost solely upon his review of the autopsy report. Brief for Petitioner at 11. A review of Dr. Duca's entire testimony and accompanying report reveals that he reviewed the autopsy report and numerous medical records concerning Decedent's treatment:

I had the opportunity to review inpatient records from Latrobe Hospital dated 2003 to 2005, some inpatient medical records from Allegheny General Hospital from 1989 and 1992, outpatient correspondence and notes from his treating physicians that include his primary care physician, Dr. Peske, P-E-S-K-E, orthopedic records from Dr. Gregory Lauro, L-A-U-R-O, orthopedic records from James McMaster, orthopedic records from Dr. Michael Weiss, W-E-I-S-S, notes from Joseph Maroon, neurologic surgeon who did lumbar surgery on Mr. Shultz, and also some additional physician notes from Drs. Hennessey, Crossett, Ayaud and Carlin, and then also some physical therapy notes.

Dr. Duca Deposition at 14-15; R.R. at 206a-207a. Dr. Duca's testimony amounted to more than a mere passing reference to Decedent's medical records. While Dr.

Duca did not review the autopsy slides (Dr. Duca Deposition at 26; R.R. at 218a) it was not wholly necessary, even according to Dr. Wecht:

The Latrobe Area Hospital final autopsy report on Mr. Shultz [Decedent] is remarkably concise and is better than the usual autopsy report I have encountered in my practice.

....

[A slide review] would be preferred, but not absolutely necessary.

Dr. Wecht Medical Report at 4; R.R. at 173a. Dr. Duca reviewed the relevant medical records and did not primarily rely on the autopsy report without any additional analysis as Claimant suggests.

Second, Claimant contends that the WCJ erroneously relied on Dr. Bures' equivocal causation opinion contained in the autopsy report. Claimant argues that Dr. Bures' opinion only offered the "most likely cause of death" and was too equivocal to establish the causal connection necessary to support a finding of fact because there were other possible causes of death. Claimant notes that "[m]edical evidence which is less than positive or which is based upon possibilities may not constitute legally competent evidence for the purpose of establishing the causal relationship." Lewis v. Workmen's Compensation Appeal Board (Pittsburgh Board of Education), 508 Pa. 360, 366, 498 A.2d 800, 802 (1985). Dr. Bures' opinion as to the "most likely cause of death" is unlike the opinion in Lewis, which was legally insufficient because the doctor opined that an injury "could have" been caused by a certain condition and made an "assumption." Id. at 367, 498 A.2d at 803. After examining the entire testimony, on the whole, it is

reasonable to conclude that Dr. Bures' opinion was not equivocal and was sufficient to establish a causal connection.

Additionally, Claimant argues the contents of the autopsy report are hearsay and the opinions should not have been relied upon in making findings of fact because they were not corroborated by competent evidence:

Hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding of the Board, if it is corroborated by any competent evidence in the record, but a finding of fact based solely on hearsay will not stand.

Gallick v. Workmen's Compensation Appeal Board (Dept. of Environmental Resources), 530 A.2d 945 (Pa. Cmwlth. 1987), *quoting* Walker v. Unemployment Compensation Board of Review, 367 A.2d 366, 370 (Pa. Cmwlth. 1976).

Claimant contends the report was offered into evidence as a joint exhibit without objection to show Decedent was dead and to establish anatomic findings, but the only corroboration offered by Employer was Dr. Duca's testimony, which was not competent. This Court disagrees. As set forth, Dr. Duca provided competent testimony and there was no error simply because it corroborated the causation opinions contained in the report. Since there was corroboration of the opinions in the autopsy report the opinions could be utilized by the WCJ in making a finding of fact. The WCJ's reliance on the opinions in the autopsy report, which was a joint exhibit, was not an error as a matter of law.

Third, Claimant contends that the WCJ's decision to deny fatal claim benefits was not supported by substantial, competent evidence and must be reversed. Again, this Court disagrees. It is not the function of this Court to reweigh evidence and substitute its judgment for that of the WCJ. Vitelli v. Workmen's Compensation Appeal Board (St. Johnsbury Trucking Co.), 630 A.2d 923 (Pa. Cmwlth. 1993). The function of this Court is to determine, upon consideration of the evidence as a whole, whether the WCJ's findings have the requisite measure of support in the record. Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Board (Skirpan), 531 Pa. 287, 612 A.2d 434 (1992). Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Bethenergy Mines, 531 Pa. at 292, 612 A.2d at 436.

Here, the WCJ's decision was supported by substantial evidence. This Court has determined that Dr. Duca's testimony was competent. Certainly, a reasonable mind might accept the competent testimony of Dr. Duca to support a conclusion regarding Decedent's cause of death. Additionally, the WCJ relied upon the causation opinion contained in the certificate of death and autopsy report, which was corroborated by Dr. Duca. Collectively, the evidence was sufficient to support the WCJ's findings.

Accordingly, this Court affirms.

BERNARD L. MCGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Alice Shultz, widow of	:
Harold Shultz, Deceased,	:
Petitioner	:
	:
v.	:
	:
Workers' Compensation	:
Appeal Board (Department	:
of Corrections),	:
Respondent	:

No. 1858 C.D. 2007

ORDER

AND NOW, this 12th day of March, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

BERNARD L. MCGINLEY, Judge