

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Jodi Beck,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 667 C.D. 2010
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Workers' Compensation Appeal	:	
Board (Kellogg Company),	:	
Respondent	:	
	:	
Kellogg Company and CorVel,	:	
	:	
Petitioners	:	
	:	
v.	:	No. 788 C.D. 2010
	:	SUBMITTED: August 20, 2010
	:	
Workers' Compensation Appeal	:	
Board (Beck),	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge**

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
PRESIDENT JUDGE LEADBETTER**

**FILED: December 22, 2010**

Jodi Beck (Claimant), and Kellogg Company and its workers' compensation administrator, CorVel (collectively, Employer), filed cross-petitions for review of the order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of the Workers' Compensation Judge (WCJ). The WCJ awarded Claimant specific loss benefits for a permanent loss of use of index and

middle fingers of her right hand under Section 306(c)(10) and (11) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 513(10) and (11), awarded her litigation costs and denied her request for unreasonable contest attorney's fees. Claimant argues that the WCJ erred in awarding specific loss benefits only for the two fingers, not for the entire right hand, and in denying her request for unreasonable contest attorney's fees. Employer challenges the denial of its motion to dismiss the claim petition and the award of specific loss benefits and litigation costs.

Claimant has been employed as Employer's Crispix quality control operator for twenty-three years. On August 26, 2005, Claimant sustained a work-related injury to her dominant right hand when it was caught between a conveyor belt and a roller. Pursuant to a notice of compensation payable describing the injury as a fracture/laceration of the right hand, Claimant received weekly disability benefits of \$716 based on her average weekly wage of \$1502.25. In January 2006, Raymond E. Peart, M.D., a board-certified orthopedic surgeon with a subspecialty in hand surgery, performed surgical procedures on Claimant, including sympathetic blocks, a right carpal tunnel release and manipulation of her stiff index and middle fingers. Claimant's benefits were suspended on July 20, 2006 after she returned to work without a loss of earnings.

On May 27, 2008, Claimant filed a claim petition seeking specific loss benefits for "[h]alf loss of use of right hand for all intents and purposes as stated by ... Dr. Peart." Reproduced Record (R.R.) at 3a. At the beginning of a hearing on June 19, 2008, Employer moved for dismissal of the claim petition, arguing that specific loss benefits could not be awarded for loss of use of one-half hand under Section 306(c)(1) of the Act. The WCJ denied the motion and proceeded to take

evidence on the claim petition.

Claimant testified that she was experiencing pain in her right hand and must use her left hand at work to open a kettle and change a spraying device nozzle. She puts ice bags on the right hand and takes Celebrex and six to eight pills of Advil to relieve pain. She also experiences difficulties using the right hand for such daily activities as opening water bottles, making beds, using a knife, brushing teeth, braiding and straightening hair, tying shoes, hanging laundry, using a lawnmower and mulching her garden. She can write with the right hand, using a pen with one-inch-thick duct tape wrapped around it.

Claimant also presented the deposition testimony of Dr. Peart, who had treated her injury since October 2005. Dr. Peart testified that Claimant fractured phalanges of the thumb and index and middle fingers of the right hand in the 2005 work incident and subsequently developed carpal tunnel syndrome and reflex sympathetic dystrophy or complex regional pain syndrome. He released Claimant to full-time work with a job site modification "to ease grasp requirements." Dr. Peart's Deposition at 20; R.R. at 73a. During his most recent examination in July 2007, Claimant complained of her inability to close her right hand into a tight fist and difficulty grasping small objects and engaging in a fine pincer motion with the right hand. Dr. Peart's examination revealed swelling around the knuckles and only 50% of normal flexibility and grip strength in the right hand.

Dr. Peart opined that Claimant had lost 30% of the functional use of the thumb, 60 to 70% of the functional use of the index and middle fingers, 20 to 30% of the functional use of the ring finger of the right hand. He further opined that Claimant lost 50% of functional use of her right hand "because of the limited

flexibility ..., ... functional difficulties with any type of forceful grasping, squeezing, pincer type activities, inability to handle certain tools, writing implements, and loss of power, as well as some element of pain." Dr. Peart's Deposition at 9; R.R. at 62a. He did not believe that additional surgery would be beneficial to Claimant.<sup>1</sup>

In opposition to the claim petition, Employer presented a surveillance DVD, showing Claimant engaging in activities using her right hand on August 24, 27 and 30 and September 3, 2008, such as exiting her pickup truck, holding a key to open the front door of her house, holding a cordless phone and a scooter's handlebar, and petting her dog. WCJ's Finding of Fact No. 9. Employer did not present any medical evidence.

The WCJ found Dr. Peart's testimony competent and credible and Claimant's testimony credible, corroborated by the surveillance DVD and consistent with the WCJ's personal view of her hands. The WCJ described her view of Claimant's hands as follows: "Claimant's left hand was able to make a complete fist and each finger and thumb was able to bend completely forward. However, in Claimant's right hand, the middle finger, the index finger and the thumb were only able to forward bend half way or to a 90 degree angle." WCJ's Finding of Fact No. 5. Finding that Claimant's August 26, 2005 injury had resolved into a specific loss of the index and middle fingers of the right hand, the WCJ awarded her 96 weeks of specific loss benefits: 50 weeks for the index finger

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<sup>1</sup> During Dr. Peart's deposition, Claimant submitted the July 31, 2008 report of Sanjiv H. Naidu, M.D., Ph.D., who performed an independent medical examination of Claimant at Employer's request. In the report, Dr. Naidu opined that Claimant suffered "50% loss of use of her right hand" and "partial loss of use of her fingers," agreeing with Dr. Peart's opinion. Dr. Peart's Deposition Exhibit No. 4; R.R. at 91a. The WCJ admitted Dr. Naidu's report into evidence only on the issue of whether Employer's contest was reasonable.

under Section 306(c)(10) of the Act, 40 weeks for the middle finger under Section 306(c)(11) and one 6-week healing period under Section 306(c)(25) and 306(d), 77 P.S. § 513,<sup>2</sup> giving Employer a credit for benefits already paid to her for the August 26, 2005 injury. The WCJ also awarded Claimant litigation costs in the amount of \$3754.25 and denied her request for unreasonable contest attorney's fees. The WCJ concluded that Employer's contest was reasonable "based upon the DVD surveillance and the complex hybrid issue of law and fact as to what constitutes a specific loss." WCJ's Finding of Fact No. 22. The Board affirmed the WCJ's decision. Both Claimant and Employer appealed, and this Court consolidated the appeals.

A claimant seeking specific loss benefits must prove that he or she suffered a permanent loss of use of an injured bodily member for all practical intents and purposes. *Workmen's Comp. Appeal Bd. v. Hartlieb*, 465 Pa. 249, 348 A.2d 746 (1975). To meet that burden, the claimant is not required to establish that the injured bodily member is of absolutely no use. *Id.* The injury, however, must be more crippling than an injury resulting in a loss of use for occupational purposes or causing limitations on the claimant's work activities. *Jacobi v. Workers' Comp. Appeal Bd. (Wawa, Inc.)*, 942 A.2d 263 (Pa. Cmwlth. 2008). A substantial loss of functional use of a bodily member may constitute a loss for all practical intents and purposes. *Burkey v. Workmen's Comp. Appeal Bd. (N. Am. Rockwell)*, 471 A.2d 1325 (Pa. Cmwlth. 1984). The claimant's testimony and the WCJ's personal view of the injured extremity may provide additional support for a

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<sup>2</sup> A healing period for specific loss of a finger is six weeks. Section 306(c)(25). Claimant was entitled to only one healing period under Section 306(d), which provides for "the largest single healing period rather than the aggregate of the healing periods" for two or more permanent injuries.

specific loss. *Id.* A loss of use of a bodily member and the extent of such loss are questions of fact. *Roadway Express, Inc. v. Workmen's Comp. Appeal Bd. (Palmer)*, 659 A.2d 12 (Pa. Cmwlth. 1995). Whether the loss is for all practical intents and purposes, however, is a question of law to be determined based on the underlying facts found by the WCJ. *Jacobi*.<sup>3</sup>

We will first address Employer's argument that the WCJ should have granted its motion to dismiss the claim petition because Claimant sought specific loss benefits for loss of use of only one-half of the right hand, not the entire right hand. Employer maintains that Section 306(c) of the Act is "intended to permit partial loss of use only for certain body parts such as fingers where one half of a finger has been amputated or rendered useless." Employer's Brief at 25.

In *Burkey*, cited by Employer, the Court rejected the claimant's argument that the permanent partial loss of use of the thumb was compensable as a physical loss of a corresponding portion of the thumb under Section 306(c)(16) and (24) of the Act.<sup>4</sup> The Court held that the 50% loss of functional use of the thumb was not the same as physical removal of one half of the thumb or a totally useless half of the thumb, and that a loss of use of any bodily member must be for all practical intents and purposes to be compensable under Section 306(c). In this matter, Claimant sought benefits for "[h]alf loss of use of right hand *for all intents*

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<sup>3</sup> This Court's review in this appeal is limited to determining whether an error of law was committed or whether the findings of fact are supported by substantial evidence. *City of Pittsburgh v. Workers' Comp. Appeal Bd. (McFarren)*, 950 A.2d 358 (Pa. Cmwlth. 2008).

<sup>4</sup> Section 306(c)(16) provides that "[t]he loss of one-half of the thumb, or a finger, shall be compensated at the same rate as for the loss of a thumb or finger but for one-half of the period provided for the loss of a thumb or finger." Section 306(c)(24) provides that "[p]ermanent loss of the use of a hand, arm, foot, leg, eye, finger, or thumb, great toe or other toe, shall be considered as the equivalent of the loss of such hand, arm, foot, leg, eye, finger, or thumb, great toe to other toe."

*and purposes.*" R.R. at 3a (emphasis added). She did not argue that the loss of one-half of functional use of her right hand should be compensated as a *physical* loss of one-half of her right hand, which was rejected in *Burkey*. The relevant inquiry before the WCJ was whether the alleged extent of loss of functional use of the right hand could be considered a specific loss. The WCJ did not err in denying the motion to dismiss the claim petition.

We also note that strictness of a pleading is not required in a workers' compensation case. *Coyne v. Workers' Comp. Appeal Bd. (Villanova Univ.)*, 942 A.2d 939 (Pa. Cmwlth. 2008). If a party effectively put the adverse party on notice as to the theory of relief, the WCJ may grant the relief sought, as indicated by the evidence. *Brehm v. Workers' Comp. Appeal Bd. (Hygienic Sanitation Co.)*, 782 A.2d 1077 (Pa. Cmwlth. 2001). Dr. Peart testified that Claimant had lost 50% of the functional use of her right hand. Employer's counsel cross-examined Dr. Peart and Claimant regarding the extent of functional use loss of Claimant's right hand. Thus, even if the relief sought by Claimant in the claim petition was unclear, Employer had adequate notice that she was seeking benefits based on a 50% loss of functional use of the right hand.

Claimant argues that the evidence supports a permanent loss of use of her right hand for all practical intents and purposes.<sup>5</sup> Employer argues, on the other hand, that Claimant failed to prove specific losses of the index and middle fingers of the right hand.

Claimant presented sufficient evidence to establish a substantial loss of functional use of the index and middle fingers of the right hand. The WCJ's

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<sup>5</sup> Specific loss benefits for a hand are sixty-six and two-thirds percent of wages during 335 weeks. Section 306(c)(1) of the Act.

personal view indicated that Claimant was able to bend the index and middle fingers only half way. The evidence also showed that due to their reduced strength and flexibility, Claimant's ability to grasp and squeeze small objects and engage in any activity requiring a fine pincer motion with those fingers was limited. Dr. Peart opined that Claimant lost 60 to 70% of the functional use of the index and middle fingers. The evidence, however, was insufficient to prove a specific loss of the thumb, ring and small fingers of the right hand. Dr. Peart found only 30% and 20 to 30% loss of functional use of the thumb and the ring finger, respectively, and did not find "any significant loss to [Claimant's] small finger." Dr. Peart's Deposition at 12; R.R. at 65a.

Claimant maintains that the WCJ capriciously disregarded Dr. Peart's unequivocal, uncontradicted testimony that she lost 50% of the functional use of the right hand, which she claims supports a specific loss of the right hand. The capricious disregard standard is now an appropriate component of appellate review if such question is properly brought before the court. *Leon E. Wintermyer, Inc. v. Workers' Comp. Appeal Bd. (Marlowe)*, 571 Pa. 189, 812 A.2d 478 (2002). A capricious disregard of evidence occurs "when there is a willful and deliberate disregard of competent testimony and relevant evidence which one of ordinary intelligence could not possibly have avoided in reaching a result." *Arena v. Packaging Sys. Corp.*, 510 Pa. 34, 38, 507 A.2d 18, 20 (1986). The capricious disregard standard, however, "serves only to ensure that an administrative adjudication is conducted within lawful boundaries; it is not to be applied in such a manner to intrude on the agency fact-finding role and discretionary decision-making authority." *Ward v. Workers' Comp. Appeal Bd. (City of Philadelphia)*, 966 A.2d 1159, 1164 (Pa. Cmwlth. 2009), *appeal denied*, 603 Pa. 687, 982 A.2d



1229 (2009). After thoroughly summarizing and considering all the testimony and documentary evidence, the WCJ concluded that Claimant only suffered a specific loss of the two fingers, not the entire right hand. Nothing in the record suggests that the WCJ willfully and deliberately disregarded any relevant evidence.

To support her argument that her evidence was sufficient to establish a specific loss of the right hand, Claimant cites *Faulkner Cadillac v. Workers' Compensation Appeal Board (Tinari)*, 831 A.2d 1248 (Pa. Cmwlth. 2003) (the claimant suffered a specific loss of both hands where he felt numbness and stiffness in the hands and could not hold a cup or a cigarette, turn a key, tie shoes or perform strenuous or repetitive activities); *Cress v. Workmen's Compensation Appeal Board (Tri-State Envelope Co.)*, 538 A.2d 1382 (Pa. Cmwlth. 1988) (the medical testimony that the claimant lost one-half of motion and grip strength in the right wrist and hand supported a loss of use for all practical intents and purposes); and *Gindy Mfg. Co. v. Workmen's Compensation Appeal Board*, 378 A.2d 492 (Pa. Cmwlth. 1977) (the claimant's inability to button his shirt and pick up small objects and the medical testimony that the functional use of the hand was not more than 55% supported a specific loss of the hand).

We note that each case must be decided on its own facts. *Dep't of Labor & Indus. v. Workers' Comp. Appeal Bd. (Savani)*, 977 A.2d 585 (Pa. Cmwlth. 2009). Claimant returned to the pre-injury job working full-time without restrictions, except for a site modification to accommodate the limitation on her right hand's grasping ability. Claimant admitted, and Dr. Peart confirmed, that she was able to use the right hand for numerous daily activities, such as personal hygiene, brushing wet hair, writing, typing on a computer, tying shoes albeit slowly, opening jars and driving. The surveillance DVD corroborated their

testimony regarding the functional ability of Claimant's right hand. Dr. Peart acknowledged: "[Claimant] still has a functional hand. It's just not a normal hand." Dr. Peart's Deposition at 27; R.R. at 80a. The evidence thus demonstrates that Claimant still has a substantial functional use of her right hand and has not permanently lost its use for all practical intents and purposes.

Claimant next argues that she is entitled to unreasonable contest attorney's fees because Employer did not present any medical evidence to oppose the claim petition and because Dr. Naidu, who performed an independent medical examination, agreed with Dr. Peart that she had lost 50% of use of her right hand for all practical intents and purposes.

Section 440(a) of the Act, added by Section 3 of the Act of February 8, 1972, P.L. 25, 77 P.S. § 996(a), provides in relevant part:

In any contested case where the insurer has contested liability in whole or in part, ... the employe or his dependent ... in whose favor the matter at issue has been finally determined in whole or in part shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred for attorney's fee, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend the proceedings: Provided, That cost for attorney fees may be excluded when a reasonable basis for the contest has been established by the employer or the insurer.

The employer's contest is reasonable where medical evidence is conflicting or susceptible to contrary inferences and where there is a lack of evidence that the employer's contest was frivolous or filed merely to harass the claimant. *Jordan v. Workers' Comp. Appeal Bd. (Philadelphia Newspapers, Inc.)*, 921 A.2d 27 (Pa. Cmwlth. 2007). The employer has the burden of establishing the reasonableness of its contest. *Lemon v. Workers' Comp. Appeal Bd. (Mercy Nursing Connections)*, 742 A.2d 223 (Pa. Cmwlth. 1999). The reasonableness of

the employer's contest is a question of law fully reviewable by this Court. *Id.*

Although Employer did not present medical evidence, it cross-examined Claimant and Dr. Peart as to the extent of the functional limitations of Claimant's right hand and presented the surveillance DVD. Contrary to Employer's assertion, "[t]he fact that the employer did not adduce medical evidence, but rather chose to rely upon the cross-examination of the claimant's physician does not render [its] basis for contest unreasonable." *Cleaver v. Workmen's Comp. Appeal Bd. (Wiley)*, 456 A.2d 1162, 1163 (Pa. Cmwlth. 1983). Further, the fact that Dr. Naidu agreed that Claimant lost 50% of the use of her right hand did not render the contest unreasonable. The relevant issue before the WCJ was not the percentage of loss of use; rather, it involved a legal question of whether the evidence was sufficient to establish a permanent loss of use of the right hand for all practical intents and purposes. *Burkey*. Employer consistently argued, although incorrectly, that one-half loss of use of the right hand, as alleged in the claim petition, was not compensable under Section 306(c) of the Act. The record shows that Employer decided to contest the claim petition to resolve a genuinely disputed issue, not to harass Claimant. The WCJ properly denied Claimant's request for unreasonable contest attorney's fees.

Section 440(a) of the Act authorizes an award of reasonable litigation costs to a claimant, in whose favor the contested issue is resolved in whole or in part. *Reyes v. Workers' Comp. Appeal Bd. (AMTEC)*, 967 A.2d 1071 (Pa. Cmwlth. 2009), *appeal denied*, 602 Pa. 671, 980 A.2d 611 (2009). Claimant prevailed in part on her claim petition because she was awarded specific loss benefits for the two fingers. Employer does not dispute the reasonableness of the amount of litigation costs awarded by the WCJ. Employer's challenge to the award of

litigation costs is without merit.

Based on the foregoing discussion, the Board's order is affirmed.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

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**ORDER**

AND NOW, this 22nd day of December 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby AFFIRMED.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge