IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jose Irizarry, Petitioner	:	
v.	:	No. 2101 C.D. 2007
Workers' Compensation Appeal Board (Ames True Temper), Respondent	:	Submitted: March 7, 2008

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: May 15, 2008

Jose Irizarry (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) affirming the Workers' Compensation Judge's (WCJ) decision denying: (1) Claimant's request for an expansion of the work injury to include a herniated disc; and (2) Claimant's request for attorney's fees for an unreasonable contest.

Claimant was employed as a machine operator by Ames True Temper (Employer) on December 9, 2004, when a skid containing a stack of aluminum blanks fell and hit him behind his legs on his left ankle and pushed him to the floor. By Notice of Compensation Denial dated January 26, 2005, Employer declined to pay worker's compensation benefits to Claimant because "[a]lthough an injury took place, [Claimant] is not disabled as a result of this injury. . . ." See

Original Record (O.R.), Bureau Exhibit 1.[1] On February 23, 2005, Employer discharged Claimant for unexcused absenteeism.

On or about February 25, 2005, Claimant filed a claim petition alleging that he suffered a work-related injury in the nature of herniated discs at L4-5 and L5-S-1on December 9, 2004, while employed by Employer. Claimant alleged that his last day of work due to his injury was January 18, 2005; and that he had lost some time from work between December 9, 2004 and January 18, 2005. Therefore, Claimant sought partial disability from December 9, 2004 to January 18, 2005; and full disability from January 18, 2005, to the indefinite future. Claimant also requested penalties for violations of the Pennsylvania Workers' Compensation Act (Act).[2]

Employer filed a timely answer denying that Claimant sustained herniated discs at L4-5 and L5-S1 as the compensable injury. Employer stated that it only admitted an injury for a low back strain and sprain. Employer also denied, *inter alia*, that it violated any provisions of the Act.

Hearings before the WCJ ensued wherein Employer conceded that it had accepted the claim for the low back strain and sprain as a medical only claim. In addition, Claimant withdrew his claim for penalties and opted to proceed only on a claim for attorney's fees based on an unreasonable contest.

In support of the claim petition, Claimant testified, through an interpreter, on his own behalf and presented the deposition testimony of Dean Nachtigall, D.O., as well as documentary evidence. The documentary evidence

[1] By order of November 30, 2007, this Court granted Claimant's application to proceed in forma pauperis thereby excusing Claimant from filing a reproduced record in this matter.

[2] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§1 - 1041.4; 2501-2708.

included an independent medical examination report prepared by Thomas S. Ryscavage, M.D., which the WCJ admitted into the record only with respect to the unreasonable contest issue. See O.R., Claimant's Exhibit C-3. Claimant also submitted into evidence a packet of medical bills which the WCJ entered into the record only for the purpose of demonstrating that Claimant had outstanding medical bills and out-of-pocket expenses. See O.R., Claimant's Exhibit C-5.

In opposition to the claim petition, Employer presented the deposition testimony of Mark A. Lauer, M.D., a medical expert. Employer also presented the deposition testimony of the following fact witnesses: (1) Tammy Himes, Employer's Human Resource Manager; (2) Jim Betz, Employer's Manufacturing Supervisor; and (3) Tony Ryan, Employer's Production Leader.

Based on the evidence presented, the WCJ concluded that because Employer acknowledged that Claimant sustained a work-related injury on December 9, 2004, the issues before her for determination were limited to: (1) whether Claimant sustained a herniated disc as a result of the December 9, 2004, work-related injury; (2) whether Claimant's termination from employment on February 23, 2005, was related to his work injury; and (3) whether Employer's contest was reasonable.

In resolving these issues, the WCJ accepted Claimant's testimony as credible only to the extent that it was corroborated by contemporaneously recorded medical records or other documents. The WCJ rejected Dr. Nachtigall's opinions as not persuasive and accepted the testimony of Dr. Lauer as competent, unequivocal and persuasive in its entirety. The WCJ also accepted as competent and credible, the testimony of Employer's three fact witnesses.

Based on the foregoing, the WCJ concluded that Claimant sustained a work-related "low back strain and contusion" and a "contusion" to his thighs on December 9, 2004. The WCJ concluded that although Claimant has a herniated disc

at L4-L5, he failed to prove that the herniated disc was caused by, related to, or a result of, his work injury of December 9, 2004. Therefore, the WCJ concluded that Claimant was not entitled to payment for treatment of his herniated disc.

The WCJ concluded further that Claimant was separated from employment on February 23, 2005, for reasons unrelated to his work injury. Therefore, Claimant was not entitled to the payment of indemnity benefits following his separation from employment on February 23, 2005. The WCJ concluded that Claimant was not entitled to reimbursement for litigation costs and that Employer's contest was reasonable.

Accordingly, the WCJ denied Claimant's request for an expansion of the December 9, 2004, work-related injury to include a herniated disc, denied Claimant's request for unreasonable contest attorney fees, and approved Claimant's twenty percent counsel fee. Claimant appealed the WCJ's decision to the Board. Upon review, the Board affirmed. This appeal followed.

Initially, we note that this Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of appeal board procedures, and whether necessary findings of fact are supported by substantial evidence. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Mrs. Smith's Frozen Foods v. Workmen's Compensation Appeal Board (Clouser), 539 A.2d 11 (Pa. Cmwlth. 1988). We note further that the WCJ, as fact finder, has exclusive province over questions of credibility and evidentiary weight, and the WCJ's findings will not be disturbed when they are supported by substantial competent evidence. Northeastern Hospital v.

Workmen's Compensation Appeal Board (Turiano), 578 A.2d 83 (Pa. Cmwlth. 1990).

Herein, Claimant raises several issues for this Court's review. First, Claimant argues that the WCJ's decision is not supported by substantial evidence. Claimant contends that the WCJ erred by relying on the testimony of Employer's medical expert, Dr. Lauer, because Dr. Lauer's testimony was equivocal. Claimant questions Dr. Lauer's ability to provide an expert opinion regarding Claimant's orthopedic injury when Dr. Lauer is only a panel family practitioner and not an orthopedic specialist. Claimant argues that Dr. Lauer's opinions are equivocal because the doctor opined that Claimant only suffered a low back sprain without reviewing the actual MRI films and ignoring Claimant's ongoing complaints of radiculopathy.

The equivocality of a medical opinion is a question of law and fully reviewable by this Court. Carpenter Technology v. Workmen's Compensation Appeal Board (Wisniewski), 600 A.2d 694 (Pa. Cmwlth. 1991). Equivocality is judged upon a review of the entire testimony. Id. In conducting this review, we are mindful of our admonition in Philadelphia College of Osteopathic Medicine v. Workmen's Compensation Appeal Board (Lucas), 465 A.2d 132 (Pa. Cmwlth. 1983), that to be unequivocal, every word of medical testimony does not have to be certain, positive, and without reservation or semblance of doubt.

It is an established principle that medical testimony is unequivocal if a medical expert testifies, after providing a foundation for the testimony, that, in his or her professional opinion, he or she believes or thinks a fact exists. Shaffer v. Workmen's Compensation Appeal Board (Weis Markets), 667 A.2d 243 (Pa. Cmwlth. 1995), petition for allowance of appeal denied, 544 Pa. 618, 674 A.2d 1079 (1996). Even if a medical expert admits to uncertainty, reservation or lack of

information with respect to medical details, the testimony remains unequivocal so long as the expert expresses a belief that, in his or her professional opinion, a fact exists. Id.

Herein, the WCJ found Dr. Lauer's testimony competent, unequivocal and persuasive in its entirety. Our review of Dr. Lauer's entire testimony reveals that it is unequivocal. Dr. Lauer never waivered in his opinion that Claimant's disc herniation was not related to his work-related injury of December 9, 2004. Dr. Lauer testified that not only did he rely upon the MRI report in reaching this opinion, but he also relied upon his examinations of Claimant, the performance of the Waddell tests, and the results of further studies which included a nerve conduction study and an EMG. Dr. Lauer testified that the results of both the nerve conduction study and the EMG were normal indicating that Claimant's symptoms were not consistent with the diagnostic studies. Dr. Lauer testified further that Claimant exhibited self limiting behavior and positive Waddell signs.

Claimant's assertions that Dr. Lauer's testimony was equivocal because Dr. Lauer was not an orthopedic specialist but rather a family practitioner actually goes to the weight of his testimony not equivocality. Moreover, the fact that Dr. Lauer did not actually read the MRI films does not render Dr. Lauer's testimony equivocal. Dr. Lauer testified that he reviewed the MRI report, that he examined Claimant on more than one occasion, that he performed Waddell tests, and that he ordered further testing, specifically the aforementioned nerve conduction study and EMG which results were normal. Dr. Lauer consistently testified that Claimant's symptoms were out of proportion to what one would normally expect with the findings on the MRI; and that the results of the nerve conduction study and EMG further supported this opinion.

In short, Dr. Lauer's opinion that Claimant's disc herniation was not related to the December 9, 2004, work-related injury was unequivocal. It was well within the WCJ's province to accept Dr. Lauer's unequivocal testimony as credible. As such, we reject Claimant's assertion that the WCJ erred by relying on Dr. Lauer's testimony.

Next, Claimant argues that the WCJ erred in not admitting certain medical reports on the basis of hearsay. Claimant contends that the medical reports from Dr. Steven Groff, Dr. John Rychak, the panel orthopedic surgeon, and Dr. Thomas Ryscavage, the IME orthopedic surgeon, were admissible as credible competent evidence. Claimant argues that the reports contain statements from Claimant as to the history of his injuries and the symptoms he was experiencing from those injuries. Claimant contends that these statements were germane to his diagnosis and treatment and the evidence contained in these medical reports was consistent with the testimony of Claimant and that of his medical expert, Dr. Nachtigall. Therefore, Claimant argues, the reports should have been considered for the additional light they shed on this matter. In support of this argument, Claimant relies upon Cody v. S.K.F. Industries, Inc. v. Workmen's Compensation Appeal Board, 447 Pa. 558, 291 A.2d 722 (1972), and Thomas v. Workmen's Compensation Appeal Board (Consolidated Coal Co.), 425 A.2d 1192 (Pa. Cmwlth. 1981), for the proposition that hearsay evidence, even if objected to, may be considered for the additional light, if any, that it may shed upon a matter so along as it is not inconsistent with the testimony of the witnesses presented.

We reject Claimant's contentions. Claimant fails to point out that the decision in Cody and similar cases thereto have been expressly limited by this Court in light of our decision in Walker v. Unemployment Compensation Board of Review,

367 A.2d 366 (Pa. Cmwlth. 1976).[3] In Benson v. Workmen's Compensation Appeal Board (Haverford State Hospital), 668 A.2d 244, 248 n.8 (Pa. Cmwlth. 1995), this Court noted that to the extent that any cases, including Cody, might suggest that objected to hearsay could be used as substantive evidence in an administrative proceeding, the Walker line of cases has clearly established that the use of hearsay evidence is strictly limited to cases where there is both corroborating evidence and where no objection was made on the record. In the present case, there were objections on the record, which were sustained by the WCJ, to the admission of the medical reports prepared by Dr. Groff, Dr. Rychak, and Dr. Ryscavage.[4] See O.R., Transcript of Hearing Held August 23, 2006; Deposition of Dr. Lauer at p. 41.

In addition, it is clear under prevailing law that, where medical testimony is required, the tender of the same in hearsay form, which is not subject to a hearsay exception, is insufficient, even where there is corroboration from lay testimony. See Kensington Manufacturing Company v. Workers' Compensation Appeal Board (Walker), 780 A.2d 820 (Pa. Cmwlth. 2001); Calcara v. Workers' Compensation Appeal Board (St. Joseph Hospital), 706 A.2d 1286 (Pa. Cmwlth. 1998). As such, Claimant's reliance on Thomas is misplaced. In Thomas, the evidence in question was hospital records which were admissible into evidence as an exception to the hearsay rule under Section 422 of the Act, 77 P.S. §835.

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[3] The Walker rule, which has been applied to worker's compensation cases, is an evidentiary rule which provides that hearsay evidence, properly objected to, is not competent evidence to support a finding. Walker, 367 A.2d at 370. Hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding if it is corroborated by any competent evidence in the record, but a finding of fact based solely on hearsay will not stand. Id.

[4] As stated previously herein, the WCJ admitted the medical report prepared by Dr. Ryscavage only for purposes of the unreasonable contest issue.

Accordingly, we conclude that the WCJ did not err by not permitting the objected to medical reports at issue into evidence on the basis of hearsay.

Next, Claimant argues that the WCJ's reasons for rejecting Dr. Nachtigall's testimony were inadequate and irrational. Claimant contends that the WCJ failed to adequately explain why she rejected Dr. Nachtigall's opinions as not persuasive and that some of the reasons given by the WCJ for rejecting the doctor's opinions are irrelevant. Claimant argues that there are a multitude of reasons why the WCJ should have considered Dr. Nachtigall's opinions to be more persuasive than those of Dr. Lauer. Claimant argues further that the WCJ did not offer an adequate explanation as to why she chose the opinion of a family practitioner (Dr. Lauer) over that of a board certified orthopedist (Dr. Nachtigall). In short, Claimant contends that the WCJ did not issue a reasoned decision in accordance with Section 422(a) of the Act, 77 P.S. §834.[5]

Section 422(a) of the Act provides, in relevant part:

> Neither the board nor any of it members nor any workers' compensation judge shall be bound by the common law or statutory rules of evidence in conducting any hearing or investigation, but all findings of fact shall be based upon sufficient competent evidence to justify same. 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 workers' compensation judge shall specify the evidence upon

[5] In conjunction with this argument, Claimant again contends that the WCJ capriciously disregarded relevant credible competent evidence in failing to consider the medical reports from the Dr. Groff, Dr. Rychak and Dr. Ryscavage. However, as we have previously determined herein that the WCJ properly excluded the aforementioned medical reports on the basis of hearsay, we will not revisit this issue.

> which the workers' compensation judge relies and state the reasons for accepting it in conformity with this section. When faced with conflicting evidence, the workers' compensation judge must adequately explain the reasons for rejecting or discrediting competent evidence. Uncontroverted evidence may not be rejected for no reason or for an irrational reason; the workers' compensation judge must identify that evidence and explain adequately the reasons for its rejection. The adjudication shall provide the basis for meaningful appellate review.

77 P.S. §834. In Daniels v. Workers' Compensation Appeal Board (Tristate Transport), 574 Pa. 61, 77, 828 A.2d 1043, 1053 (2003), our Supreme Court articulated a standard by which a reasoned decision may be discerned upon appellate review. In circumstances where a fact finder's credibility assessment was not determined as a result of seeing and hearing the witness testify before them – such as in cases where deposition testimony is considered, such as the instant one - some articulation of the actual objective basis for the credibility determination must be offered for the decision to be a "reasoned" one which facilitates effective appellate review. Daniels, 574 Pa. at 77-78, 828 A.2d at 1053.

Upon review of the WCJ's decision in the instant matter, we disagree with Claimant that the decision is not reasoned. The WCJ thoroughly and adequately explained the reasons why she rejected Dr. Nachtigall's testimony as not persuasive. The fact that Claimant disagrees with those reasons and believes that there are a multitude of reasons why the WCJ should have considered Dr. Nachtigall's opinions to be more persuasive than those of Dr. Lauer does not make the WCJ's decision inadequate and unreasoned. Moreover, it is well settled that the WCJ, as the ultimate fact finder in workers' compensation cases, has exclusive province over questions of credibility and evidentiary weight, and is free to accept

or reject the testimony of any witness, including a medical witness, in whole or in part. General Electric Co. v. Workmen's Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), petition for allowance of appeal denied, 529 Pa. 626, 600 A.2d 541 (1991).

In explaining why she found Dr. Nachtigall's opinions unpersuasive, the WCJ pointed out, *inter alia*, that: (1) Dr. Nachtigall offered little or no explanation for his opinion on causation; (2) unlike Dr. Lauer, Dr. Nachtigall seemingly relied solely upon MRI findings and Claimant's subjective complaints without correlating them to Claimant's history and objective physical examination findings; and (3) Dr. Nachtigall failed to adequately explain the inconsistencies cited by Dr. Lauer including the lack of a positive result on the EMG and nerve conduction studies. Therefore, we conclude that the WCJ properly articulated an actual objective basis for her credibility determination with regard to Dr. Nachtigall, thereby rendering a reasoned decision which facilitates effective appellate review in accordance with Section 422(a) of the Act and Daniels.

Next, Claimant argues that Employer unreasonably contested the claim petition and the petition for review. Claimant contends that Employer violated the Act by filing the NCD late, thereby forcing Claimant to file a claim petition to shift the burden to Claimant in a situation where there was an obvious work-related injury which should have been accepted by way of a notice of compensation payable. Claimant argues that the WCJ erred by not awarding penalties and attorney fees for an unreasonable contest.

Initially, we note that Claimant withdrew, before the WCJ, his claim for penalties and opted to proceed only on a claim for attorney's fees based on an unreasonable contest. See O.R., Transcript of Hearing Held August 23, 2006 at p. 6-7. Therefore, Claimant's contention that he should have been awarded penalties

based on a violation of the Act by Employer is waived. We now turn to Claimant's contention that Employer's contest was unreasonable.

Pursuant to Section 440 of the Act, a denial of attorney's fees is proper only when the employer has a reasonable basis for contesting the claim. White v. Workmen's Compensation Appeal Board (Gateway Coal Company), 520 A.2d 555 (Pa. Cmwlth. 1987). Whether or not an employer's contest has a reasonable basis is a question of law. Id. In determining the reasonableness of an employer's contest, the primary question is whether or not the contest was brought to resolve a genuinely disputed issue or merely for purposes of harassment. Id.

Herein, Employer accepted the claim for the low back strain and sprain as a medical only claim. However, Employer contested Claimant's contention that he had suffered a herniated disc on December 9, 2004, when he was injured at work. Employer's contest of the exact nature of Claimant's work-related injury was based on: (1) Dr. Lauer's conclusion on December 18, 2004, that Claimant had suffered a contusion to his lower back and legs on December 9, 2004; and (2) Dr. Lauer's subsequent conclusion on January 18, 2005, that although Claimant's MRI was not entirely normal, the MRI findings did not explain Claimant's ongoing symptoms and such symptoms were not related to his work-related injury on December 9, 2004. In addition, Dr. Lauer released Claimant from his care without restrictions on January 18, 2005.

It is undisputed that Dr. Lauer rendered these opinions prior to the filing of the claim petition. Therefore, Employer had a basis to dispute Claimant's claim for benefits based on a herniated disc at the time Claimant filed the claim petition. Accordingly, the WCJ properly determined that Employer's contest was reasonable as it was not brought merely for the purposes of harassment but to

resolve a genuinely disputed issue as to whether Claimant's herniated disc was related to the December 9, 2004, work-related injury.

Next, Claimant argues that he should have been awarded worker's compensation benefits and litigation costs. Claimant argues that because he was separated from employment through no fault of his own and because the WCJ did not find that he was fully recovered from the work-related injury as diagnosed by Dr. Lauer as a contusion/ low back strain/sprain, he is entitled to indemnity benefits pursuant to Vista International Hotel v. Workmen's Compensation Appeal Board (Daniels), 560 Pa. 12, 742 A.2d 649 (1999), because he continues to suffer ongoing work-related disability.

In Vista, 560 Pa. at 29, 742 A.2d at 658, our Supreme Court held as follows:

> [A] claimant who has established partial disability due to a work-related injury should generally continue to receive partial disability benefits by virtue of his loss in earnings capacity, even though subsequently discharged from employment, because the loss in earnings capacity remains extant. Whether the same claimant may receive total disability benefits depends upon whether the employer can demonstrate that suitable work was available or would have been available but for circumstances which merit allocation of the consequences of the discharge to the claimant, such as claimant's lack of good faith.

Thus, a claimant who is partially disabled and then discharged by his or her employer for cause is still entitled to receive partial disability benefits; however, that same claimant who is discharged for cause may not receive total disability benefits.

Herein, the WCJ found, based on the credible testimony of Employer's fact witness, Tammy Himes, that Claimant was separated from his

employment with Employer for reasons unrelated to his December 9, 2004, work injury. As found by the WCJ, when Employer was notified by Dr. Lauer on or about January 18, 2005, that Claimant's ongoing complaints were not related to his work injury and that Claimant was released without any restrictions relating to his work-related injury, Ms. Himes contacted Claimant to discuss Dr. Lauer's report. At that time, Ms. Himes informed Claimant that Employer did not make light duty work available to employees who have non-work related restrictions. Therefore, Ms. Himes provided Claimant with the necessary paperwork to apply for Family Medical Leave Act (FMLA) benefits. Ms. Himes asked Claimant to return the FMLA paperwork on February 10, 2005; however, Claimant did not return the paperwork as instructed and in fact, never returned the FMLA paperwork.

Ms. Himes testified further that Employer also had an attendance control policy which provides that an employee can be fired for unexcused absences. Ms. Himes testified that if Claimant had returned the FMLA paperwork by February 23, 2005, his absences from work would have been considered "excused" and he would not have been terminated from employment. Ms. Himes testified that Claimant brought in a disability certificate from Ortho Surgeons on February 23, 2005, indicating that he was released to light duty on February 16, 2005. Ms. Himes testified that she sent Claimant a letter dated February 23, 2005, referencing the disability certificate. Ms. Himes also informed Claimant that he had been discharged by Dr. Lauer and had been provided with FMLA paperwork with instructions to return it no later than February 10, 2005. Ms. Himes testified that she advised Claimant in the February 23, 2005, letter that his failure to return the FMLA paperwork "disqualified" his absences as covered under the FMLA and that he was terminated effective February 23, 2005, for unexcused absenteeism.

As the WCJ found Ms. Himes testimony credible, we must reject Claimant's assertion that he was not separated from employment due to any fault on his part. To the contrary, Claimant's separation from employment was entirely due to his fault by his failure to comply with Employer's instructions resulting in his absence from work being deemed unexcused. Thus, the WCJ's finding that Claimant was separated from employment on February 23, 2005, for reasons unrelated to his work injury will not be disturbed on appeal. Therefore, we reject Claimant's assertion that he was discharged through no fault of his own.

However, we do agree with Claimant's assertion that the WCJ did not specifically find that he had fully recovered from his December 9, 2004, work-related injury as accepted by Employer.[6] The WCJ concluded, *inter alia*, based on the evidence presented, that: (1) Claimant sustained a work-related "low back strain and contusion" and a "contusion" to his thighs on December 9, 2004; (2) Claimant was separated from employment on February 23, 2005, for reasons unrelated to his work injury; and (3) Claimant was not entitled to payment of indemnity benefits following his separation from employment on February 23, 2005.

The problem with the foregoing is that the WCJ did not make a specific finding as to what degree Claimant was disabled as a result of his work-related injury between the date of the injury on December 9, 2004, and the date of

[6] We note that the evidence found credible by the WCJ would sufficiently support a finding that Claimant had fully recovered from his work-related injury as accepted by Employer as of January 18, 2005. Dr. Lauer specifically testified that as of January 18, 2005, he did not have any restrictions on Claimant as they related to the December 9, 2004 work-related injury and discharged Claimant from his care. See C.R., Deposition of Dr. Lauer at p. 18-19.

his discharge on February 23, 2005. In his claim petition, Claimant alleged that he was partially disabled between the time period December 9, 2004, and January 18, 2005, and totally disabled thereafter. However, the WCJ failed to make a specific finding as to whether Claimant was partially disabled or even suffered a loss of earnings as a result of the December 9, 2004, work-related injury. Employer indicated that it was only accepting the injury as a medical claim only and it is unclear from the record if Claimant suffered a loss of earnings.

While it appears from the evidence accepted as credible by the WCJ and the Employer's acceptance of that injury that Claimant was partially disabled as a result of his work-related injury between December 9, 2004, and January 18, 2005, this Court is not the fact finder. As such, we must remand this matter for specific findings as to what degree Claimant was disabled as a result of his December 9, 2004, work-related injury and for what time period. If the WCJ determines that Claimant was partially disabled and had not fully recovered on or before his date of discharge, Claimant would be entitled to an award of partial indemnity benefits pursuant to our Supreme Court's decision in Vista.

Accordingly, the Board's order affirming the WCJ's decision is reversed and this matter is remanded for additional findings in accordance with this opinion.

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JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jose Irizarry, Petitioner	:	
v.	:	No. 2101 C.D. 2007
Workers' Compensation Appeal Board (Ames True Temper), Respondent	:	

O R D E R

AND NOW, this 15th day of May, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is reversed and this matter is remanded for additional findings in accordance with the foregoing opinion.

Jurisdiction relinquished.

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JAMES R. KELLEY, Senior Judge