IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Margaret Salari, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (The Clark Group), Respondent	:	No. 1469 C.D. 2010
	:	Submitted: October 8, 2010

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: January 25, 2011

Margaret Salari (Claimant) petitions for review of the July 8, 2010 order of the Workers' Compensation Appeal Board (Board) affirming the Workers' Compensation Judge's (WCJ) order suspending future benefits due to her failure to submit to an independent medical examination (IME). The issues before this Court are: 1) whether there was substantial evidence to prove that Claimant had a reasonable excuse for failing to submit to an IME, and 2) whether the Board issued a reasoned decision.[1] For the following reasons, we affirm the Board's decision.

[1] Claimant's brief fails to separately address in the Argument section the two issues listed in her Statement of Questions Involved, as required under Pa.R.A.P. 2119(a). Even though she combines aspects of both issues into one argument, she does discuss both issues. Since we can discern her arguments here, meaningful appellate review is possible, and we will address both issues. *See Russell v. Unemployment Comp. Bd. of Review*, 812 A.2d 780 (Pa. Cmwlth. 2002); *Roseberry Life Ins. Co. v. Zoning Hearing Bd. of the City of McKeesport*, 664 A.2d 688 (Pa. Cmwlth. 1995). Moreover, in its brief, The Clark Group (Employer) only addressed the issue of whether a WCJ has the authority to suspend Claimant's medical benefits, and failed to mention the

Claimant sustained a work-related injury on May 18, 1995, while working for The Clark Group (Employer). She subsequently entered into a Compromise and Release Agreement for indemnity benefits, but Employer remained liable for Claimant's medical benefits. In early 2009, Employer requested that Claimant submit to an IME in Williamsport, Pennsylvania pursuant to Section 314(a) of the Workers' Compensation Act (Act).[2] Because Claimant failed to attend the IME, Employer filed a Petition to Compel a Physical Exam. A hearing was held before a WCJ on March 6, 2009, during which Claimant provided a letter from her physician, Dr. Gentilezza, restricting her ability to travel by car more than an hour from her home in Scranton, Pennsylvania to Williamsport. She was willing to submit to an IME closer to Scranton. The WCJ issued an order on March 23, 2009 ordering Claimant to submit to the IME in Williamsport.

Claimant again refused to travel to Williamsport for the IME, claiming her injuries would be exacerbated by the trip. On August 5, 2009, Employer filed a Petition to Suspend medical benefits, and a hearing was held on September 4, 2009.

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reasonableness of Claimant's refusal to submit to the IME. Since the issue of suspension of medical benefits was not raised by Claimant in her appeal to this Court, we will not separately address Employer's argument.

[2] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 651(a). Section 314(a) of the Act states, in pertinent part:

> At any time after an injury the employe, if so requested by his employer, must submit himself at some reasonable time and place for a physical examination . . . by an appropriate health care provider . . . who shall be selected and paid for by the employer. If the employe shall refuse upon the request of the employer, to submit to the examination . . . by the health care provider . . . a workers' compensation judge assigned by the department may, upon petition of the employer, order the employe to submit to such examination . . . at a time and place set by the workers' compensation judge and by the health care provider . . . .

In an order issued on September 16, 2009, the WCJ found that Claimant's excuse that she was unable to attend the IME because she was incapable of uninterrupted travel to Williamsport was unreasonable, since Claimant was not required to travel non-stop to the IME. The WCJ thereby suspended Claimant's medical benefits until she submitted to the IME.

Claimant appealed to the Board arguing that the WCJ erred in suspending her benefits because her failure to submit to the IME was reasonable, and that the Act only permits suspension of indemnity benefits, not medical benefits. The Board affirmed the WCJ's decision. Claimant appealed to this Court.[3]

Claimant argues that the Board erred in finding that she did not present evidence to support her contention that she was unable to travel to Williamsport since she submitted a letter from her physician, Dr. Gentilezza, at the first WCJ hearing. We disagree.

> A claimant's failure to comply with an order to submit to an IME as authorized under section 314 of the Act, without a reasonable excuse, shall result in the deprivation of a claimant's right to compensation until the claimant complies with such order. The [WCJ], as ultimate fact finder, has discretion to determine the reasonableness of a claimant's excuse for noncompliance with a board order to submit to an IME.

Raymond v. Workmen's Comp. Appeal Bd. (Donolo Masonry Constr.), 659 A.2d 657, 659-60 (Pa. Cmwlth. 1995) (citation omitted). "Nothing less than a manifest abuse of discretion by a WCJ will justify interference by this Court with a WCJ's decision on

[3] This Court's review is limited to determining whether an error of law was committed, whether the findings of fact are supported by substantial evidence and whether the Claimant's constitutional rights were violated. *Sysco Food Servs. of Phila. v. Workers' Comp. Appeal Bd. (Sebastiano)*, 940 A.2d 1270 (Pa. Cmwlth. 2008).

this matter." *Pancoast v. Workers' Comp. Appeal Bd. (City of Phila.)*, 734 A.2d 52, 54 (Pa. Cmwlth. 1999).

The reasonableness of Employer's request that Claimant submit to an IME in Williamsport was previously litigated, and the WCJ issued a decision in Employer's favor on March 23, 2009. Claimant did not appeal that decision. Employer's petition to suspend benefits cannot be used by Claimant as a basis on which to relitigate the merits of that order. Moreover, the letter from Dr. Gentilezza is irrelevant to the case *sub judice* because the issue before this Court is not the reasonableness of the order to compel attendance, but whether Claimant had a good reason for not attending the IME she was ordered to attend. If Claimant believed the letter from Dr. Gentilezza gave her a reasonable excuse not to attend the IME, she should have appealed the WCJ's March 23, 2009 order on that basis. She cannot now expect to use the same excuse for not attending that the WCJ already considered when determining that the IME request was reasonable.

Claimant also argues that the Board failed to issue a reasoned decision because it did not address the evidence of record, namely the letter from Dr. Gentilezza. We note, however, that the Act requires the WCJ, rather than the Board, make a reasoned decision.

> Section 422(a) of the Act states, in pertinent part, that all parties in a workers' compensation case 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.' 77 P.S. § 834. The decision of a WCJ is 'reasoned' if it allows for meaningful appellate review without further elucidation.

ICT Grp. v. Workers' Comp. Appeal Bd. (Churchray-Woytunick), 995 A.2d 927, 932 (Pa. Cmwlth. 2010). Claimant did not offer Dr. Gentilezza's letter into evidence at the hearing concerning the petition to suspend benefits. She states in her brief that Dr. Gentilezza's letter was submitted to the WCJ and attached as an exhibit to her brief to the Board. However, even though the same WCJ heard both the petition to compel and the petition to suspend benefits, submission of the letter into evidence at the hearing on the petition to compel does not automatically make it evidence of record on the petition to suspend benefits, nor does attaching the letter to her brief automatically enter it into evidence. Rather,

> [i]tems that are not part of the record . . . may not be considered by an appellate body on review. Briefs filed in this Court are not part of the evidentiary record and assertions of fact therein that are not supported by the evidentiary record may not form the basis of any action by this Court.

Gentex Corp. v. Workers' Comp. Appeal Bd. (Morack), 975 A.2d 1214, 1219 n.4 (Pa. Cmwlth. 2009), *appeal granted*, __ Pa. __, 995 A.2d 874 (2010) (citation omitted).

In addition, the WCJ specifically stated in the present case:

> Claimant's proffered excuse for failing to comply with the Order to attend the physical examination (that claimant was incapable of uninterrupted travel from her home to Williamsport, Pennsylvania to attend the examination) is not deemed a reasonable excuse for the failure to comply with the Order to attend the physical examination. As noted at the September 4, 2009 hearing, claimant was not required to travel non-stop to the scheduled examination.

Reproduced Record (R.R.) at 11a. Although the WCJ does not specifically mention Dr. Gentilezza's letter, he did base his decision on Claimant's alleged inability to travel to Williamsport. Since the WCJ's decision clearly allows for a meaningful appellate review without further explanation, and Dr. Gentilezza's letter was not

admitted into evidence with respect to the petition to suspend benefits, we decline to overturn the WCJ's decision on the basis that it is not reasoned. We conclude that it is.

For the reasons stated above, the Board's order is affirmed.

JOHNNY J. BUTLER, Judge

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O R D E R

AND NOW, this 25th day of January, 2011, the July 8, 2010 order of the Workers' Compensation Appeal Board is affirmed.

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JOHNNY J. BUTLER, Judge