IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Percy Hogan, Jr.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2032 C.D. 2011
	:	Submitted: June 22, 2012
Workers' Compensation Appeal Board (Giant Eagle, Inc. / OK Grocery Co.),	:	
	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY SENIOR JUDGE COLINS **FILED: November 8, 2012**

Percy Hogan, Jr. (Claimant), *pro se*, petitions for review from an August 30, 2011 order of the Workers' Compensation Appeal Board (Board) that affirmed the Workers' Compensation Judge's (WCJ) September 2, 2010 denial of his Review and Penalty Petitions, dismissal as moot of Giant Eagle, Inc. / OK Grocery Co.'s (Employer) Suspension Petition, and grant of Employer's Termination Petition. We affirm.[1]

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[1] This Court's scope of review is limited to determining whether constitutional rights have been violated, whether an error of law has been committed, or whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. § 704; *City of Pittsburgh v. Workers' Compensation Appeal Board (McFarren)*, 950 A.2d 358 (Pa. Cmwlth. 2008). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept to support a conclusion." *Ryan v. Workmen's Comp. Appeal Bd. (Community Health Services)*, 550 Pa. 550, 559, 707 A.2d 1130, 1134 (1998).

Claimant was injured on January 2, 2008, when, in the course of unloading his tractor-trailer, the handle of a large pallet jack jerked to the right, lifted Claimant off his feet, lodged into his stomach and groin, and pinned him against the right side of the trailer. (September 2, 2010, WCJ Opinion and Order, Findings of Fact (WCJ Opinion and Order, F.F.) ¶¶1, 12.) Prior to his injury, Claimant was employed as a truck driver, which, in addition to driving, required him to unload merchandise, rebuild pallets overturned during transport, hook up his tractor to his trailer, and move a heavy dock plate, but did not entail any initial loading of merchandise into his trailer. (WCJ Opinion and Order, F.F. ¶1.) While working, Claimant had an average weekly wage of $1,628.33. (*Id.*)

Employer filed a Notice of Temporary Compensation Payable that described Claimant's injury information as a left groin contusion from a jack handle pinning Claimant against the trailer wall and stated Claimant's weekly compensation rate as $807.00. (January 18, 2008, Notice of Temporary Compensation Payable.) The temporary compensation payable to Claimant was later converted into compensation payable. (April 8, 2008, Notice of Compensation Payable.) On July 8, 2008, the injury information on the Notice of Compensation Payable was amended to include a lumbar strain along with the groin contusion. (July 8, 2008, Amended Notice of Compensation Payable.) The July 8, 2008, amendment was followed by a Supplemental Agreement between Claimant and Employer, which included the amended injury description and reinstated benefits as of June 30, 2008. (July 10, 2008, Supplemental Agreement for Compensation; *see also* September 25, 2008 WCJ Hearing, Transcript at 7.)

Upon returning to work following his injury, Claimant initially worked light duty, however, on August 17, 2008, Claimant returned to his pre-

injury position as a truck driver for Employer. (WCJ Opinion and Order, F.F. ¶1.) Claimant continued to work until August 25, 2008, when he experienced pain in his back while returning from a delivery with an empty trailer, significant here because the empty load causes the trailer to move around more on the road. (*Id.*) Following his experience on August 25, 2008, Claimant did not return to work again until December 14, 2008, at which time he resumed his time-of-injury position. (*Id.*)

On September 5, 2008, Employer filed a Petition for Termination or Suspension, asserting that Claimant had fully recovered from his work injury and had been able to return to work as of May 21, 2008; Claimant filed an answer denying the allegations contained in the Petition on September 18, 2008. (Workers' Compensation Appeal Board Certified Record Item (R. Item) 1, 3; *see also* March 9, 2010 WCJ Hearing Transcript (3/9/10 H.T.) at 33.) By September 26, 2008 Opinion and Order the WCJ denied Supersedeas requested by Employer and granted Claimant's Challenge Petition as of August 26, 2008. (September 26, 2008, WCJ Interlocutory Opinion and Order.)

Claimant, on April 9, 2009, filed a Penalty Petition, in which he alleged that Employer had unilaterally suspended his benefits, even though his return to work on December 14, 2008, was at less than his average weekly wage prior to injury. (R. Item 4.) Claimant also filed a Review Petition on April 9, 2009, seeking to amend the description of his work-related injury to include "chronic venous insufficiency." (R. Item 7.) On May 4, 2009, Employer responded to Claimant's Penalty Petition with a denial, in which Employer advised that Claimant had returned to work on December 14, 2008, and had refused to sign a Supplemental Agreement acknowledging such. (R. Item 6.) Employer also

responded with an answer on May 4, 2009, to Claimant's Review Petition, denying the need to amend the description of Claimant's work-related injury. (R. Item 9.)

Claimant was initially represented by counsel in the proceedings below, including depositions and hearings before the WCJ; however, as of October 27, 2009, Claimant has been acting *pro se*. In the January 12, 2010, hearing before the WCJ, Claimant advised that he sought to amend the description of his work-related injury to include "erectile dysfunction." (January 12, 2010 WCJ Hearing Transcript at 22.) The WCJ held a final hearing on March 9, 2010, and issued a decision and order on September 2, 2010 denying Claimant's Review and Penalty Petitions, dismissing as moot Employer's Suspension Petition, and granting Employer's Termination Petition. (September 2, 2010, WCJ Opinion and Order.)

Claimant timely appealed to the Board. The Board affirmed the WCJ's order, concluding that "the record reveals substantial, competent evidence supports the WCJ's Findings of Fact and the WCJ committed no errors of law." (August 30, 2011, Board Opinion and Order, at 8.) Claimant timely appealed the Board's order to this Court.

In Claimant's *pro se* brief, he identifies five issues for our review in his statement of questions involved: 1) "whether the WCJ erred in relying on [Employer's neurological expert] for the date of recovery"; 2) whether the WCJ erred in relying on the integrity and credibility of [Employer's neurological expert]"; 3) "whether a physician's incomplete and inaccurate testimony is incompetent as a matter of law"; 4) "whether the WCJ erred in failing to consider the objective findings of diagnostic tests"; and 5) "whether arbitrarily terminating benefits violates the due process clause." (Claimant's Brief at *V*.) In addition to the issues identified in his statement of questions involved, Claimant raises

multiple sub-issues throughout his brief and in his reply brief. While we are cognizant of the many challenges facing *pro se* litigants and applaud Claimant's vigorous advocacy on his own behalf, our discussion of the issues raised by Claimant will not go beyond those fairly suggested by his statement of questions involved. *See* Pa. R.A.P. 2116(a).

In Workers' Compensation cases, the WCJ is the ultimate finder of fact, with exclusive province over questions of credibility and evidentiary weight, including whether to accept or reject any testimony in whole or in part, be it the testimony of a medical expert or lay witness. *Anderson v. Workers' Compensation Appeal Board (Penn Center for Rehab)*, 15 A.3d 944, 949 (Pa. Cmwlth. 2010). When supported by substantial evidence, this Court cannot and will not disturb the WCJ's findings of fact. *Id.* However, in contrast to arguments concerning the credibility determinations of the WCJ, whether or not the testimony of a medical expert is equivocal so as to be incompetent evidence is a question of law subject to plenary review. *Campbell v. Workers' Compensation Appeal Board (Pittsburgh Post-Gazette)*, 954 A.2d 726, 730 (Pa. Cmwlth. 2008). Medical evidence is equivocal, and therefore incompetent, if, after review of a medical expert's entire testimony, it is found to be based on mere possibilities or conjecture. *Id.*

Claimant here argues that the WCJ's conclusion that Employer met its burden of proof in the Termination Petition was in error, in that the WCJ relied on the incompetent testimony of Richard Kasdan, M.D., to find that Claimant was recovered from his work-related injury as of his May 21, 2008 examination by Dr. Kasdan. (WCJ Opinion and Order, F.F. ¶19). In asserting his claim, Claimant identifies deposition testimony in which Dr. Kasdan acknowledged on cross-examination that although he was not evaluating Claimant as a treating physician,

he recommended that Claimant do back stretches and take ibuprofen prior to work, because ibuprofen would alleviate Claimant's ongoing back pain without making him sleepy. (December 15, 2008, Deposition of Dr. Kasdan (Kasdan Dep.) at 31, 32.)

In a proceeding addressing a Termination Petition, the employer bears the burden of proof to establish that the work injury has ceased. *Udvari v. Workmen's Compensation Appeal Board (USAir, Inc.)*, 550 Pa. 319, 327, 705 A.2d 1290, 1293 (1997). Where a claimant reports continued pain, the employer's burden is met when medical evidence, such as the unequivocal testimony of employer's medical expert, establishes that within a reasonable degree of medical certainty, claimant is fully recovered, can return to work without restrictions, and that no objective medical findings exist to either substantiate claimant's reports of pain or connect them to the work injury. *Id.*

Our review of the testimony as a whole demonstrates that Dr. Kasdan did not equivocate in his opinion that Claimant was recovered from the work injury at the time of Dr. Kasdan's May 21, 2008 evaluation. On direct examination, Dr. Kasdan testified that following a review of Claimant's medical records and a physical examination, he formed the opinion that Claimant "bruised or had a soft-tissue injury to his groin when struck by the jack handle and strained his back at the same time." (Kasdan Dep. at 17-19, 20, 21.) As noted by the WCJ, Dr. Kasdan specifically testified that upon examination, Claimant had:

> Full range of back flexicon, extension, and side-to-side motion. No palpable tightness or spasm to his back or neck muscles. He had no pain when I lifted each leg straight to 90 degrees, arguing against any significant back pathology. When I rotated his left hip inward, he said, that his groin hurt him. That was his only pertinent finding. There was no other weakness, sensory loss, or reflex change.

(Kasdan Dep. at 20; WCJ Opinion and Order, F.F. ¶19, ¶19a.) Dr. Kasdan concluded that Claimant had recovered from this injury as of the date of Dr. Kasdan's physical exam and that Claimant could return to work without restriction. (Kasdan Dep. at 22, 23.)

On cross-examination, Dr. Kasdan was provided with additional records from Claimant's primary care physician, which included prescriptions for physical therapy that post-dated Dr. Kasdan's conclusion that Claimant was able to return to work. (Kasdan Dep. at 33-34.) As recounted above, Dr. Kasdan also acknowledged under cross-examination that he advised Claimant to stretch and take ibuprofen for pain. (Kasdan Dep. at 31.) However, when questioned on redirect examination, Dr. Kasdan clearly stated that the additional records provided to him did not alter his opinion that Claimant was recovered and able to return to work on May 21, 2008. (Kasdan Dep. at 36-37.) *See Laird v. Workmen's Compensation Appeal Board (Michael Curran & Assocs.)*, 585 A.2d 602, 603-604 (Pa. Cmwlth. 1991); *Philadelphia College Osteopathic Medicine v. Workmen's Compensation Appeal Board (Lucas)*, 465 A.2d 132, 134-35 (Pa. Cmwlth. 1983).

Dr. Kasdan's testimony unambiguously states the basis for his opinion and without conjecture or equivocation states the type of injury Claimant experienced at work, the status of that injury, and the ability of Claimant to return to work. As stated above, the WCJ is the ultimate finder of fact, and when presented with competent evidence in the form of expert medical testimony, the WCJ may credit that testimony. Here, the WCJ found Dr. Kasdan's testimony concerning the lack of objective medical findings supporting Claimant's reports of continuing disability, recovery status, and ability to work without restrictions to be

credible. (WCJ Opinion and Order, F.F. ¶19(a).) The WCJ also found that Claimant's primary physician was not credible. (*Id.*) As Dr. Kasdan's testimony was found to be credible, and constitutes competent evidence, the Board's affirmance of the WCJ's grant of Employer's Termination Petition is supported by substantial evidence and not in error. *See Udvari*, 550 Pa. 319, 322, 705 A.2d 1290, 1291.

Similar to his argument concerning the WCJ's conclusion regarding Employer's Termination Petition, Claimant argues that the WCJ erred in relying on the incompetent testimony of Stanley Hirsch, M.D., to conclude that Claimant failed to demonstrate a causal connection between his work injury and his development of chronic venous insufficiency of the left leg. Here, Claimant draws attention to testimony by Dr. Hirsch, a vascular surgeon, where Dr. Hirsch states that he performed a physical examination of Claimant, but did not perform diagnostic tests in addition to those provided as a part of Claimant's medical records, and that he did not review the deposition testimony offered by Claimant's primary physician. (September 21, 2009, Deposition of Dr. Hirsch (Hirsch Dep.) at 36, 41.)

In *Chik-Fil-A v. Workers' Compensation Appeal Board (Mollick)*, 792 A.2d 678, 689 (Pa. Cmwlth. 2002), the employer challenged the competency of the testimony of claimant's medical expert on the basis that the opinion offered was formed without knowledge of the claimant's relevant prior medical records, treatment, or diagnostic tests, and contained an admission that had the medical history been other than that indicated by the claimant, the evaluation underlying the expert's testimony on causation would be incorrect. In his argument, Claimant

likens the testimony found incompetent in *Chik-Fil-A* with the testimony offered by Dr. Hirsch. We disagree.

In contrast to the medical expert in *Chik-Fil-A*, Dr. Hirsch did review Claimant's relevant prior medical records, including diagnostic tests, in addition to doing a June 11, 2009, physical exam and taking Claimant's history. (Hirsch Dep. at 16, 26-27.). *See Newcomer v. Workmen's Compensation Appeal Board (Ward Trucking Corp.)*, 547 Pa. 639, 647, 692 A.2d 1062, 1066 (1997). In his testimony, Dr. Hirsch described the physical examination and the lack of objective evidence of venous insufficiency, such as abnormality in Claimant's arterial or venous system in his lower legs, varicose veins, or leg measurements outside the normal range. (Hirsch Dep. at 22, 26.) Dr. Hirsch also testified that the less than one-second reflux evident in the diagnostic tests previously performed on Claimant had no "clinical significance," and clearly stated that Claimant did not have a vascular disease, either arterial or venous. (Hirsch Dep. at 23, 29.) Concerning his decision not to perform any diagnostic tests himself, Dr. Hirsch stated that "to do a test, there has to be an indication, and there was no indication for it." (Hirsch Dep. at 51.) Finally, when questioned on cross-examination about the differing diagnosis made by Claimant's vascular surgeon, Dr. Hirsch stated, "he was dead wrong." (Hirsch Dep. at 47.)

In sum, Dr. Hirsch's testimony is straightforward, lacking equivocation, and presents the type of competent evidence the WCJ is free to rely upon without error. *See Southwest Airlines v. Workers' Compensation Appeal Board (King)*, 985 A.2d 280, 286 (Pa. Cmwlth. 2009); *Casne v. Workers' Compensation Appeal Board (Stat Couriers, Inc.)*, 962 A.2d 14, 16-17 (Pa. Cmwlth. 2008). Similar to the WCJ's credibility conclusions regarding Claimant's

date of recovery, the WCJ credited Dr. Hirsch's testimony regarding the lack of causation between Claimant's alleged chronic venous insufficiency and his work-related injury, but did not credit the testimony of Claimant's primary physician causally connecting the two. (WCJ Opinion and Order, F.F. ¶18(a).) When a review petition is filed seeking to amend a notice of compensation payable to include additional injuries or disability as a result of a work-related injury, the evidentiary burden is on the claimant just as if a claim petition had been filed, which means that the claimant must demonstrate that the additional injuries alleged are causally related to the work-related injury and, in cases where the causal relationship is not obvious, must establish causation with unequivocal medical evidence. *Degraw v. Workers' Compensation Appeal Board (Redner's Warehouse Markets, Inc.)*, 926 A.2d 997, 1000 (Pa. Cmwlth. 2007). Again, as with Dr. Kasdan, Dr. Hirsch's testimony constitutes competent evidence, and because the WCJ found the testimony of Dr. Hirsch to be credible and the testimony of Claimant's primary physician to be incredible on the subject of causation, it is clear that Claimant failed to meet his burden. Accordingly, the Board's affirmance of the WCJ's denial of Claimant's Review Petition is supported by substantial evidence and not in error. *Campbell*, 954 A.2d at 732.

Claimant next argues that the WCJ erred in failing to consider the objective findings of diagnostic tests. Section 422(a) of the Workers' Compensation (Act) ensures meaningful appellate review by requiring the WCJ to issue a decision containing findings of fact and conclusions of law that are based on the evidence as a whole and state the rationale for the WCJ's decision without ambiguity. Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 834. Section 422(a) of the Act further mandates that when faced with conflicting evidence, the

WCJ include an explanation of the reasoning for rejecting or discrediting competent evidence. *Id*. Part and parcel of the reasoned decision requirement contained within the Act is the substantial evidence standard, which ensures that such relevant evidence as a reasonable mind might accept to support a conclusion underpins the WCJ's findings of fact and conclusions of law. *Ryan*, 550 Pa. at 559, 707 A.2d at 1134. If the WCJ's reasoning and credibility determinations fall short of the substantial evidence standard, and instead reveal a deliberate disregard of competent relevant evidence, this Court must and will overturn the WCJ's decision. *Leon E. Wintermeyer, Inc., v. Workers' Compensation Appeal Board (Marlowe)*, 571 Pa. 189, 203 n.12, 812 A.2d 478, 487 n.12 (2002).

In his Review Petition, Claimant sought to expand the description of his work-related injury to include both erectile dysfunction and chronic venous insufficiency. In support of expanding his injury description, Claimant's primary physician, James David Wagner, M.D., testified about Claimant's history, medical records, the tests performed by and recommendations of the vascular surgeon he referred Claimant to, Paul Collier, M.D., and his own conclusions concerning Claimant's recovery status and ability to return to work without restrictions, as well as the causal connection between Claimant's medical issues and the work-related injury. (April 7, 2009 Deposition of Dr. Wagner (Wagner Dep.).)

In the September 2, 2010 Opinion and Order, the WCJ discussed at length the medical evidence provided by Dr. Wagner, in addition to the conflicting evidence provided by Dr. Kasdan and Dr. Hirsch referenced above. (WCJ Opinion and Order, F.F. ¶¶6, 8, 10.) The WCJ also reviewed the testimony submitted by Employer of the urologist Jay Lutins, M.D., the report submitted by Claimant from cardiologist Elisa C. Taffe, M.D., medical records from Ohio Valley General

Hospital on the date of injury, and the various testing conducted and included in Claimant's medical records. (WCJ Opinion and Order, F.F. ¶¶7, 9, 13, 16.)

The record in this case does contain conflicting medical evidence and, as required by the Act, the WCJ's opinion identifies and explains the conflicts and the reasoning behind the rejection of competent evidence within the record. For example, in rejecting Dr. Wagner's opinion that the erectile dysfunction experienced by Claimant was causally related to the work injury and crediting the testimony of Dr. Lutins that no such causal connection existed, the WCJ stated, "[i]t is noted that Dr. Wagner treated the [C]laimant for erectile dysfunction in 2007, a year before the work injury." (WCJ Opinion and Order, F.F. ¶18(d).) In concluding that the chronic venous insufficiency of the left leg also lacked a causal connection to Claimant's work injury, the WCJ noted the ten to eleven month gap between the work injury and the development of the alleged condition, Dr. Wagner's finding of reflux in both legs, the inaccurate history given to Dr. Taffe, and the failure to report any swelling in the spring of 2008 when Claimant saw Dr. Lutins and Dr. Kasdan. (WCJ Opinion and Order, F.F. ¶18(a)-(c).)

In the WCJ's finding of facts, the WCJ references various diagnostic tests and physical examinations performed on Claimant and contained within his medical records. (WCJ Opinion and Order, F.F. ¶¶6, 8, 10.) In accepting and rejecting the evidence of record, the WCJ does not disregard this evidence, but instead credits specific interpretations of the diagnostic tests documented in Claimant's records and rejects other interpretations. In contrast to Claimant's arguments, we find that the WCJ's opinion is reasoned and supported by substantial evidence.

Claimant's final argument is that his benefits were arbitrarily terminated by Employer, that his Penalty Petition therefore should have been granted, and that the failure of the WCJ to do so violated his right to due process.[2]

In a penalty petition, the claimant bears the initial burden of establishing that the Act has been violated; the burden then shifts to employer to prove that the violation did not occur. *Department of Transportation v. Workers' Compensation Appeal Board (Clippinger)*, 38 A.3d 1037, 1047 (Pa. Cmwlth. 2011). Even when a violation of the Act has been proven, whether to assess penalties and the amount of penalties are within the discretion of the WCJ. *Allegis Group and Broadspire v. Workers' Compensation Appeal Board (Coughenaur)*, 7 A.3d 325, 328 (Pa. Cmwlth. 2010).

In the January 13, 2009 hearing before the WCJ, Claimant's attorney agreed that Claimant had returned to work in mid-December, and Claimant himself testified at the May 12, 2009 hearing before the WCJ that he had returned to his pre-injury position with Employer on December 14, 2008. (January 13, 2009 WCJ Hearing Transcript at 6; May 12, 2009 WCJ Hearing Transcript at 14.)

The WCJ found that Claimant "returned to work on or about December 14, 2008, and that [Employer] did not unilaterally suspend [C]laimant's benefits, but did provide a proposed Supplemental Agreement which was not

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[2] We note that Claimant was given ample opportunity and assistance by the WCJ to make his case. Following Claimant's dismissal of his attorney, the WCJ allowed Claimant time to find new counsel before proceeding *pro se*. From the transcripts of the many hearings held in this case, it is clear that the WCJ explained to Claimant the relevant portions of the Act and what evidence he needed to present to support his burden and prove his case. Additionally, the transcripts and correspondence from the WCJ demonstrate an effort to assist Claimant in his filings by differentiating between evidence and argument, and clearly articulating for Claimant what would and could be considered in the WCJ's deliberations and ultimate decision.

signed by [C]laimant," and based on this finding, the WCJ concluded that Claimant did not carry his burden of demonstrating that Employer violated the Act and that Employer had in fact not violated the Act. (WCJ Opinion and Order, F.F. ¶17, Conclusions of Law ¶1.) *See Shuster v. Workers' Compensation Appeal Board (Pennsylvania Human Relations Comm'n)*, 745 A.2d 1282, 1288 (Pa. Cmwlth. 2000). We find no abuse of discretion in the WCJ's refusal to penalize Employer where the WCJ has found that Claimant returned to work at his pre-injury position and wage, but failed to acknowledge so in a supplemental agreement.

The order of the Board is affirmed.

JAMES GARDNER COLINS, Senior Judge

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	:	
Respondent	:	

O R D E R

AND NOW, this 8th day of November, 2012, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby AFFIRMED.

JAMES GARDNER COLINS, Senior Judge