IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Louann Torpey-Hepworth, Petitioner	:	
v.	:	No. 1453 C.D. 2012
	:	SUBMITTED: February 1, 2013
Workers' Compensation Appeal Board (Luther Woods Convalescent Center), Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE LEADBETTER **FILED: July 11, 2013**

Louann Torpey-Hepworth (Claimant) petitions for review of the orders of the Workers' Compensation Appeal Board (Board) that affirmed the decisions of the Workers' Compensation Judge (WCJ) granting Claimant's penalty petitions, denying her review petition, and granting the termination petition filed by Luther Woods Convalescent Center (Employer). The WCJ also awarded Claimant attorney's fees for Employer's unreasonable contest to the penalty petitions and litigation costs. Claimant argues that the WCJ erred in failing to allow her to amend the description of her work injury in the notice of compensation payable (NCP), terminating her benefits and failing to award her certain litigation costs. She further argues that the WCJ failed to render a reasoned decision. We affirm.

While employed as Employer's nursing assistant, Claimant sustained a work injury on October 20, 1992 and began receiving total disability benefits, pursuant to an NCP which described her injury as "Cervical and Dorsal Sprain and Strain." Exhibit E-3.[1] In 1994, Employer filed a petition to suspend or modify Claimant's benefits. In a "Stipulation for Commutation of Benefits" (Stipulation) (Exhibit E-3) entered into in September 1996, Claimant and Employer stipulated that as of August 1, 1993, Claimant could perform part-time work paying $205.39 a week, entitling her to receive weekly partial disability benefits of $97.14. Claimant's remaining weeks of partial disability benefits were commuted for a lump sum amount of $32,500.[2] Employer agreed to remain responsible for Claimant's "reasonable, necessary and causally related medical expenses." Stipulation, ¶ 13. The WCJ approved the Stipulation.

In August 2006, Claimant filed a penalty petition, alleging that Employer refused to pay for her prescriptions. She later filed a petition for review, seeking to amend the description of her work injury in the NCP to include ulnar nerve of the left arm, brachial plexus/TOS of the left shoulder, cervical disc injuries, chronic pain syndrome and posttraumatic depression. Employer filed a termination petition, alleging that as of July 17, 2007, Claimant had fully recovered from the work injury and was able to return to work without restrictions. Claimant then filed a second penalty petition, alleging that Employer failed to pay for her prescriptions.

Claimant testified that she sustained the October 20, 1992 injury when

[1] This Court granted Claimant's application for leave to proceed in forma pauperis and excused her from filing a reproduced record.

[2] Partial disability benefits are payable for not more than 500 weeks. Section 306(b)(1) of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 512(1).

she took a patient's weight, while lifting him with her coworker and attempting to prevent him from hitting the floor, and that she felt a crack in her neck and popping of her left shoulder and began to experience symptoms in her right side six months later. She further testified that she was experiencing constant pain in her left shoulder and back radiating into her neck, numbness in her hands, and depression, and that Employer's insurance carrier stopped paying bills, totaling over $11,000, for her prescribed medication that she had been on for more than three years, and for elbow and wrist bands, pads for her TENS unit, mattress bed pads and chemicals for the hot tub. After the injury, she returned to school and worked as a secretary and a customer service representative for other employers until 2004 or 2005.

Claimant's treating physician, Scott Fried, D.O., a board-certified orthopedic surgeon, first examined Claimant in February 2002. Dr. Fried noticed muscle spasm in Claimant's neck, problems with the left scapholunate ligament, and color changes in her hands, which were consistent with a fixed brachial plexus and nerve injury. Dr. Fried diagnosed Claimant with a cervical sprain with a bilateral brachial plexus traction injury, a thoracic nerve injury and bilateral ulnar neuropathy secondary to the 1992 work incident. Dr. Fried referred Claimant to Dr. Stephen Whitenack who performed a scalenectomy of the left brachial plexus in August 2002. In April 2003, Dr. Fried performed a transposition of the left ulnar nerve. Dr. Fried testified that Claimant exhibited increasing signs of overusing the right arm to compensate for her left arm limitations. He diagnosed Claimant with additional conditions of pain syndrome and reactive depression and opined that she was capable of performing part-time sedentary work.

Leonard Kamen, D.O., who is board-certified in physical medicine

and rehabilitation, treated Claimant beginning December 2002. Dr. Kamen diagnosed Claimant with a stretch injury to the cervical brachial plexus. He treated Claimant with antidepressants and exercises. He testified that Claimant's prescriptions were reasonable and necessary to treat her work injury. In his report, Andrew Sattel, M.D., a board-certified orthopedic surgeon who evaluated Claimant in July 2002, diagnosed her with brachial plexopathy/left thoracic outlet.

Employer presented the deposition testimony of Donald F. Leatherwood, II, M.D., a board-certified orthopedic surgeon, who examined Claimant on July 17, 2007. Claimant related to Dr. Leatherwood that she had recovered from a neck injury sustained in a motor vehicle accident two years before the 1992 work injury. Dr. Leatherwood found that Claimant had a 70% range of motion of the cervical spine, a full range of motion of the fingers, thumbs, wrists and elbows, and no evidence of sweating, hair loss, swelling, edema or disuse atrophy. Claimant's motor strength of the biceps, triceps and deltoid was intact. Dr. Leatherwood testified that Claimant complained of pain in the left trapezius area "in a delayed and somewhat theatrical manner" and that she was not fully cooperative with the examination. Dr. Leatherwood's March 5, 2008 Deposition (Exhibit E-1) at 12. Dr. Leatherwood's review of the cervical MRI taken in July 2003 showed disc bulging at C3-4, 4-5 and 5-6. Dr. Leatherwood opined that Claimant did not suffer from an ulnar nerve problem, brachial plexopathy, thoracic outlet syndrome of the left shoulder, cervical disc injury or chronic pain syndrome from the 1992 work incident and that she had fully recovered from the work-related cervical and dorsal sprain and strain. Lori McKenna, R.N., a nurse consultant, who attended Dr. Leatherwood's examination for Claimant, testified regarding her observations of the examination.

Wolfram Rieger, M.D., a board-certified psychiatrist, examined Claimant in August 2007. Claimant told Dr. Rieger that the work injury affected her emotionally and that she was taking antidepressants, and that she had other non-work-related stressors at home. Dr. Rieger diagnosed Claimant with a "pain disorder associated with psychological factors and physical condition." Dr. Rieger's Deposition (Exhibit E-2) at 23. He opined that Claimant was not in need of psychotherapy and was not disabled from a psychiatric point of view.

Employer also presented surveillance videodiscs taken by two private investigators in October and November 2007. They testified that they observed Claimant carrying large pieces of wood under her right arm without wearing hand braces, repositioning a decorative scarecrow outside her home, driving a car, and carrying shopping bags. Disputing their testimony, Claimant testified that the wood she was carrying was light and that the scarecrow weighed only one pound.

The WCJ accepted as credible the testimony of Employer's medical witnesses and rejected the conflicting testimony of Claimant's medical witnesses. The WCJ noted that the only evidence presented by Claimant covering the 9-year period following the 1992 work incident was the 1993 EMG report that could not rule in or rule out brachial neuropathy. The WCJ concluded that Claimant failed to establish the causal relationship between the October 20, 1992 work injury and the alleged additional injuries. The WCJ further concluded that Employer established Claimant's full recovery from all residual symptoms of the work injury as of July 17, 2007. The WCJ found that Employer violated Section 306(f.1)(5) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 531(5), by failing to pay Claimant's medical bills related to the work injury. The WCJ accordingly denied Claimant's petition for review, granted Employer's

termination petition and granted Claimant's penalty petitions. The WCJ ordered Employer to pay Claimant a $3000 penalty and awarded her litigation costs, except the $320 fees charged by Claimant's nurse witness, McKenna, for her deposition.

The Board affirmed the WCJ's decision and remanded to the WCJ to make further findings regarding the reasonableness of Employer's contest to the penalty petitions and to determine Claimant's entitlement to unreasonable contest attorney's fees. On remand, Employer submitted its counsel's letter dated April 30, 2007 and sent to the WCJ (Exhibit RE-1), in which Employer's insurance carrier, PMA, offered to pay for Claimant's medical expenses for the injury accepted by Employer in the NCP, including the prescribed pain medications, the telephone headset, the orthopedically related consultations, the replacement electrodes for the TENS unit and $3000 for the hot tub/spa. PMA was not willing to pay for her psychological treatment, consultations and medications, wrist and shoulder braces and mattress pads. Finding that Employer's contest to the penalty petitions was unreasonable until PMA offered to pay for Claimant's medical expenses related to the work injury on April 30, 2007, the WCJ awarded Claimant unreasonable contest attorney's fees in the amount of $2400 (12 hours spent by her counsel on the penalty petitions x $200 per hour). The Board affirmed.

Claimant first challenges the WCJ's denial of her request to amend the description of the work injury in the NCP and termination of her benefits. Terms of an NCP are valid and binding until they are modified or set aside. *Commercial Credit Claims v. Workmen's Comp. Appeal Bd. (Lancaster)*, 556 Pa. 325, 330, 728 A.2d 902, 904 (1999). Section 413(a) of the Act, 77 P.S. §§ 771-773, authorizes a WCJ to amend an NCP if it is materially incorrect or if the disability status of the injured employee has changed. *Jeanes Hosp. v. Workers' Comp. Appeal Bd.*

(Hass), 582 Pa. 405, 418-19, 872 A.2d 159, 166-67 (2005). As a party seeking to amend the "incorrect description of injury" in the review petition, Claimant was required to demonstrate that the injury accepted by Employer in the NCP does not reflect all of the injuries sustained in the work incident. *Id.*[3] To terminate Claimant's benefits, Employer had the burden of establishing either that her disability had ceased or that her remaining disability was unrelated to the work injury. *Gillyard v. Workers' Comp. Appeal Bd. (Pa. Liquor Control Bd.)*, 865 A.2d 991, 995 (Pa. Cmwlth. 2005).

Claimant argues that Dr. Leatherwood's opinion is equivocal and

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[3] Under the first paragraph of Section 413(a) of the Act, 77 P.S. § 771, a WCJ may modify an NCP "at any time" if it is in any material respect incorrect. The second paragraph of Section 413(a), 77 P.S. § 772, provides that except for eye injuries, no NCP "shall be reviewed, or modified, or reinstated, unless a petition is filed … within three years after the date of the most recent payment of compensation made prior to the filing of such petition." In *Cinram Manufacturing, Inc. v. Workers' Compensation Appeal Board (Hill)*, 601 Pa. 524, 530-31, 975 A.2d 577, 580-81 (2009), our Supreme Court distinguished NCP amendments under the first and second paragraphs of Section 413(a): the first paragraph of Section 413(a) covers "corrective amendments" that are applicable to "an inaccuracy in the identification of an existing injury" and can be sought at any time; the second paragraph of Section 413(a), on the other hand, covers "[a]mendments pertaining to an increase, decrease, recurrence, or cessation of disability," which must be sought within three years after the most recent payment of compensation. In *Fitzgibbons v. Workers' Compensation Appeal Board (City of Philadelphia)*, 999 A.2d 659, 664 (Pa. Cmwlth. 2010), this Court distinguished *Cinram Manufacturing* on the basis that it was unnecessary for the *Cinram Manufacturing* Court to consider the applicability of "the more restrictive method" for seeking NCP amendments under the second paragraph of Section 413(a) to proceedings involving corrective NCP amendments under the first paragraph of Section 413(a). In *Fitzgibbons*, we held that a review petition must be filed within three years of the date of the most recent payment of compensation whether it is filed under the first or second paragraph of Section 413(a). Employer argues that its payment of Claimant's medical bills after the 1996 commutation of her benefits does not constitute "compensation" for the purpose of tolling the three-year limitations period in Section 413(a) for filing a review petition. *Seekford v. Workers' Comp. Appeal Bd. (R.P.M. Erectors)*, 909 A.2d 421, 427 n.12 (Pa. Cmwlth. 2006). However, employer waived the timeliness defense due to its failure to raise it in a timely fashion before the WCJ or the Board. *Smith v. Workmen's Comp. Appeal Bd.*, 543 Pa. 295, 300-1, 670 A.2d 1146, 1149 (1996).

incompetent to support the WCJ's decision because he misunderstood the mechanism of her 1992 work injury and failed to review all of her pre-2002 medical records. A medical witness's testimony is unequivocal if the witness testifies, after providing a foundation, that he or she believes or thinks facts exist. *ARMCO, Inc. v. Workmen's Comp. Appeal Bd. (Carrodus)*, 590 A.2d 827, 829 (Pa. Cmwlth. 1991). Medical evidence that relies on mere possibilities or is less positive is not legally competent evidence. *City of Phila. v. Workers' Comp. Appeal Bd. (Kriebel)*, 612 Pa. 6, 17, 29 A.3d 762, 769 (2011). To determine whether medical testimony is equivocal, it must be reviewed and taken as a whole. *Lewis v. Workmen's Comp. Appeal Bd.*, 508 Pa. 360, 366, 498 A.2d 800, 803 (1985). Whether medical testimony is unequivocal and competent to support the WCJ's findings is a question of law subject to our plenary review. *Kriebel*, 612 Pa. at 18, 29 A.3d at 769-70.

Based on the history given by Claimant, his review of Claimant's medical record and his own examination, Dr. Leatherwood found none of the additional physical conditions alleged by Claimant to be causally related to the 1992 work incident. Dr. Leatherwood testified that thoracic outlet syndrome could be caused by "a severe and significant trauma to the lower neck, upper chest region" and that such condition is almost always congenital/developmental and rarely involves neurologic structures. Dr. Leatherwood's September 10, 2008 Deposition (Exhibit E-4) at 7. He explained:

> [Claimant] informed me that she was simply posturing as part of a lifting mechanism. She did not fall to the ground. She did not sustain any significant major high energy trauma such as a motor vehicle accident, falling down a staircase, or something of that nature. She simply was trying to lift a patient and was … posturing at the time.

> In my opinion, this type of mechanism could cause a sprain[,] strain type injury. … [I]t could not possibly cause any problems with … the cervical spine ….
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> And, … it could not possibly have caused any traction injury to the brachial plexus. The reason is it's just simply not enough force to actually pull on the major nerves of the brachial plexus. … There are traction injuries of the brachial plexus. People get them. But they get them from major trauma.

Id. at 8-9. He opined that the two surgeries performed on Claimant in 2002 and 2003 were not related to her 1992 work injury and that as of his examination, Claimant had fully recovered from the cervical and dorsal sprain and strain.

The testimony of Drs. Leatherwood and Rieger constitutes unequivocal and competent medical evidence as to the extent of Claimant's work injury and her full recovery from the work injury. Contrary to Claimant's assertion, the fact that Dr. Leatherwood reviewed only one medical record of Claimant for the nine-year period following the 1992 work injury "only goes to the weight of [his] testimony, not its competency." *Coyne v. Workers' Comp. Appeal Bd. (Villanova Univ.)*, 942 A.2d 939, 955 (Pa. Cmwlth. 2008).

In a workers' compensation case, credibility determinations and evaluation of evidentiary weight are within the exclusive province of the WCJ. *Clear Channel Broad. v. Workers' Comp. Appeal Bd. (Perry)*, 938 A.2d 1150, 1156 (Pa. Cmwlth. 2007). The WCJ found the testimony of Employer's medical witnesses to be credible and rejected the conflicting testimony of Claimant's medical witnesses regarding the causal connection between the 1992 work incident and the additional injuries alleged by Claimant and Claimant's full recovery from the work-related injury. The WCJ's acceptance of one medical testimony over another does not constitute a reversible error. *Spring Gulch Campground v. Workmen's Comp. Appeal Bd. (Schneebele)*, 612 A.2d 546, 548 (Pa. Cmwlth.

1992). Because the WCJ's findings are based on credibility determinations, they may not be disturbed on appeal. *Lehigh Cnty. Vo-Tech Sch. v. Workmen's Comp. Appeal Bd. (Wolfe)*, 539 Pa. 322, 329, 652 A.2d 797, 800 (1995). We conclude that the WCJ's denial of the review petition and grant of the termination petition are supported by substantial, unequivocal and competent evidence and must be upheld.[4]

Claimant next argues that Employer was estopped from denying its liability for the additional injuries alleged in the review petition. She claims that she had no reason to seek an amendment of the description of the work injury because Employer's insurance carrier paid the medical bills as submitted.

The essential elements of equitable estoppel are a party's inducement of the other party to believe that certain facts exist, and the other party's reliance on that belief to act, resulting in prejudice. *Westinghouse Elec. Corp./CBS v. Workers' Comp. Appeal Bd. (Korach)*, 584 Pa. 411, 423, 883 A.2d 579, 586 (2005); *DePue v. Workers' Comp. Appeal Bd. (N. Paone Constr., Inc.)*, 61 A.3d 1062, 1068 (Pa. Cmwlth. 2013). Claimant was required to demonstrate that Employer's actions lulled her into "a false sense of security." *Workmen's Comp. Appeal Bd. v. Niemann*, 356 A.2d 370, 373 (Pa. Cmwlth. 1976). As the Supreme Court stated, "'in the absence of expressly proved fraud, there can be no estoppel based on the acts or conduct of the party sought to be estopped, where they are as consistent with honest purpose and with absence of negligence as with their

[4] Claimant asserts that the WCJ exhibited bias against her. Claimant states that the WCJ took "a highly critical tone for actually filing" the review petition after she filed the petition as he suggested. Claimant's Brief at 44 n.7. Claimant states that she "may have taken a different tactical approach with a judge who did not act fatherly and concerned." *Id.* Claimant fails to explain how she was prejudiced by the WCJ's mere suggestion of the course of the action to be taken by her counsel. We reject her assertion as lacking merit.

opposites.'" *Westinghouse Elec. Corp,* 584 Pa. at 423, 883 A.2d at 586 [quoting *Tallarico Estate*, 425 Pa. 280, 288, 228 A.2d 736, 741 (1967)]. A party invoking estoppel has the burden of establishing its elements. *DePue.*

In commuting her partial disability benefits in 1996, Claimant agreed that her stipulated earning power was "with regard to her work-related injuries only and d[id] not account for other disabling conditions from which [she] suffer[ed]." Stipulation, ¶ 6. Employer agreed to continue to pay only Claimant's medical expenses that are reasonable, necessary and causally related to her work injury. *Id.* ¶ 13. As we have consistently held, an employer's voluntary payment of a claimant's medical bills alone cannot constitute an admission of liability for the claimant's injury. *Securitas Sec. Servs. USA, Inc. v. Workers' Comp. Appeal Bd. (Schuh)*, 16 A.3d 1221, 1224 (Pa. Cmwlth. 2011). To hold otherwise "would be contrary to the Act's policy of encouraging employers to voluntarily pay medical expenses to injured employees to assist them in regaining health without fear of being later penalized for the payment." *DePue*, 61 A.3d at 1068.

This case is factually similar to *Westinghouse Elec. Corp.*, which involved the claimant who sustained a work-related back injury in 1984 and commuted his remaining weeks of partial disability benefits in 1990. As in this case, the employer remained responsible for medical bills which were reasonable and necessary to treat the work injury. The employer subsequently paid all of the claimant's medical bills until 1998 when it refused to continue to pay for the claimant's psychiatric care. In rejecting the WCJ's determination that by paying the medical bills for a long period of time, the employer lulled the claimant into believing that the employer had accepted responsibility for claimant's psychiatric care, the Supreme Court stated:

Employer merely paid the bills submitted to it by one of

> its injured employees for which it was already compensating medical treatment. Nothing exists in the record to demonstrate that Employer attempted to lure Claimant into thinking that psychiatric treatment was included within its sphere of responsibility. Nor is there anything in the conduct of Employer that would have prevented Claimant from filing a Petition to amend the NCP.

Westinghouse Elec. Corp., 584 Pa. at 424, 883 A.2d at 587.

As in *Westinghouse Elec. Corp.*, the evidence demonstrates only that PMA paid the medical bills as submitted by Claimant. Nothing in the record indicates in any way that Employer lured Claimant into believing that it took the responsibility for the alleged additional injuries, let alone that Employer engaged in concealment, misrepresentation or fraud. Estoppel simply does not apply to the facts in this case. Moreover, unlike in *Westinghouse Elec. Corp.*, Claimant was able to assert and litigate his review petition because Employer did not timely raise the issue of the Section 413(a) limitations period. Thus, Claimant suffered no prejudice, and indeed received only a benefit, from Employer's voluntary payments.

Claimant next argues that the WCJ erred in failing to award her litigation costs for the fees charged by McKenna for her deposition and report. A claimant is entitled to "have a health care provider[5] of his own selection, *to be paid by him*, participate in [a physical] examination requested by his employer or ordered by the [WCJ.]" Section 314(b) of the Act, 77 P.S. § 651(b) (emphasis added). Under the express language of Section 314(b), the claimant must bear his or her own costs to have a health care provider present at the examination. *Kan v.*

[5] The definition of "health care provider" includes a nurse. Section 109 of the Act, added by Section 3 of the Act of July 2, 1993, P.L. 190, 77 P.S. § 29.

Workers' Comp. Appeal Bd. (Budd Co.), 852 A.2d 1286, 1288 (Pa. Cmwlth. 2004). In addition, only a claimant, "in whose favor the matter at issue has been finally determined in whole or in part" in a contested case, is entitled to an award of reasonable litigation costs. Section 440(a) of the Act, added by Section 3 of the Act of February 8, 1972, 77 P.S. § 996(a). Consequently, a claimant must prevail on the contested issue to be entitled to an award of litigation costs. *Jones v. Workers' Comp. Appeal Bd. (Steris Corp.)*, 874 A.2d 717, 721 (Pa. Cmwlth. 2005). Here, Claimant did not prevail on the contested issues raised in the review petition and the termination petition, for which McKenna testified. Hence, the fees charged by McKenna for her deposition and report are not recoverable as litigation costs.

Finally, Claimant argues that the WCJ failed to render a reasoned decision. Section 422 of the Act, 77 P.S. § 834, requires a WCJ to render "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 …." Where medical experts testified by deposition, the WCJ must offer some articulation of the objective basis for the credibility determinations. *Daniels v. Workers' Comp. Appeal Bd. (Tristate Transp.)*, 574 Pa. 61, 78, 828 A.2d 1043, 1053 (2003). The WCJ, however, is not required to address "a line-by-line analysis of each statement by each witness, explaining how a particular statement affected the ultimate decision." *Acme Mkts., Inc. v. Workers' Comp. Appeal Bd. (Brown)*, 890 A.2d 21, 26 (Pa. Cmwlth. 2006). A WCJ's decision is considered a reasoned decision if it allows for adequate appellate review. *Id*. In his 17-page decision, WCJ Olin thoroughly summarized the testimony of each witnesses and the exhibits presented by the parties, made the findings necessary to resolve the issues and clearly articulated the reasons for his

credibility determinations and rulings on the issues. We conclude that the WCJ rendered a reasoned decision.

Accordingly, the Board's orders are affirmed.

BONNIE BRIGANCE LEADBETTER,
Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Louann Torpey-Hepworth, Petitioner	:	
v.	:	No. 1453 C.D. 2012
Workers' Compensation Appeal Board (Luther Woods Convalescent Center), Respondent	:	

O R D E R

AND NOW, this 11th day of July 2013, the orders the Workers' Compensation Appeal Board in the above-captioned matter are AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
Judge