IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Don Tollefson,	:	
Petitioner	:	
	:	
v.	:	No. 95 C.D. 2012
	:	Submitted: August 10, 2012
Workers' Compensation	:	
Appeal Board (Fox News),	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE COLINS **FILED: October 25, 2012**

Don Tollefson (Claimant) petitions for review from an order of the Workers' Compensation Appeal Board (Board) affirming the decision of the Workers' Compensation Judge (WCJ), which (1) granted the claim petition against Fox News, in part, finding temporary total disability for the closed period from March 24, 2008, until June 15, 2008, suspending benefits thereafter, and (2) denied Claimant's penalty petition.

Claimant asserts on appeal that (1) the Board erred in affirming the WCJ's determination that Claimant was capable of performing his pre-injury job as a sportscaster as of June 15, 2008, and (2) the Board erred in affirming the WCJ's denial of Claimant's penalty petition, in which Claimant argued that Fox News

violated the Workers' Compensation Act (Act)[1] by failing to timely grant or deny his claim for benefits. We affirm.

I. Background

Claimant was employed as sports director and sports anchor by Fox News, WTXF-TV, Fox 29 (Employer), in Philadelphia. On March 24, 2008, he injured his neck and shoulder in a car accident on the Pennsylvania Turnpike while on his way to Villanova University to cover a story about the men's basketball team. He immediately advised Employer's Human Resources Director, Ameena Ali, that he had been in a car accident, sustained an injury en route from his home to work, and that he might be unable to work. Ms. Ali advised Claimant that he could take leave under the Family Medical Leave Act (FMLA)[2] and Employer would provide him with full salary continuation, as per Employer's benefits plan.

The day after the accident, Claimant woke up with tremendous pain and sought medical treatment from his family physician and long-time friend, Dr. Gary Dorshimer, M.D., a board-certified internist with additional expertise in sports medicine, serving as the official team doctor for the Philadelphia Flyers professional hockey team, in addition to other sports medicine-related experience. Dr. Dorshimer concluded that Claimant was disabled and unable to return to work. Claimant, on Dr. Dorshimer's recommendation, remained out of work from March 25, 2008, until June 15, 2008. During that time, Claimant was on leave from work

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

[2] 29 U.S.C. §§ 2601-2654. Unlike the Pennsylvania Workers' Compensation Act, the FMLA does not contain a requirement that an injury must be suffered during the course of employment. *Id.* § 2612(a)(1)(D) ("[A]n eligible employee shall be entitled to a total of 12 work weeks of leave during a 12-month period . . . (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee."). The FMLA does not require that the employer pay the employee during his or her leave.

under the FMLA, not pursuant to a work-related injury, and he received his full salary under Employer's benefits plan, which was $4,903.84 per week.

Dr. Dorshimer released Claimant to return to work on June 13, 2008. Claimant worked one full day on June 15, 2008, after which Claimant returned to Dr. Dorshimer complaining of exacerbated symptoms. On June 17, 2008, Dr. Dorshimer again concluded that Claimant was disabled and recommended that he not return to work. Claimant did not work for Employer after June 15, 2008. The parties' respective medical experts disputed whether Claimant was capable of working beyond that date, and the WCJ credited the testimony of Employer's expert on that issue, ruling that Claimant was capable of returning to work on June 15, 2008, and beyond. (WCJ Decision and Order, Findings of Fact (F.F.) ¶¶3-4, Conclusions of Law (C.L.) ¶3.)

Claimant's employment contract expired at the end of June 2008 and was not renewed. Claimant filed the instant claim petition on July 9, 2008. Claimant also filed a penalty petition, alleging that Employer violated the Act by failing to timely respond to his claim. The Pennsylvania Department of Labor and Industry, Bureau of Workers' Compensation (Bureau) forwarded Claimant's filings to Employer and, according to the testimony of Employer's witnesses, Employer first learned on July 23, 2008, that Claimant was asserting the injuries he suffered in the car accident were work-related. Employer issued a Notice of Compensation Denial on August 8, 2008. The WCJ conducted a hearing on September 16, 2008. In support of Claimant's petitions, he testified on his own behalf and submitted the deposition transcript of Dr. Dorshimer. Employer submitted the deposition transcripts of Ms. Ali; its medical expert, Dr. Curt Miller,

M.D.; and a workers' compensation claims adjuster for Gallagher Bassett Services, Inc., Jeanne Palmer.

The WCJ issued a Decision and Order on August 26, 2009, granting, in part, the claim petition and denying the penalty petition. Ruling on the claim petition, the WCJ found credible Claimant's testimony regarding his initial injury and inability to work, but found "less than credible" his testimony regarding his inability to work beyond June 15, 2008. (F.F. ¶2.) Similarly, the WCJ found credible Dr. Dorshimer's testimony regarding Claimant's injury and his inability to work until June 15, 2008, but found that the testimony of Employer's medical expert, Dr. Miller, was more credible than Dr. Dorshimer's testimony regarding Claimant's ability to work after that date. (F.F. ¶¶3-4.) The WCJ concluded that Claimant had met his burden of proving that he sustained disabling, work-related injuries in the car accident, but that he was physically capable of returning to his job duties on June 15, 2008. The Board affirmed.

In the penalty petition, Claimant contended that, on March 25, 2008, immediately following the car accident, when he reported the car accident to Employer, he also reported that it was work-related. Accordingly, Claimant argued that, under the Act, Employer was required to investigate and provide him with information from the Bureau within 21 days. Employer argued that it was not informed that Claimant contended the car accident or his injuries were work-related until several months later, in July, and that, once informed, it timely provided him with a Notice of Compensation Denial on August 8, 2008. The WCJ resolved the conflicting evidence in favor of Employer and denied the penalty petition. The WCJ credited the testimony of Ms. Palmer, Employer's claims adjuster, who testified that Employer did not learn of Claimant's assertion that his

injuries were work-related until July 23, 2008, and that less than 21 days later, on August 8, 2008, she issued a Notice of Compensation Denial. (F.F. ¶6; C.L. ¶5.) The WCJ concluded that Employer timely responded to Claimant's claim once he informed Employer that he considered his injuries to be work-related. Finally, the WCJ found that Claimant chose to exhaust his leave under the FMLA before seeking workers' compensation, thereby receiving his full pay of $4,908.84 per week, rather than workers' compensation benefits of $807 per week. (F.F. ¶1; C.L. ¶5.) The Board affirmed, noting that Employer's Human Resources Director, Ms. Ali, who the WCJ found credible, also testified that Employer was not notified that Claimant considered his injuries to be work-related until July 23, 2008. (Board Op. at 7.)

Following the Board's affirmance, Claimant appealed to this Court.

II. Discussion

Claimant first contends that the Board's decision to grant Claimant only partial benefits and suspend those benefits as of June 15, 2008, is not supported by substantial evidence. After a careful review of the record, we conclude that the Board did not err and the necessary findings of fact are supported by substantial evidence.[3]

In a claim petition, the claimant bears the burden of establishing that the injury, aggravation, or exacerbation was sustained during the course of employment and that a causal connection exists between his or her work and the disabling injury. *Coyne v. Workers' Compensation Appeal Board (Villanova*

[3] This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, board procedures violated, and whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. § 704; *City of Pittsburgh v. Workers' Compensation Appeal Board (McFarren)*, 950 A.2d 358 (Pa. Cmwlth. 2008).

University and PMA Group), 942 A.2d 939, 945 (Pa. Cmwlth.), *appeal denied*, 599 Pa. 683, 960 A.2d 457 (2008). If the causal connection is not obvious, a claimant is required to present unequivocal medical testimony. *Povanda v. Workmen's Compensation Appeal Board (Giant Eagle Markets, Inc.)*, 605 A.2d 478, 481 (Pa. Cmwlth.), *appeal denied*, 533 Pa. 603, 617 A.2d 1276 (1992).

Section 422(a) of the Act aids meaningful appellate review by requiring the WCJ to issue a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole and clearly stating the rationale for the decision. 77 P.S. § 834. When the WCJ is faced with conflicting evidence, Section 422(a) of the Act further requires that his or her reasons for rejecting or discrediting competent evidence be explained. *Id*. This does not mean that the requirement of a reasoned decision permits a party to challenge or second-guess the WCJ's reasons for credibility determinations; determining the credibility of the witnesses remains the quintessential function of the fact finder. *Dorsey v. Workers' Compensation Appeal Board (Crossing Construction Co.)*, 893 A.2d 191, 195 (Pa. Cmwlth. 2006), *appeal denied*, 591 Pa. 667, 916 A.2d 635 (2007). The WCJ is free to accept, in whole or in part, the testimony of any witness, including expert medical witnesses. *Remaley v. Workers' Compensation Appeal Board (Turner Dairy Farms, Inc.)*, 861 A.2d 405, 409 (Pa. Cmwlth. 2004), *appeal denied*, 582 Pa. 720, 872 A.2d 1200 (2005). However, the WCJ's findings of fact and conclusions of law must be supported by "substantial evidence" or "such relevant evidence as a reasonable mind might accept to support a conclusion." *Ryan v. Workmen's Compensation Appeal Board (Community Health Services)*, 550 Pa. 550, 559, 707 A.2d 1130, 1134 (1998). The appellate role in a workers' compensation case is not to reweigh the evidence or review the credibility of

witnesses, but to determine whether the WCJ's findings have the requisite measure of support in the record as a whole. *Bethenergy Mines, Inc. v. Workmens' Compensation Appeal Board (Skirpan)*, 531 Pa. 287, 291-92, 612 A.2d 434, 436-37 (1992).

Claimant offered the expert testimony of Dr. Dorshimer, who testified at his deposition that Claimant suffered a cervical sprain and strain ("a whiplash injury, as one would call it") and a left shoulder sprain that were the result of the car accident on March 24, 2008. (Deposition of Gary Dorshimer, M.D. (Dorshimer Dep.) at 8-10, R.R. at 46a-47a.) Dr. Dorshimer opined that Claimant was unable to work as a result of his injuries and the WCJ credited that portion of Dr. Dorshimer's testimony. (F.F. ¶3; Dorshimer Dep. at 10, R.R. at 47a.) Dr. Dorshimer also conceded that he had cleared Claimant to return to work as a sports anchor in mid-June 2008, but that he later amended that opinion and recommended that Claimant remain on medical leave. (Dorshimer Dep. at 30, R.R. at 52a; Sept. 16, 2008 Hearing Transcript (H.T.) at Ex. D-1, R.R. at 68a; H.T. at Ex. D-2, R.R. at 69a.) The WCJ accepted Dr. Dorshimer's original opinion that Claimant was able to return to work in mid-June, but rejected his amended opinion that Claimant was unable to work after mid-June 2008. (F.F. ¶¶3-4.)

Employer's expert, Dr. Miller, performed an independent medical evaluation of Claimant on September 29, 2008, and reviewed Claimant's medical records. (Deposition of Curt Miller, M.D. (Miller Dep.) at 12-13, R.R. at 184a-185a.) Dr. Miller opined that Claimant suffered from left shoulder problems that would require ongoing medical attention, and that Claimant was able to return to work at his pre-injury job with certain limitations to account for his left shoulder injury. (Miller Dep. at 22-24, R.R. at 194a-196a.) The WCJ found credible Dr.

Miller's testimony regarding Claimant's ongoing ability to perform his job. (F.F. ¶4.) Additionally, the WCJ found that Dr. Miller's testimony was consistent with Dr. Dorshimer's first assessment in mid-June 2008 that Claimant was able to return to his pre-injury job. (*Id.*)

The WCJ made the following conclusions of law regarding the claim for benefits:

> 2. Claimant has sustained his burden of proof that he suffered injuries in a motor vehicle accident on March 24, 2008, while en route to a specific work assignment. I conclude, as a matter of law, that the nature of Claimant's employment required frequent traveling to a variety of sites, and Philadelphia television sports is extremely dependent on coverage of local schools, particularly basketball. Claimant's travel to Villanova University was clearly in furtherance of his ability to provide timely reporting of a scheduled press conference, and his trip was specifically requested by his supervisors. As a result, this Claim Petition must be granted.
>
> 3. After reviewing the totality of the medical evidence, I find as a fact that Claimant was physically able to perform his sports anchor duties when he returned to work on June 15, 2008. I find the testimony of Dr. Miller concerning Claimant's continuing ability to perform this job to be more credible than that of Claimant's treating physician, and longtime friend. As a result, benefits must be suspended as of that date. . . .

(C.L. ¶¶2-3.)

The WCJ's fact findings are supported by substantial evidence and he resolved the conflicting medical evidence in accordance with Section 422(a) of the Act. 77 P.S. § 834; *Dorsey*, 893 A.2d at 195. Claimant argues that the WCJ and, in turn, the Board failed to consider the physical restrictions recommended by Employer's medical expert, Dr. Miller, and whether the work that Employer

offered to Claimant when he first returned from his injury was within those restrictions. Claimant also argues that the Board ignored Claimant's and Dr. Dorshimer's testimony regarding Claimant's physical capabilities when he attempted to return to work on June 15, 2008. We disagree.

Dr. Miller testified to certain physical limitations due to Claimant's left shoulder injury, but neither Claimant's injury nor the limitations would have prevented Claimant from performing his pre-injury job. As quoted above, the WCJ found that Claimant's job as a sports anchor involved frequent travel and attendance of press conferences. (C.L. ¶2.) Although Claimant urges us on appeal to adopt a different version of his pre-injury job, *i.e.*, one that required him to practically participate in the sports he was covering, the WCJ rejected that version of the facts. Further supporting the WCJ's decision that Claimant was not disabled after June 15, 2008, Dr. Dorshimer testified at his November 24, 2008 deposition that he had recently seen Claimant on the field during a professional football game in San Francisco, California, while Claimant was working as a side-line reporter. (Dorshimer Dep. at 15-16, 21-25; R.R. at 48a-51a.) Although Dr. Dorshimer noted that Claimant told him he was experiencing some discomfort during the game, it is clear that Claimant, nevertheless, was capable of travelling and covering a sporting event.

Claimant next argues that the Board erred in affirming the WCJ's denial of Claimant's penalty petition. Pursuant to Section 435 of the Act, a WCJ may award penalties upon finding a violation of the Act or rules or regulations promulgated under the Act.[4] When a violation of the Act occurs, it is within the discretion of the WCJ to impose penalties. *Farance v. Workers' Compensation*

[4] Section 435 of the Act, added by the Act of Feb. 8, 1972, P.L. 25, 77 P.S. § 991.

Appeal Board (Marino Brothers, Inc.), 774 A.2d 785, 789 (Pa. Cmwlth. 2001). In a penalty petition, the claimant bears the initial burden of proving that a violation of the Act occurred; the burden then shifts to the employer to prove that the violation did not occur. *Department of Transportation v. Workers' Compensation Appeal Board (Clippinger)*, 38 A.3d 1037, 1047 (Pa. Cmwlth. 2011).

Here, Section 406.1 of the Act is at issue, which requires employers to accept or deny an injury as work-related within 21 days of receiving notice thereof.[5] Claimant testified that he informed Employer of his work-related injury immediately after it occurred on March 24, 2008, which would render Employer in violation of the reporting requirement of Section 406.1. Employer's Human Resources Director, Ms. Ali, agreed that Claimant informed her of the accident, but denied that he reported at that time that his injury was work-related. (Deposition of Ameena Ali (Ali Dep.) at 12, R.R. at 113a ("Q: Did he advise you or give you any information that would have alerted you to a work related injury at that time? A: No, he didn't.").) Thus, Ms. Ali advised Claimant to take leave under the FMLA, which Claimant did.

Ms. Ali also testified that in April 2008, Claimant asked her to write a letter to his insurance company explaining that his car accident was not work-related. (Ali Dep. at 17, R.R. at 118a; April 22, 2008 Letter, Ali Dep. at Ex. 2, R.R. at 163a.) Claimant denied making that request. (H.T. at 20-21, R.R. at 34a-35a.) Finally, Ms. Palmer, Employer's claims adjuster, testified that she first learned that Claimant was asserting his injury was work-related on July 23, 2008,

[5] Section 406.1 of the Act, added by the Act of Feb. 8, 1972, P.L. 25, 77 P.S. § 717.1; *Lemansky v. Workers' Compensation Appeal Board (Hagan Ice Cream Co.)*, 738 A.2d 498, 502 (Pa. Cmwlth. 1999).

and that she issued a Notice of Compensation Denial within 21 days, on August 8, 2008.

The WCJ resolved the conflicting testimony in favor of Employer, crediting the testimony of Employers' witnesses and denying the penalty petition. The WCJ also concluded that, notwithstanding Claimant's testimony to the contrary, it was more likely that he chose to pursue a workers' compensation claim only after his leave under FMLA had expired and he was off Employer's payroll. The WCJ's conclusions are not erroneous and his findings are supported by substantial evidence. We will not disturb his credibility determinations on appeal.

For the foregoing reasons, we affirm.

JAMES GARDNER COLINS, Senior Judge

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Appeal Board (Fox News),	:	
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O R D E R

AND NOW, this 25th day of October, 2012, the order of the Workers' Compensation Appeal Board is AFFIRMED.

JAMES GARDNER COLINS, Senior Judge