

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lyndia Phillips, :
Petitioner :
 :
v. : No. 789 C.D. 2008
 : Submitted: September 5, 2008
Workers' Compensation Appeal Board :
(Park Hyatt), :
Respondent :

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER

FILED: November 26, 2008

Claimant, Lyndia Phillips, seeks review of an order of the Workers' Compensation Appeal Board (Board) affirming denial of her claim petition filed October 20, 2006. Claimant alleged in her claim petition that her job duties as a hotel room attendant aggravated her pre-existing bilateral carpal tunnel syndrome. The question presented to the Court is whether the Board erred in affirming the Workers' Compensation Judge's (WCJ) denial of the petition when her decision was not well reasoned nor supported by substantial, competent evidence.

Claimant worked for Park Hyatt (Employer) for six years and had been a room attendant since 2005, which involved cleaning up to 15 rooms per day and required triggering a spray bottle, vacuuming and cleaning floors. Claimant was injured in a car accident in 2002 and was treated for back pain and bilateral de Quervain's tenosynovitis in her hands. Although testifying that she felt fine when she returned to work, she stated that the pain in her hands increased at the

end of 2005. Dr. James M. Burke performed an EMG in March 2006, and he diagnosed Claimant with carpal tunnel syndrome and recommended surgery. She stopped working on April 6, 2006, and four days later she applied for short-term disability benefits with the help of Aynaushu Desai, assistant director of human resources. Claimant stated on the application that her injury was not work related. She began receiving disability benefits in April 2006 and receiving unemployment compensation in December 2006.

Claimant underwent an unsuccessful left carpal tunnel surgery in June 2006 with Dr. Jack Jallo, a neurosurgeon. Another EMG was performed in July 2006, and in October Claimant began treating with Dr. Michael McCoy, board-certified in family practice. On November 6, 2006, Employer filed an answer and notice of compensation denial (NCD) alleging, *inter alia*, that Claimant "did not suffer a work-related injury" and "did not give notice of [her] injury ... within 120 days."¹ Reproduced Record (R.R.) at 6a. An MRI was performed in November 2006. Dr. Noubar Didizian, board-certified in orthopedic surgery with specialty in hand surgery, performed an independent medical evaluation (IME) in March 2007.

Claimant provided her deposition testimony and that of Dr. McCoy. Employer provided testimony from Dr. Didizian, Desai and Claimant's supervisor Charles Wiggins. The WCJ denied the claim petition, finding in part, as follows:

7. Based on a review of the evidentiary record ... this Judge finds Claimant's testimony not credible...:
 - a. Claimant admitted that she never told Mr. Wiggins or anyone else that her job duties caused her hand problems. However, she later

¹Section 311 of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §631, states, in part: "[U]nless the employe ... shall give notice thereof to the employer..., no compensation shall be due..., and, unless such notice be given within one hundred and twenty days after the occurrence of the injury, no compensation shall be allowed."

changed her testimony and stated that she told Mr. Desai that her job was worsening her condition but even that testimony was vague.

....

- c. Claimant alleged that her hand symptoms from her 2002 motor vehicle accident resolved and she was "fine" when she returned to work. However, the medical evidence reveals several references to ongoing hand and wrist pain for several years prior to Claimant's alleged April 2006 work injury.
- d. Claimant's testimony is inconsistent with the short-term disability forms she completed indicating that her condition was NOT work related.
- e. Claimant provided a slightly different history to Dr. Didizian in that for the first time she mentioned an alleged specific incident in December 2005 and January 2006....

8. [T]his Judge finds the testimony of Dr. McCoy not credible....:

- a. Dr. McCoy is board certified in family practice only and thus less qualified than Dr. Didizian to render opinions regarding orthopedic and neurology matters.
- b. Dr. McCoy only began treating Claimant on referral from her lawyer over seven months after she stopped working.

....

- d. Dr. McCoy testified that Claimant's pre-existing deQuervain's had "pretty much resolved", yet he opined that Claimant sustained a work related aggravation of deQuervain's.

....

- f. Dr. McCoy had no idea which of Claimant's fingers had numbness and tingling. Nor did he know any specifics regarding Claimant's job duties or non-work related activities.

9. [T]his Judge finds the testimony of Dr. Didizian credible and accepts the same as fact....:

....

- b. Dr. Didizian's opinions are based on the various medical records and the lack of specific findings by Claimant's treating surgeon.
- c. Dr. Didizian's opinions take into account that Claimant may have another cause of her symptoms given the failed surgery.

WCJ Findings of Fact, 7 - 9. The WCJ credited Wiggins' and Desai's testimony in Findings Nos. 10 and 11 that Claimant did not attribute the pain in her hands to her job. The Board affirmed denial of the claim and reasoned in part as follows:

In a claim petition, the claimant bears the burden of establishing each of the elements necessary to support an award. Inglis House v. WACB (Reedy), [535 Pa. 135, 634 A.2d 592 (1993)]. The claimant must prove that she sustained a work-related injury causing a disability. Ruhl v. WCAB (Mac-It Parts, Inc.), 611 A.2d 327 (Pa. Cmwlth. 1992). To be compensable, an injury is not required to result from an accident or sudden occurrence, but may be due to daily trauma. Firestone Tire & Rubber Co. v. WCAB, 396 A.2d 902 (Pa. Cmwlth. 1979).

....

Nevertheless, Claimant argues that the WCJ failed to render a reasoned decision, and that the WCJ failed to give objective bases for her credibility determinations. ... Here, the WCJ set forth concise findings of fact and explained the bases for her findings and credibility determinations. ... While Claimant seeks to attack or refute the reasons that the WCJ listed for her credibility determinations, we note that deciding credibility is the quintessential function of the WCJ as fact-finder, and the Board will not take the WCJ's obligation to explain her reasons as a license to undermine the WCJ's power by second-guessing her. Kasper v. W.C.A.B. (Perloff Bros. Inc.), 769 A.2d 1243 (Pa. Cmwlth. 2001)....

Claimant further argues that the opinions of Dr. Didizian are not competent in that they are not based on the diagnostic studies and medical records. On the contrary, the WCJ determined that Dr. Didizian's opinions are based on the medical records, and further, any alleged errors in Dr. Didizian's medical opinion as it relates to his reliance on medical records would go only

to the weight to be accorded to his testimony, not to its competency. Marriott Corp. WCAB (Knechtel), 837 A.2d 623, 631 (Pa. Cmwlth. 2003)....

Claimant also argues that Defendant was estopped from raising a notice defense.... On the contrary, we see no indication that Defendant failed to raise a notice defense because Defendant's November 6, 2006 Answer denied Claimant's allegation that she provided [notice].... ...[A]ny issue of notice is ... irrelevant in that the WCJ rejected Claimant's lay and medical testimony....

Board opinion, pp. 3 - 8.²

Claimant asserts that an aggravation of her pre-existing condition is compensable just as any cumulative trauma injury, citing *Blue Bell Printing v. Workmen's Compensation Appeal Board (Montgomery Pub. Co.)*, 539 A.2d 933 (Pa. Cmwlth. 1988) (affirming award where pre-existing condition aggravated). Claimant cites *City of Philadelphia v. Workers' Compensation Appeal Board (Williams)*, 578 Pa. 207, 223, 851 A.2d 838, 847 - 848 (2004), stating that notice is "timely so long as it was given within 120 days of the last aggravation injury- which will usually be the last day at work...." Claimant challenges as unsupported Finding No. 1(e) because the WCJ had no opportunity to observe Claimant's demeanor. The finding summarizes Claimant's testimony regarding notice and states that it was vague and contradictory. Desai testified about his knowledge of Claimant's inability to work as of April 6, 2006 and the form that she signed titled

²Review is limited to determining whether constitutional rights have been violated, errors of law have been committed, a Board practice or procedure was not followed or necessary findings were supported by substantial evidence. *Helvetia Coal Co. v. Workers' Compensation Appeal Board (Learn)*, 913 A.2d 326 (Pa. Cmwlth. 2006). The WCJ has exclusive province over questions of credibility and evidentiary weight and is free to accept or to reject the testimony of any witness in whole or in part. *General Electric Co. v. Workmen's Compensation Appeal Board (Valsamaki)*, 593 A.2d 921 (Pa. Cmwlth.1991). The Court's function is to determine whether the WCJ's findings of fact are supported by substantial evidence. *Peterson v. Workers' Compensation Appeal Board (Wal Mart)*, 938 A.2d 512 (Pa. Cmwlth. 2007).

"Employee Responsibility Statement for Work Related Injuries" (setting forth procedures to follow in the event of a work-related accident), which was dated June 2, 2006 or within 60 days of her disability and within the 120-day notice required under Section 311 of the Act. Further, the NCD was not issued based upon a lack of notice, and Employer therefore could not raise a notice defense.

Claimant refutes Finding No. 7 that she changed her testimony about notice when Employer's form that Claimant signed established her notice of injury within 60 days of her disability, and she challenges Finding No. 8 regarding Dr. McCoy's credibility where the WCJ failed to provide objective reasons for her credibility determination as required by *Daniels v. Workers' Compensation Appeal Board (Tristate Transp.)*, 574 Pa. 61, 828 A.2d 1043 (2003). Claimant argues that the WCJ should not penalize her for treating with a doctor referred by her counsel, particularly when Employer ended Claimant's health coverage. In her challenge to Finding No. 9, Claimant asserts that Dr. Didizian's testimony is not based on the medical records; rather, his opinion was not competent as it lacks specific findings on examination, and his opinion that there may be another cause for Claimant's condition does not represent the kind of objective reason on which to base a credibility determination. Lastly, Claimant challenges as unsupported Finding No. 11 regarding Desai's credibility where the WCJ did not mention the June 2006 form that Claimant signed, which Employer offered into evidence.

Employer replies that Claimant's duties are not repetitive in nature and notes Wiggins' testimony that Claimant never reported pain in performing her job. It emphasizes Claimant's statement on the disability form that her injuries were not work related and her failure to state otherwise to Desai. It notes Dr. McCoy's lack of knowledge regarding Claimant's job duties and history, Dr. Didizian's credible

testimony regarding a lack of objective signs for carpal tunnel syndrome and Claimant's failure to prove cumulative trauma. *See Samson Paper Co. & Fidelity Engraving v. Workers' Compensation Appeal Board (Digiannantonio)*, 834 A.2d 1221 (Pa. Cmwlth. 2003) (holding that expert's lack of all medical records of claimant goes to weight of testimony); *Pryor v. Workers' Compensation Appeal Board (Colin Serv. Sys.)*, 923 A.2d 1197 (Pa. Cmwlth. 2006) (holding that expert opinion is competent unless it is based solely on inaccurate information). Further, the WCJ's decision is reasoned as she explained credibility determinations and met the standards under *Daniels*. *See also Hahnemann Univ. Hosp. v. Workers' Compensation Appeal Board (Wallace)*, 718 A.2d 391 (Pa. Cmwlth. 1998). As for notice, Employer cites *Leber v. Workmen's Compensation Appeal Board (Yellow Freight Sys.)*, 628 A.2d 481, 484 (Pa. Cmwlth. 1993), stating that a "specific denial [in the answer is] sufficient to raise the issue of notice." Claimant failed to meet her burden, and even if the WCJ erred in considering notice it was harmless.

Having reviewed the record as a whole, the Court holds that Claimant failed to meet her burden and that substantial evidence exists to support the WCJ's findings. *Inglis House*. The WCJ discredited Claimant's lay and expert testimony while crediting Employer's expert testimony. These credibility determinations are supported by the record and are binding. *Kasper*. As to Findings Nos. 1(e), 7, 8, 9 and 11, the Court repeats the rule that the WCJ has authority to resolve all conflicts in the evidence as to whether a claimant's injury is work related. Also, the WCJ's decision contains objective reasons for her credibility determinations and allows for meaningful review. As the ultimate fact finder, the WCJ credited Dr. Didizian over Claimant's experts, and her failure to mention the June 2006 form does not

undermine her credibility determinations. Given the Court's review, it need not decide the notice issue, and it accordingly affirms the Board's order.

DORIS A. SMITH-RIBNER, Judge

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(Park Hyatt),	:	
	:	
Respondent	:	

ORDER

AND NOW, this 26th day of November, 2008, the Court affirms the orders of the Workers' Compensation Appeal Board.

DORIS A. SMITH-RIBNER, Judge