IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Maylin Band, Petitioner	:	
v.	:	No. 489 C.D. 2011
Workers' Compensation Appeal Board (Visteon Ford), Respondent	:	Submitted: June 24, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: September 15, 2011

Maylin Band (Claimant) petitions for review of the order of the Workers' Compensation Appeal Board (Board) affirming the decision of a workers' compensation judge (WCJ) granting the termination petition of Visteon Ford (Employer), and denying Claimant's penalty petition, pursuant to the provisions of the Pennsylvania Workers' Compensation Act (Act).[1] We affirm.

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

On February 10, 1988, Claimant sustained a low back injury in the nature of a lumbar disc herniation at the L4-5 and L5-S1 levels while in the course and scope of his employment with Employer. Claimant's compensation benefits for this work-related injury were suspended upon his return to work for Employer on January 25, 1993.

Subsequently, Claimant filed a claim petition seeking the payment of medical expenses as of July 22, 2005, based upon the recurrence of his work-related injury. By a decision dated July 25, 2006, the claim petition was granted by a WCJ based upon a stipulation between the parties that Claimant's work-related injury had recurred, and that Employer would pay all reasonable and necessary medical expenses attendant to the recurrence of Claimant's injury from July 22, 2005, forward.

On March 3, 2008, Employer requested utilization review regarding the reasonableness and necessity of treatment provided to Claimant by Robert Ackert, D.C., a doctor licensed to practice chiropractic medicine. On May 16, 2008, a Utilization Review (UR) Determination was issued which indicated that the chiropractic care provided to Claimant by Dr. Ackert was reasonable and necessary for the period of February 3, 2007 to April 7, 2008. However, the determination also indicated that all pre-scheduled chiropractic care provided to Claimant by Dr. Ackert after April 7, 2008, was not reasonable and necessary.

On April 9, 2008, Employer filed a petition to terminate Claimant's benefits in which it was alleged that he had fully recovered from his work-related injury. On April 21, 2008, Claimant filed an answer to the petition in which he denied that he had fully recovered from his work-related injury.

On April 22, 2008, Claimant filed a petition for penalties in which he alleged that Employer had refused to pay the medical bills for treatment by Dr. Ackert pursuant to the WCJ's decision of July 26, 2005, and the UR Determination of May 16, 2008. On April 30, 2009, Employer filed an answer to the petition denying all of the material allegations raised therein. Hearings on the petitions ensued before a WCJ.

In support of the termination petition, Employer presented the deposition testimony of Alan Cooper, M.D., a physician board certified in orthopedic surgery. In opposition to the penalty petition, Employer presented the affidavit of Isabelle Stevenson, Employer's claim representative. In opposition to the termination petition, and in support of the penalty petition, Claimant testified and presented the deposition testimony of Dr. Ackert.

On March 16, 2010, the WCJ issued a decision disposing of the petitions in which he made the following relevant findings of fact. With respect to Dr. Ackert's testimony, he stated that he saw Claimant on: April 14, 17, 21, 25 and 28, 2008; May 1, 5, 8, 14, 19, 23, 26 and 30, 2008; June 2, 5, 11, 12, 16, 19, 23, 26 and 30, 2008; July 2, 7, 11, 16, 21, 24 and 30, 2008; August 4, 8, 11, 14, 18, 22 and 28, 2008; September 5, 8 and 29, 2008; October 8, 16, 27 and 31, 2008; November 12, 14 and 19, 2008; December 3, 15, 17 and 29, 2008; January 7, 14, 19, 26 and 28, 2009; February 2, 9, 11, 23, 25 and 27, 2009; March 2, 4, 11, 18 and 25, 2009; April 6, 8, 22, 24 and 27, 2009; May 6, 11, 13, 20 and 25, 2009; June 3, 5, 22 and 29, 2009; and July 13, 15, 27 and 29, 2009. WCJ Decision at 5. Dr. Ackert stated that he did not know whether the bills for Claimant's treatment since August 28, 2008, had been submitted to Employer's insurance carrier. Id. at 6.

With respect to Dr. Cooper's testimony, he stated that on physical examination: Claimant demonstrated limited lumbar range of motion on flexion and extension due to discomfort; rotation was good; there was no tenderness over the lumbosacral spine; deep tendon reflexes were symmetric; pulses were good; overall strength of both legs was 5/5; straight leg raising was negative bilaterally in the seated position and positive on the right in the supine position; hip motion was full; Claimant reported decreased sensation to the lateral aspect of the right leg and foot, which would not cause functional impairment in and of itself; and there was no atrophy or muscle weakness indicative of ongoing herniation. WCJ Decision at 7.

With respect to his review of Claimant's medical records, Dr. Cooper testified that a 2005 lumbar MRI scan showed bulging at the L4-5 and L5-S1 levels, and some degenerative disc disease at L5-S1, but that there was no gross narrowing of the spinal cord. WCJ Decision at 7. Dr. Cooper also stated that Dr. Ackert's records indicated that he had been treating Claimant consistently over a 19 year period, and that Claimant's visual analog score, which measures the response to treatment, was essentially unchanged throughout that course of care. Id.

Based upon Claimant's history, the results of his examination, and his review of Claimant's medical records, Dr. Cooper opined: Claimant was fully recovered from his February 10, 1988 work injury as of February 10, 2009; he did not require any further medical treatment related to that injury; and he was capable of returning to work at a heavy duty manual labor type of job. WCJ Decision at 7. In addition, Dr. Cooper stated that the treatment provided to Claimant by Dr. Ackert in 2009 was not causally related to Claimant's 1988 work injury. Id. Dr.

Cooper also stated that, for the purposes of his opinion in this case, he accepted that Claimant's February 10, 1988, compensable work injury was a disc herniation at L4-5 and L5-S1. Id. at 8.

The WCJ also made the following credibility determinations:

> 13. Concerning the period of time from April 7, 2008 to February 10, 2009, the testimonies of Claimant and Dr. Ackert that Claimant continued to treat with Dr. Ackert on a strictly as needed basis and not on a pre-scheduled basis is found to be neither credible nor persuasive and is rejected as fact in this case. In this regard, the undersigned notes that for all practical intents and purposes, after the [UR] Determination, Claimant continued to arrange essentially the same number and frequency of visits with Dr. Ackert in the same manner as he had before the [UR] Determination; that the undersigned had the opportunity to observe Claimant testify and assess his demeanor; and that Dr. Ackert acknowledged that the care and treatment he provided to Claimant after the [UR] Determination was essentially the same care and treatment he provided to Claimant before the [UR] Determination, and there are chiropractic guidelines regarding the treatment of chronic versus acute conditions, but he does not know what they are.
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> 14. Concerning the period of time on and after April 10, 2009, the testimony of Dr. Alan Cooper that as of February 10, 2009, Claimant was fully recovered from his February 10, 1988, work injury and no longer required any further medical treatment related to that injury is found to be credible and persuasive and is accepted as fact in this case. To the extent that the testimonies of Claimant and Dr. Robert Ackert are inconsistent with the testimony Dr. Cooper, the testimonies of Claimant and Dr. Ackert are specifically rejected as neither credible nor persuasive. In this regard, the undersigned notes that the testimony of Dr. Cooper was clear and unequivocal, logical and coherent, and supported by the results of his examination of Claimant and review of Claimant's medical records; that the

> undersigned had an opportunity to observe Claimant testify and assess his demeanor; and that Claimant's accepted work injury was a back injury, and Dr. Cooper's credentials as a Board Certified orthopedic surgeon are superior to those of Dr. Ackert's in terms of the diagnosis and treatment of the type of work injury sustained by Claimant. Furthermore, in this regard, the undersigned notes that Dr. Ackert testified there are chiropractic guidelines regarding the treatment of chronic versus acute conditions but acknowledged he does not know what they are.

WCJ Decision at 8.

Based on the foregoing, the WCJ concluded: (1) Employer sustained its burden of proving that all disability related to Claimant's work-related injury had ceased as of February 10, 2009; (2) Claimant's compensation benefits should be terminated as of February 10, 2009; and (3) Claimant failed to sustain his burden of proving that Employer violated the Act in the processing or payment of his compensation benefits. WCJ Decision at 9. As a result, the WCJ issued an order granting Employer's termination petition, terminating Claimant's compensation benefits, and denying Claimant's penalty petition. Id.

On March 22, 2010, Claimant appealed the WCJ's decision to the Board. On March 14, 2011, the Board issued an opinion and order affirming the WCJ's decision. Claimant then filed the instant petition for review.[2]

[2] 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). It is well settled that where, as here, the Board has not taken additional evidence, the WCJ is the ultimate finder of fact. Hayden v. Workmen's Compensation Appeal Board (Wheeling Pittsburgh Steel Corp.), 479 A.2d 631 (Pa. Cmwlth. 1984). As the fact finder, the WCJ is entitled 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

(Continued....)

In this appeal, Claimant contends that the Board erred in affirming the WCJ's decision because the WCJ erred in granting Employer's termination petition and in denying his penalty petition. More specifically, Claimant contends: (1) Dr. Cooper's testimony does not constitute substantial evidence, and it is not competent, to support the termination of his compensation benefits; and (2) Employer violated the Act by failing to pay for medical treatment approved under the UR Determination.

Claimant first contends that Dr. Cooper's testimony does not constitute substantial evidence, and it is not competent, to support the termination of his compensation benefits. Claimant asserts that the testimony does not constitute substantial evidence because Dr. Cooper acknowledged Claimant's continuing decrease in sensation, numbness, and disc bulge, and because he did not review an EMG and a 2009 MRI. Claimant also submits that the testimony is not competent because although Dr. Cooper accepted that Claimant's February 10, 1988, compensable work injury was a disc herniation at L4-5 and L5-S1, he believed that Claimant had only suffered a lumbar strain and sprain from which he should have recovered in six months after the injury.

In a termination proceeding, the employer bears the burden of proving that all of the claimant's work-related disability has ceased. AT&T v. Workers' Compensation Appeal Board (Hernandez), 707 A.2d 649 (Pa. Cmwlth. 1998). An

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(Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), petition for allowance of appeal denied, 529 Pa. 626, 600 A.2d 541 (1991). Thus, questions of credibility and the resolution of conflicting testimony are within the exclusive province of the fact finder. American Refrigerator Equipment Company v. Workmen's Compensation Appeal Board (Jakel), 377 A.2d 1007 (Pa. Cmwlth. 1977). As a result, determinations as to witness credibility and evidentiary weight are within the exclusive province of the WCJ and are not subject to appellate review. Hayden.

employer can meet this burden by presenting unequivocal, competent medical testimony that the claimant has fully recovered from a work-related injury. Jordan v. Workmen's Compensation Appeal Board (Consolidated Electrical Distributors), 550 Pa. 232, 704 A.2d 1063 (1997). A termination of benefits is proper where the medical evidence shows that the claimant has fully recovered from his work injury and can return to work without restrictions, and that there are no objective medical findings that either substantiate alleged symptoms or connect them to the work-related injury. Folmer v. Workers' Compensation Appeal Board (Swift Transportation), 958 A.2d 1137 (Pa. Cmwlth. 2008), petition for allowance of appeal denied, 601 Pa. 690, 971 A.2d 493 (2009).

A medical expert's opinion is not rendered incompetent unless it is solely based on inaccurate or false information. Casne v. Workers' Compensation Appeal Board (STAT Couriers, Inc.), 962 A.2d 14 (Pa. Cmwlth. 2008). The medical expert's opinion must be viewed as a whole, and even inaccurate information will not render his opinion incompetent unless it is dependent on those inaccuracies. Id. The failure of a medical expert to review all records and test results in arriving at his opinion does not render testimony incompetent, but only goes to its weight and credibility. Crucible Steel, Inc. v. Workmen's Compensation Appeal Board (Morris), 442 A.2d 1199 (Pa. Cmwlth. 1982), disavowed on other grounds by Bucyrus-Erie Co. v. Workmen's Compensation Appeal Board (Holland), 457 A.2d 1031 (Pa. Cmwlth. 1983). In addition, "[a] medical professional is not required to believe a condition existed; he is merely required to accept as true the adjudicated fact that a condition existed and opine as to whether the condition continues to exist at the time of the examination."

Folmer, 958 A.2d at 1147 (citation omitted). Whether a medical expert's opinion is competent is a question of law subject to our plenary review. Casne.

Moreover, "substantial evidence" is such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Waldameer Park, Inc. v. Workers' Compensation Appeal Board (Morrison), 819 A.2d 164 (Pa. Cmwlth. 2003); Hoffmaster v. Workers' Compensation Appeal Board (Senco Products, Inc.), 721 A.2d 1152 (Pa. Cmwlth. 1998). In performing a substantial evidence analysis, the evidence must be viewed in a light most favorable to the party who prevailed before the WCJ. Waldameer Park, Inc.; Hoffmaster; American Refrigerator Equipment Co. In a substantial evidence analysis where both parties present evidence, it is immaterial that there is evidence in the record supporting a factual finding contrary to that made by the WCJ; rather, the pertinent inquiry is whether there is any evidence which supports the WCJ's factual finding. Waldameer Park, Inc.; Hoffmaster.

When viewed in a light most favorable to Employer, although Dr. Cooper acknowledged Claimant's continuing decrease in sensation, numbness, and disc bulge, Dr. Cooper clearly and unequivocally testified that Claimant had fully recovered from his work-related injury, and that there were no objective findings which indicated that Claimant was disabled as a result of any of the foregoing conditions. See N.T. 7/23/09 at 13-14, 15-16, 16-17, 20, 21, 47-48.[3] Moreover, he

[3] More specifically, Dr. Cooper testified, in pertinent part, as follows:

> Q. Continuing on with your findings, was he tender over the lumbosacral spine?
>
> A. Yes. He had good rotation to the left and right side with his LS spine. He did not have tenderness over the lumbosacral region of his back.

(Continued....)

When I did a straight leg raise test on the left, he just had some buttock pain. When I did the right, he also had very similar type of buttock pain.

Q. Would you consider that a positive straight leg raise test?

A. No. I would say it was a negative.

Q. Okay.

A. His deep tendon reflexes were symmetric. He had good pulses; his vascular flow to his legs. His overall strength in both legs was five over five, which is equal and full strength.

He did have some areas of decreased sensation over the lateral aspect of his right foot. His leg lines were equal….

* * *

Q. And that finding of decreased sensation standing alone, would that be something that would functionally impair an individual?

A. No.

Q. Now, this man has a 21-plus year history of a disc herniation. Were there any findings of atrophy?

A. No.

Q. Would you expect to have that if he continued to be symptomatic from the disc herniation?

A. I think if you truly had a chronic nerve impingement, or what they say like a herniation where the nerve is undergoing degenerative changes and so forth, you would probably see some atrophy in the region of the nerve distribution. That's quite possible, yes.

Q. What other kinds of findings would you expect to find?

A. I think it would be weakness, muscle weakness in the lower extremity.

* * *

Q. Doctor, can an individual recover from a disc herniation?

A. Yes. There are a number of people who are completely asymptomatic walking around with these type of MRI findings.

(Continued....)

* * *

Q. Okay. Did you have an opinion within a reasonable degree of medical certainty whether as of February 10, 2009 [Claimant] was fully recovered from the injury he sustained on February 10, 1988?

A. Yes. I felt at the time of my IME that clearly he had reached not only maximal medical improvement, but that he was essentially was completely recovered from the work related injury.

* * *

Q. So, there would be no functional –

A. Right. There's no functional reason why somebody couldn't work a heavy duty manual labor type of position with a sensation decrease.

Q. Have all of the opinions that you offered been within a reasonable degree of medical certainty?

A. Yes, they have.

Q. Finally, do you have an opinion within a reasonable degree of medical certainty whether [Claimant] required any ongoing treatment?

A. Well, yes. My strong feeling is that he at this time frame for sure does not need any further treatment pertaining to his lower back.

* * *

Q. Doctor, I do have a couple follow up.

For purposes of rendering your opinion, did you accept that [a WCJ] had found that this compensable injury was a disc herniation at L4-5 and L5-S1?

A. Yes.

Q. And, obviously, for purposes of conducting your examination and rendering your opinion, you did so as a board certified and recertified orthopedic surgeon. Correct?

A. Yes.

Q. Your were asked about the neurologic manifestations of a disc herniation and the fact that loss of sensation would be the first

(Continued....)

specifically acknowledged that in rendering his opinion, within a reasonable degree of medical certainty, that he "[a]ccept[ed] that [a WCJ] had found that [Claimant's] compensable injury was a disc herniation at L4-5 and L5-S1…." Id. at 47. Thus, although Dr. Cooper acknowledged Claimant's continuing decrease in sensation, numbness, and disc bulge, and although he did not review an EMG and a 2009 MRI, his testimony constituted substantial, competent evidence to support the termination of benefits in this case. See Fulmer, 958 A.2d at 1148 ("In sum, [the medical experts] acknowledged each and every one of Claimant's adjudicated injures, and each testified that Claimant was fully recovered. They also demonstrated that Claimant's alleged symptoms lacked any objective basis. This testimony, which was credited by the WCJ, was fully competent to meet Employer's burden of proof for a termination of benefits.").

Finally, Claimant contends that Employer violated the Act by failing to pay for reasonable and necessary medical treatment approved under the UR Determination. In particular, Claimant asserts that there is not substantial evidence

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neurologic element to appear.

Do you recall that line of questioning?

A. Yes.

Q. After 21 years, if someone was to manifest all of the neurologic complications of a disc herniation, would you expect that to appear after 21 years?

A. Yes. I would expect more severe nerve damage possibly related to, you know, depending on what nerve root, but the affects of that from a muscle standpoint.

Q. You wouldn't think that it takes 21 years for the sensation to develop, and then we are going to see the other ones sometime further down the line. Correct?

A. That is correct. Yes.

supporting the WCJ's determination that his appointments with Dr. Ackert after April 7, 2008, were prescheduled and not covered by the UR Determination.

With respect to the imposition of penalties under Section 435 of the Act[4], this Court has previously noted:

> In order for the imposition of penalties to be appropriate, a violation of the Act or of the rules and regulations issued pursuant to the Act must appear on the record. However, the imposition of a penalty is at the discretion of the WCJ. Thus, the imposition of a penalty is not required even if a violation of the Act is apparent on the record. Because the assessment of penalties, as well as the amount of penalties imposed, is discretionary, we will not overturn a penalty on appeal absent an abuse of discretion by the WCJ.

Farance v. Workers' Compensation Appeal Board (Marino Brothers, Inc.), 774 A.2d 785, 789 (Pa. Cmwlth.), petition for allowance of appeal denied, 567 Pa. 748, 788 A.2d 380 (2001) (citations omitted). An abuse of discretion is not merely an error of judgment but occurs, inter alia, when the law is misapplied in reaching a

[4] Section 435 of the Act, added by Act of February 8, 1972, P.L. 25, provides, in pertinent part:

> (d) The department, the board, or any court which may hear any proceedings brought under this act shall have the power to impose penalties as provided herein for violations of the provisions of this act or such rules and regulations or rules of procedure:
>
> (i) 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).

conclusion. Candito v. Workers' Compensation Appeal Board (City of Philadelphia), 785 A.2d 1106 (Pa. Cmwlth. 2001).

Thus, a claimant who files a penalty petition must first meet his initial burden of proof that a violation of the Act has occurred; the burden then shifts to the employer to prove that the violation has not occurred. City of Philadelphia v. Workers' Compensation Appeal Board (Andrews), 948 A.2d 221 (Pa. Cmwlth. 2008). In order to meet this burden of proof, Claimant, as the burdened party, had to meet both his burden of production and his burden of persuasion regarding the required element. See, e.g., Topps Chewing Gum v. Workers' Compensation Appeal Board (Wickizer), 710 A.2d 1256, 1261 n. 16 (Pa. Cmwlth. 1998) ("The 'burden of proof' actually includes two different burdens: the burden of production where the burdened party must produce enough evidence to avoid an adverse legal ruling, and the burden of persuasion, where the burdened party 'must convince the fact finder to the required degree of certainty of the party's position on that issue.'") (citation omitted).

As noted above, in denying the imposition of penalties in this case, the WCJ specifically determined that, "[c]oncerning the period of time from April 7, 2008 to February 10, 2009, the testimonies of Claimant and Dr. Ackert that Claimant continued to treat with Dr. Ackert on a strictly as needed basis and not on a pre-scheduled basis is found to be neither credible nor persuasive and is rejected as fact in this case…." WCJ Decision at 8. These determinations as to witness credibility and evidentiary weight were within the exclusive province of the WCJ and are patently not subject to our review on appeal. Hayden. As Claimant failed to sustain his initial burden of proof in this regard, the WCJ did not abuse his discretion in denying Claimant's petition for the imposition of penalties.

Accordingly, the order of the Board is affirmed.

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JAMES R. KELLEY, Senior Judge

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v.	:	No. 489 C.D. 2011
Workers' Compensation Appeal Board (Visteon Ford), Respondent	:	

O R D E R

AND NOW, this 15th day of September, 2011, the order of the Workers' Compensation Appeal Board, dated March 14, 2011 at No. A10-0477, is AFFIRMED.

JAMES R. KELLEY, Senior Judge