IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Connie Carter,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 489 C.D. 2010
	:	
Workers' Compensation Appeal Board (Southern York County School District),	:	No. 490 C.D. 2010
	:	Submitted: July 16, 2010
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: September 9, 2010**

Connie Carter (Claimant) petitions for review of the order of the Workers' Compensation Appeal Board (Board), affirming the Workers' Compensation Judge's (WCJ) order denying Claimant's two Claim Petitions and a Penalty Petition. Claimant contends that the Board erred in affirming the WCJ's decision because the WCJ arbitrarily and capriciously disregarded evidence, rendered her own medical opinion rather than relying on the medical testimony presented by Claimant's physician, and erroneously denied her Penalty Petition.

On February 28, 2008, Claimant filed a Claim Petition alleging that, on April 18, 2007, Claimant sustained an injury to her neck, left shoulder, and left elbow in the course and scope of her employment for Southern York County School District (Employer). In the Claim Petition, Claimant requested the payment of medical bills and the payment of benefits for lost wages beginning April 20, 2007. Claimant also filed a Penalty Petition on February 28, 2008, alleging that she reported the injury to Employer on April 19, 2007, but Employer did not deny her claim until August 9, 2007, in violation of Section 406.1(a) of the Workers' Compensation Act (Act)[1] and 34 Pa. Code § 121.13.[2] On March 7, 2008, Employer filed an answer to the Claim Petition denying that Claimant suffered a work-related injury which caused a disability and a separate answer to the Penalty Petition denying that it violated the terms of the Act.

On July 17, 2008, Claimant filed a second Claim Petition alleging that she sustained work-related injuries to her right arm and shoulder in an incident on

---

[1] Act of June 2, 1915, P.L. 736, as amended, added by Section 3 of the Act of February 8, 1972, P.L. 25, 77 P.S. § 717.1(a). Section 406.1(a) provides that an employer must promptly investigate a reported injury and commence payment of compensation due under an agreement upon the compensation payable, a notice of compensation payable, or a notice of temporary compensation payable. Id. The first payment must be made within 21 days after the employer has notice of the employee's disability. Id.

[2] The regulation at 34 Pa. Code § 121.13 provides:

> If compensation is controverted, a Notice of Workers' Compensation Denial, Form LIBC-496, shall be sent to the employee or dependent and filed with the Bureau, fully stating the grounds upon which the right to compensation is controverted, within 21 days after notice or knowledge to the employer of the employee's disability or death.

January 22, 2008 and seeking the payment of medical bills and the payment of ongoing benefits for lost wages from January 22, 2008 forward. Employer filed an answer on July 25, 2008, specifically denying that the injuries that Claimant described in the Claim Petition were work related. Hearings were held by the WCJ on April 22, 2008, June 18, 2008, September 9, 2008, and November 19, 2008.

Claimant's testimony regarding the first incident is summarized as follows. Claimant worked for Employer as a custodian and, on April 18, 2007, she was stacking metal folding chairs on a storage rack and one fell from a rack above her, hitting her on the left arm. (Hr'g Tr. at 8-10, September 9, 2008, R.R. at 13a-15a.) As the chair fell, she "jerked away" so the chair would not hit her head and, in so doing, she "pulled" her neck. (Hr'g Tr. at 9, R.R. at 14a.) She did not tell anyone about the incident that day, went home after work, and put ice on her left arm and neck. (Hr'g Tr. at 11, R.R. at 16a.) The next day, April 19, 2007, she told her supervisor, Edward Sweitzer, about the incident and filled out an accident report. (Hr'g Tr. at 11-12, R.R. at 16a-17a.) On April 20, 2007, she went to see Dr. David Chalker, Employer's physician, who told Claimant to put ice on the injuries and take Tylenol for the pain. (Hr'g Tr. at 13, R.R. at 18a.) Claimant participated in physical therapy until July 2007, when the therapist discontinued it because her condition was not improving. (Hr'g Tr. at 14, R.R. at 19a.) Claimant then sought treatment with her family doctor, Dr. Kurz. (Hr'g Tr. at 14, R.R. at 19a.) Claimant's shoulder first began to hurt at the end of July 2007. (Hr'g Tr. at 15, R.R. at 20a.) Dr. Kurz sent Claimant to Orthopedic and Spine Specialists (OSS) in September 2007, where Dr. Nicholas Pandelidis examined x-rays and told her to continue treatment with ice and Tylenol. (Hr'g Tr. at 15-16, R.R. at 20a-21a.) Claimant subsequently saw William

Ulmer, Jr., D.O., who took an MRI of her shoulder. (Hr'g Tr. at 16, R.R. at 21a.) She still had neck, arm, and shoulder pain from the first injury at the time of the hearing. (Hr'g Tr. at 18, R.R. at 23a.) Claimant continued to work while she was receiving treatment on her left arm and shoulder. (Hr'g Tr. at 18, R.R. at 23a.)

Claimant's testimony regarding the second incident is summarized as follows. On January 22, 2008, Claimant tripped over a box and fell at work, suffering an injury to her neck, right arm, and elbow. (Hr'g Tr. at 21-22, R.R. at 26a-27a.) Claimant told Mr. Sweitzer about the incident and filled out an accident report. (Hr'g Tr. at 21, R.R. at 26a.) She went to see Dr. Chalker for this injury, he took x-rays, and told Claimant to take "pain pills" for the injury. (Hr'g Tr. at 22, R.R. at 27a.) Dr. Chalker then referred her to Dr. Kurz, who again sent Claimant to OSS. (Hr'g Tr. at 22-23, R.R. at 27a-28a.) At OSS, Dr. Ulmer treated Claimant's right-side injury. (Hr'g Tr. at 23, R.R. at 28a.) Claimant did not work after January 22, 2008, because she was not supposed to use either her right or left arm, and Employer did not have any positions available within these restrictions. (Hr'g Tr. at 24, R.R. at 29a.) Employer terminated Claimant in March 2008. (Hr'g Tr. at 24, R.R. at 29a.)

On cross-examination, Employer's attorney asked Claimant if she had called Mr. Sweitzer on January 15, 2008, to inform him that she would not be able to come into work after an incident where she slipped on some ice and fell in a Wal-Mart parking lot. (Hr'g Tr. at 27, R.R. at 32a.) Claimant testified that she could not remember. (Hr'g Tr. at 27, R.R. at 32a.) When pressed by her own attorney later, Claimant stated, if she had taken any days off after that particular fall, she must have contacted Mr. Sweitzer. (Hr'g Tr. at 37, R.R. at 42a.) Claimant stated that she might

have taken off January 16-17, 2008. (Hr'g Tr. at 37, R.R. at 42a.) Claimant also testified that the only injury she sustained in her Wal-Mart fall was a skinned knee. (Hr'g Tr. at 36, R.R. at 41a.) Claimant testified that she could not remember if she had discussed anything with Mr. Sweitzer about her right or left arms at the time she informed him about the Wal-Mart fall, but she did not think that she had. (Hr'g Tr. at 37, R.R. at 42a.)

Claimant also presented the deposition testimony of Dr. Ulmer in support of her Claim Petitions. Dr. Ulmer testified that when Claimant first came to see him on November 5, 2007, she had had an incident at work and "since that time had been having pain in the shoulder and neck." (Ulmer Dep. at 5-6, October 30, 2008, R.R. at 51a-52a.) Based on the history obtained from Claimant and his review of MRI studies, he diagnosed Claimant with a left rotator cuff tear and recommended that she undergo surgery to repair it. (Ulmer Dep. at 7, R.R. at 53a.) At that time, he stated that her restrictions were to not use her left arm for work activities. (Ulmer Dep. at 8, R.R. at 54a.) Dr. Ulmer also testified that Claimant was unable to have surgery to repair her left rotator cuff because of her diabetes. (Ulmer Dep. at 9, R.R. at 55a.) Dr. Ulmer saw Claimant again in March 2008 after the alleged January 22, 2008 work injury to her right shoulder. (Ulmer Dep. at 9, R.R. at 55a.) Prior to the March 2008 examination, Claimant had seen another doctor in Dr. Ulmer's practice, Dr. Rutter, about bilateral knee pain related to her fall at Wal-Mart, and Dr. Ulmer reviewed the medical history from this examination. (Ulmer Dep. at 10, R.R. at 56a.) Dr. Ulmer stated that there was no indication in the history from Dr. Rutter that Claimant had any shoulder pain from the Wal-Mart fall. (Ulmer Dep. at 10-11, R.R. at 56a-57a.) However, Dr. Ulmer indicated that Claimant never mentioned the Wal-

Mart incident to him. (Ulmer Dep. at 11, R.R. at 57a.) Dr. Ulmer's diagnosis as to the January 22, 2008 injury was a right rotator cuff tear, while her left shoulder condition remained unchanged from previous examinations. (Ulmer Dep. at 12, R.R. at 58a.) Dr. Ulmer stated that, following an April 3, 2008 visit, he put Claimant on light-duty restrictions for her right shoulder, which consisted of lifting no more than 10-15 pounds. (Ulmer Dep. at 12-13, R.R. at 58a-59a.) Dr. Ulmer testified that, based on the history provided by Claimant about her complaints, her medical records and the history he reviewed, both shoulder injuries were work-related injuries. (Ulmer Dep. at 14-15, R.R. at 60a-61a.) On cross-examination, Dr. Ulmer agreed that his opinions and testimony were based on the assumption that Claimant gave him a truthful history. (Ulmer Dr. at 18, R.R. at 64a.)

In opposition to the Claim Petitions, Employer offered the testimony of Mr. Sweitzer, head custodian for Employer and Claimant's supervisor. (Hr'g Tr. at 31, R.R. at 36a.) His testimony is summarized as follows. On January 15, 2008, Claimant called him to report that she had fallen in the Wal-Mart parking lot, had hurt her shoulder and knee in the fall, and would not be coming into work that day. (Hr'g Tr. at 34, R.R. at 39a.) On January 16, 2008, he received a call from Claimant saying that her right arm and back still hurt from the fall. (Hr'g Tr. at 34, R.R. at 39a.) He then received a call from Claimant on January 17, 2008, during which Claimant said that her chest hurt and she could not lift her arm. (Hr'g Tr. at 34-35, R.R. at 39a-40a.) Claimant returned to work on January 18, 2008. (Hr'g Tr. at 35, R.R. at 40a.) Mr. Sweitzer stated that when he asked Claimant how she was feeling, she responded that her shoulder and back still hurt. (Hr'g Tr. at 35, R.R. at 40a.) He then testified that, on January 22, 2008, Claimant approached him during her shift and told him that

she had tripped and fallen in a classroom while working. (Hr'g Tr. at 31-32, R.R. at 36a-37a.) He stated that Claimant did not appear to be in any distress after the incident and worked three more hours, finishing her shift. (Hr'g Tr. at 32-33, R.R. at 37a-38a.) Claimant called Mr. Sweitzer the next day to tell him that she was too stiff to come into work and that she was going to see a doctor. (Hr'g Tr. at 33, R.R. at 38a.) Claimant never returned to work after that day. (Hr'g Tr. at 33, R.R. at 38a.)

Employer also presented the deposition of Sanjiv Naidu, M.D., Ph.D, who testified that he examined Claimant on July 10, 2008, for injuries to both shoulders. (Naidu Dep. at 5, September 11, 2008.) Regarding the injury to the left shoulder, Dr. Naidu's examination and review of MRI films revealed "AC joint arthritis, Type II acromion, and chronic cystic changes over the shoulder at the ball of the shoulder . . . consistent with degenerative changes." (Naidu Dep. at 6.) There was also a "full thickness rotator cuff tear," which was a degenerative tear. (Naidu Dep. at 6.) Dr. Naidu testified that Claimant suffered bruising of the left shoulder from the work-related injury, completely separate from the degenerative tear, and she had completely recovered from this bruising at the time of his examination. (Naidu Dep. at 7-8.) Regarding the injury of January 2008, Dr. Naidu's diagnosis was that Claimant had "right shoulder preexisting AC joint arthritis and rotator cuff tear which is also degenerative that was exacerbated by the fall." (Naidu Dep. at 9.) Dr. Naidu also testified that, at the time of his examination, Claimant had not recovered from the exacerbation and she was limited to lifting up to 20 pounds. (Naidu Dep. at 9-10.) There is no mention in Dr. Naidu's testimony or in his medical report of Claimant's fall at Wal-Mart or that Dr. Naidu was ever made aware of that fall.

At a subsequent hearing, Claimant and Employer introduced, as a joint exhibit, the accident report from Claimant's fall in the Wal-Mart parking lot (Joint Exhibit). (Hr'g Tr. at 4-6, November 19, 2008, R.R. at 45a-47a.) The Joint Exhibit indicated that Claimant fell at approximately 1:00 a.m. on January 15, 2008, and it gave a short description of the incident provided by Claimant to Wal-Mart on the day of her fall as follows:

> Walked outside on parking lot, went to my car, there was ice between the cars. I stepped to put my stuff in my car and there was ice, my left leg went out to the side and I went down on my right knee. Twisted my back when I was on my right knee.

(Joint Exhibit, R.R. at 70a.) The Joint Exhibit was offered by the parties for two different reasons. Employer introduced the Joint Exhibit for the purpose of impeachment, while Claimant introduced the Joint Exhibit for its content. (Hr'g Tr. at 4-5, November 19, 2008, R.R. at 45a-47a.)

In her decision, the WCJ found Claimant's testimony competent, but not credible. (WCJ Decision, April 27, 2009, Findings of Fact ¶ 13.) In contrast, the WCJ accepted Mr. Sweitzer's testimony as competent and credible. (FOF ¶ 16.) The WCJ also found the testimony of Dr. Ulmer and Dr. Naidu incompetent and not credible because Claimant chose not to reveal to either physician "the fact that *there was a 2-month delay in the onset of her shoulder symptoms*" from the first incident. (FOF ¶¶ 14-15; WCJ Decision at 11 (emphasis in original).) Without this information, the WCJ stated that Dr. Ulmer and Dr. Naidu were working from an incomplete medical history. (WCJ Decision at 11.) Additionally, the WCJ stated that Claimant "chose to hold back [from Dr. Ulmer and Dr. Naidu] the fact that she had a non-work-related fall at Wal-Mart that involved some of the same areas of the body

that she was claiming were injured at work." (WCJ Decision at 11.) As a result of Claimant's decision to withhold information, the WCJ held that Dr. Ulmer's and Dr. Naidu's diagnoses and opinions were based on an incomplete medical history and were rejected as not legally competent. (WCJ Decision at 11.) Accordingly, in a decision circulated April 27, 2009, the WCJ denied both of Claimant's Claim Petitions because Claimant failed to meet her burden of proving that she sustained disabling, work-related injuries on April 18, 2007 and January 22, 2008. (WCJ Decision at 12-13.) The WCJ denied the Penalty Petition because Claimant failed to prevail on any litigated issue. Claimant appealed to the Board, which affirmed the WCJ's determination. Claimant now petitions this Court for review of the Board's decision.[3]

Claimant makes several arguments as to why the WCJ erred. First, Claimant argues that the WCJ's decision was arbitrary and capricious because she rejected Claimant's testimony as not credible. Second, Claimant contends that the decision was arbitrary and capricious because the WCJ engaged in a "patchwork of findings" by failing to consider the Joint Exhibit and by using parts of Claimant's testimony to find Dr. Ulmer and Dr. Naidu not competent or credible. Third, Claimant argues that the WCJ rendered her own medical opinion in place of the opinions of Dr. Ulmer and

[3] This Court's scope of review is "limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated." DeGraw v. Workers' Compensation Appeal Board (Redner's Warehouse Mkts., Inc.), 926 A.2d 997, 999 n.2 (Pa. Cmwlth. 2007). Substantial evidence is defined as "such relevant evidence as a reasonable person might accept as adequate to support a conclusion." Capuano v Workers' Compensation Appeal Board (Boeing Helicopter Co.), 724 A.2d 407, 409 (Pa. Cmwlth. 1999).

Dr. Naidu. Finally, Claimant contends that the WCJ erred in denying the Penalty Petition for the April 2007 injury.

Claimant first argues that the WCJ's decision was arbitrary and capricious because she failed to find Claimant's testimony credible. We disagree.

"In a workers' compensation proceeding, the WCJ is the ultimate finder of fact." Ausburn v. Workers' Compensation Appeal Board (Merrell & Garaguso), 698 A.2d 1356, 1358 (Pa. Cmwlth. 1997). The WCJ must resolve conflicts in testimony and weigh evidence. Alpo Petfoods, Inc. v. Workers' Compensation Appeal Board (Neff), 663 A.2d 293, 295 (Pa. Cmwlth. 1995). This Court's role in a workers' compensation case is to determine if the WCJ's findings have sufficient support in the record, not to review witness credibility or reweigh evidence. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 329, 652 A.2d 797, 800 (1995). When a witness testifies before a WCJ and the WCJ can assess her demeanor, a simple conclusion of whether the witness is found credible is sufficient to render the credibility decision reasoned. Daniels v. Workers' Compensation Appeal Board (Tristate Transport), 574 Pa. 61, 77, 828 A.2d 1043, 1052-53 (2003). Here, Claimant testified in person before the WCJ, so the WCJ needs to provide no further explanation of her credibility determination of Claimant's testimony than she did. Id. Moreover, the WCJ found Claimant's testimony not credible because: parts of her testimony contradicted the credible testimony of Mr. Sweitzer; she did not tell Dr. Ulmer and Dr. Naidu about the fall at Wal-Mart; and she failed to tell the physicians about the two-month delay in her shoulder pain from the first injury. (WCJ Decision at 11, April 27, 2009.) Further, when first asked

about the fall at Wal-Mart during the hearing, Claimant could not recall ever discussing the fall with Mr. Sweitzer, even though she later admitted missing work as a result of it. (Hr'g Tr. at 27, September 9, 2008, R.R. at 32a.) These reasons provide substantial evidence for the WCJ to find Claimant's testimony not credible. Therefore, the WCJ's finding that Claimant's testimony was not credible must remain undisturbed by this Court.

Claimant next argues that the WCJ's decision was arbitrary and capricious because the WCJ failed to consider the Joint Exhibit. Although admitted into the record, (Hr'g Tr. at 4-6, November 19, 2008, R.R. at 45a-47a), the WCJ's decision did not discuss the Joint Exhibit, and did not list it with the other exhibits admitted on the cover page of the Decision. It appears that Claimant introduced the Joint Exhibit to show that she had not listed in the accident report any shoulder or arm injuries resulting from the January 15, 2008 fall at Wal-Mart. However, because the WCJ found Claimant's testimony not credible and accepted the contrary testimony of Mr. Sweitzer regarding the extent of Claimant's injuries sustained in the fall, the Joint Exhibit does not appear to have much probative value. Furthermore, when giving a description of the incident at the hearing, Claimant specifically testified that she did not have any other injuries besides a skinned knee. (Hr'g Tr. at 36-37, September 9, 2008, R.R. at 41a-42a.) This testimony directly contradicts her statement on the Joint Exhibit, in which she indicates that she twisted her back. Employer introduced the Joint Exhibit specifically to expose such contradictions between the form and Claimant's testimony. Additionally, Mr. Sweitzer testified that over the course of three days after the Wal-Mart fall, Claimant called and told him that she could not come into work because she had injured her shoulder, right arm, and chest in the fall.

Because the WCJ did not find Claimant's testimony credible, she likely did not or would not have found the Joint Exhibit, which Claimant prepared, credible.

Moreover, even if the Joint Exhibit had been considered, the WCJ still found the testimony of Dr. Ulmer and Dr. Naidu not competent or credible and, therefore, Claimant would still not have provided any competent, credible medical evidence to meet her burden of proof here.[4] In Thissen v. Workers' Compensation Appeal Board (Tri-Boro Concrete, Inc.), 842 A.2d 536, 538-39 (Pa. Cmwlth. 2004), this Court found that the failure of a WCJ to consider the claimant's deposition and the deposition of the claimant's witness was harmless error where the claimant not only failed to prove he sustained a work-related injury, as he alleged that the depositions would prove, but also did not meet his burden by proving that he was disabled due to the injury. Further, this Court found the claimant's argument that consideration of the depositions might have influenced the WCJ's credibility determinations with respect to the medical witnesses unpersuasive because the WCJ chose not to credit the medical witnesses since they had not examined the claimant's medical history.

[4] In a workers' compensation case, the claimant has the burden of proving all of the elements which are necessary to grant benefits. Berks County Intermediate Unit v. Workmen's Compensation Appeal Board (Rucker), 631 A.2d 801, 803-04 (Pa. Cmwlth. 1993). The claimant must not only establish an injury, she must also prove that the injury caused her to be disabled. Where there is no obvious causal connection between an injury and the alleged work-related cause, that cause must be established by unequivocal medical evidence. Id. Where it is not obvious that a work-related incident would have caused the injury, a claimant must prove the causation through unequivocal medical evidence. Id. Here, given the two-month delay in the development of the symptoms in Claimant's left-shoulder and the fall at Wal-Mart that occurred just days before the alleged January 22, 2008 work injury, which involved, based on Mr. Sweitzer's credible testimony, Claimant's right shoulder, the cause of Claimant's shoulder injuries is not obvious. Therefore, Claimant would have to present unequivocal, competent, and credible medical testimony to satisfy her burden of proof.

Id. at 539 n.1. In the present case, the Joint Exhibit provided a history and result of the Wal-Mart fall, i.e., it involved Claimant's knee and back, which the WCJ rejected when she credited Mr. Sweitzer's testimony. Indeed, even Claimant's testimony that she only had a skinned knee from her fall conflicts with the description provided by the Joint Exhibit. The Joint Exhibit would do nothing to correct the reasons why the WCJ found the testimony of Dr. Ulmer and Dr. Naidu not competent or credible, namely the incomplete medical history. Because Claimant could not have met her burden of proof without the testimony of Dr. Ulmer or Dr. Naidu, the WCJ's failure to address the Joint Exhibit is harmless error. Thissen, 842 A.2d at 539.

Claimant also argues that the WCJ abused her discretion and acted with capricious disregard by engaging in a "patchwork of findings" because she used parts of Claimant's testimony to discredit witnesses even though she found Claimant's testimony not credible overall. (Claimant's Br. at 9.) Specifically, Claimant argues that, despite finding Claimant's testimony not credible, the WCJ used Claimant's testimony that there was a two-month delay in the onset of shoulder pain from the first incident to find the testimony of Dr. Ulmer and Dr. Naidu not competent or credible. Claimant cites Giant Eagle, Inc. v. Workmen's Compensation Appeal Board (Bensy), 651 A.2d 212 (Pa. Cmwlth. 1994), for the proposition that a WCJ commits an abuse of discretion when she makes credibility determinations in a patchwork fashion by taking bits and pieces of testimony as credible. "To be capricious, the [WCJ's] decision must not be merely an error in judgment of course, but 'the adjudication must be so flagrant as to be repugnant to a man of reasonable intelligence.'" Id. at 217 (quoting Bullock v. Building Maintenance, Inc., 297 A.2d 520, 522 (Pa. Cmwlth. 1972)). In Giant Eagle, this Court found that the WCJ:

> . . . inexplicably states that he finds the direct testimony of all [the medical] witnesses as being not believable and not credible and picks and chooses as to the credibility of parts of testimony of other witnesses with no rhyme or reason. The [workers' compensation judge] found that he does believe the cross-examination testimony of Dr. Durning and Dr. Merkow, despite the fact that there are very few relevant facts contained in these portions of the testimony. In essence, we can make no sense of the patchwork of credibility findings as to portions of each individual's testimony. . . . We believe the findings are so capricious that no reasonable person could have made such findings of fact or conclusions of law.

Giant Eagle, 651 A.2d at 218.

Here, the WCJ's findings and determinations are not based on an arbitrary patchwork of findings as in Giant Eagle. In this case, the WCJ did not find Claimant's testimony credible, but she did use the time period given by Claimant for the onset of shoulder pain to determine whether Dr. Ulmer and Dr. Naidu had an accurate history of Claimant's left shoulder injury. Claimant gave this history of the injury in her testimony and the WCJ noted in her decision that, if this delay in the onset of symptoms took place as claimed, then Claimant should have notified Dr. Ulmer and Dr. Naidu of that delay so they could correctly diagnose Claimant. The WCJ did not engage in a "patchwork of findings"; the WCJ merely found that, if Claimant was to meet her burden, she needed to give her physicians an accurate and full history of the injury, consistent with her testimony. Concluding that Claimant failed to do so, the WCJ found that Dr. Ulmer and Dr. Naidu did not have an accurate medical history of the work injury and, therefore, their opinions were not competent or credible to make a diagnosis. Chik-Fil-A v. Workers' Compensation Appeal Board (Mollick), 792 A.2d 678, 689 (Pa. Cmwlth. 2002) (stating that a physician's testimony regarding the cause of the claimant's injuries was incompetent as a matter

of law because the physician's testimony was based on an incomplete medical history).

Moreover, Claimant did not give Dr. Ulmer and Dr. Naidu an accurate history related to her right shoulder and arm injuries. Claimant did not inform either doctor about her fall at Wal-Mart a few days prior to the second work incident. The WCJ, finding Mr. Sweitzer's testimony credible, found that the Wal-Mart fall "involved some of the same areas of the body that she was claiming were injured at work." (WCJ Decision at 11.) Therefore, because Claimant did not make the Wal-Mart incident known to Dr. Ulmer and Dr. Naidu, they were working from an incomplete medical history for the January 2008 injury as well, and their determinations were incompetent.

Claimant next argues that the WCJ rendered her own medical opinion in place of the medical opinion of Dr. Ulmer and Dr. Naidu. Claimant contends that the WCJ first rendered a medical opinion by finding the testimony of Dr. Ulmer and Dr. Naidu not competent or credible, and then rendered a medical opinion again when she stated that "there was a 2-month delay in the onset of her shoulder symptoms" in her decision. (WCJ Decision at 11.) In support of her argument Claimant cites Liveringhouse v. Workers' Compensation Appeal Board (Adecco), 970 A.2d 508 (Pa. Cmwlth. 2009), in which this Court vacated the Board's order affirming a WCJ's decision and remanded the case because the WCJ made independent medical determinations that there was "no clinical corroboration for the EMG findings," that a physician's opinion was not credible because of his reliance on the claimant's

subjective complaints of pain, and that a medical witness was credible when his opinion was contrary to Pennsylvania law. Id. at 512-16.

In the present case, the WCJ made no medical determinations. In finding the testimony of Dr. Ulmer and Dr. Naidu not competent, the WCJ was not making an independent medical determination as in Liveringhouse, but was following precedent and rejecting medical determinations that were not based on a complete and accurate medical history. Chik-Fil-A, 792 A.2d at 689. Here, the WCJ could not credit the testimony of Dr. Ulmer and Dr. Naidu because their opinions were based on an incomplete medical history that could have skewed their medical determinations regarding the cause or extent of Claimant's injuries.

Claimant also cites Signorini v. Workmen's Compensation Appeal Board (United Parcel Service), 664 A.2d 672 (Pa. Cmwlth. 1995), in support of her argument. In Signorini, the referee[5] found an expert medical witness's testimony to be equivocal when, on direct examination, he testified that the claimant could lift 10-20 pounds, but on cross-examination testified that the claimant was unable to return to work. Id. at 676. This Court found that these statements did not make the medical witness's testimony equivocal because they were answers to two separate questions and were not inconsistent, as the claimant would have to lift up to 70 pounds as part of his job. Id. at 676-77. Claimant argues that Signorini applies in the present case as well. However, here the WCJ did not find the testimony of Dr. Ulmer or Dr. Naidu

[5] "WCJs were previously known as 'referees.'" City of Philadelphia v. Workers' Compensation Appeal Board (Andrews), 948 A.2d 221, 231 n.5 (Pa. Cmwlth. 2008).

equivocal; rather, she found it incompetent because they did not have a complete medical history. Therefore, Signorini does not apply.

Furthermore, the WCJ's statement that "*there was a 2-month delay in the onset of [Claimant's] shoulder symptoms*" cannot be seen as rendering her own medical opinion. (WCJ Decision at 11 (emphasis in the original).) The WCJ is merely restating what Claimant stated as fact during the hearing. Claimant contends that this statement "is a medical determination to be made by a physician who understands that some symptoms may not appear immediately after an incident." (Claimant's Br. at 23.) The WCJ was not using this statement to discredit Claimant's symptoms or make any kind of medical finding; rather, the WCJ was simply restating Claimant's testimony regarding the timeframe in which her left shoulder symptoms began. The WCJ then used this information to find the testimony of Dr. Ulmer and Dr. Naidu incompetent and not credible, not because she did not believe that such symptoms could take two months to develop, but because that information was not made known to Dr. Ulmer and Dr. Naidu prior to their examinations, preventing them from making the very medical determination that Claimant purports the WCJ improperly made. Thus, we reject Claimant's assertion that the WCJ made an independent medical determination.

Finally, Claimant contends that the WCJ erred in denying the Penalty Petition for the April 2007 injury. Claimant notified Employer of her injury on April 19, 2007. Employer did not send the Notice of Denial to Claimant until August 9, 2007, which violates the 21-day deadline imposed under 34 Pa. Code § 121.13. Section

435(d)(i) of the Act, 77 P.S. § 991(d)(i),[6] allows for an employer to be penalized for noncompliance with the Act. However, a penalty can only be assessed when the claimant prevails and is awarded benefits. Jaskiewicz v. Workmen's Compensation Appeal Board (James D. Morrisey, Inc.), 651 A.2d 623, 626 (Pa. Cmwlth. 1994). Furthermore, imposition of penalties is within the discretion of the WCJ. Id. Because Claimant did not prevail on her Claim Petition for the April 2007 injury, the WCJ did not err in denying the Penalty Petition under Section 435(d)(i) of the Act.

For the foregoing reasons, we affirm the Board's order.

RENÉE COHN JUBELIRER, Judge

[6] Section 435 was added by Section 3 of the Act of February 8, 1972, P.L. 25, as amended. Section 435(d)(i) provides, in relevant part:

> Employers and insurers may be penalized a sum not exceeding ten per centum of the amount awarded and interest accrued and payable: Provided, however, That such penalty may be increased to fifty per centum in cases of unreasonable or excessive delays.

77 P.S. § 991(d)(i).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Connie Carter,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 489 C.D. 2010
	:	
Workers' Compensation Appeal Board (Southern York County School District),	:	No. 490 C.D. 2010
	:	
	:	
Respondent	:	

O R D E R

NOW, September 9, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge