IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pittsburgh Steelers Sports, Inc. (State Workers' Insurance Fund), Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Okobi), Respondent	:	No. 94 C.D. 2014
	:	Submitted: August 22, 2014

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COVEY FILED: March 4, 2015

Pittsburgh Steelers Sports, Inc. and its insurer State Workers' Insurance Fund (collectively, Employer) petition this Court for review of the Workers' Compensation Appeal Board's (Board) December 18, 2013 order affirming the Workers' Compensation Judge's (WCJ) decision on remand granting Chukky S. Okobi (Claimant) total disability benefits. The issues for this Court's review are: (1) whether the WCJ abused his discretion by closing the record and precluding Employer's evidence; (2) whether the WCJ erred by verbatim adopting Claimant's proposed findings of fact; (3) whether the WCJ issued a reasoned decision; and (4) whether the WCJ erred by finding Employer's contest unreasonable. Upon review, we affirm.

Claimant played professional football for Employer as an offensive lineman and special teams member for six years between 2001 and 2007. In September 2007, Claimant signed with the Arizona Cardinals. In October 2007, after

only four games, Claimant's contract with the Arizona Cardinals was terminated. In January 2008, Claimant signed with the Houston Texans. However, on June 3, 2008, Claimant sustained a right triceps injury during mini-camp. Without Claimant ever having played for them, the Houston Texans released him from his contract with an injury settlement.

On July 24, 2009, Claimant filed Claim Number 3542622 seeking lost wages, medical benefits and counsel fees for an August 1, 2006 "cervical herniated disc" injury that occurred "during contact in practice." Reproduced Record (R.R.) at 14a. Thereafter, Claimant filed three additional claim petitions on July 29, 2009. Under Claim Number 3545102, Claimant sought lost wages, medical benefits and counsel fees for a July 30, 2006 "cervical herniated disc/left shoulder" injury that occurred "during contact in practice." R.R. at 6a. Pursuant to Claim Number 3542627, Claimant sought lost wages, medical benefits and counsel fees for an August 31, 2007 "low back" injury that occurred due to "[r]epetitive trauma . . . from playing, practicing, and working out."[1] R.R. at 22a. Relative to Claim Number 3542632, Claimant sought lost wages, medical benefits and counsel fees for an August 5, 2007 work-related injury to his left triceps. R.R. at 30a. Employer denied Claimant's allegations in all four petitions. The claim petitions were consolidated for hearings and a decision.

A WCJ held hearings on August 25, 2009, February 4, 2010, June 15, 2010, November 2, 2010 and February 17, 2011. On March 17, 2011, the WCJ

[1] Claimant's original Claim Number 3542627 listed December 31, 2006 as his date of injury. However, in January 2011, Claimant amended the claim petition designating the date of injury as August 31, 2007 because the claim stemmed from a repetitive use injury, and August 31, 2007 was the last date Claimant played for Employer.

ordered, in pertinent part:

> 1. [Claimant's] three Claim Petitions[2] are GRANTED. [Claimant] is entitled to receive total disability benefits at a maximum compensation rate per week, based on the year of injury. [Claimant's] total disability compensation rate begins on June 3, 2008, which represents the day after [Claimant's] release from the Houston Texans, through the present and continuing thereafter pursuant to the Workers' Compensation Act [(Act)[3]] and his compensation shall be paid by [Employer].

WCJ Dec. at 16. The WCJ also awarded Claimant reasonable and necessary medical expenses, plus $5,516.14 in costs and $17,832.50 in attorney's fees for an unreasonable contest. Employer appealed to the Board.[4]

On September 4, 2012, the Board affirmed the WCJ's decision but remanded the matter for the WCJ to clarify the applicable indemnity rate, explaining:

> Where a claimant sustains two injuries while employed by the same employer under coverage by the same carrier, the claimant may receive total or partial disability benefits, as the case may be, for only one injury, while benefits for the other injury are suspended. *Rotoblast Abrasives v.* [*Workmen's Comp. Appeal Bd.*] *(Hockenberry)*, 646 A.2d 678 (Pa. Cmwlth. 1994); *Varghese v.* [*Workmen's Comp. Appeal Bd.*] *(M. Cardone Indus*[*.)*], 573 A.2d 630 (Pa. Cmwlth. 1990). A claimant cannot receive more than the maximum indemnity benefit even where there are separate injuries, each of which is totally disabling on its own, with overlapping periods of disability. *Varghese*. Where both injuries contribute to a claimant's disability[,] it is within the [WCJ's] discretion to determine for which injury the benefits were being paid, with a preference for the injury paying the greater benefits. *Hockenberry*.

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[2] At the February 17, 2011 WCJ hearing, Claimant withdrew Claim Number 3542622 for the August 1, 2006 work injury because it was duplicative of Claimant's July 30, 2006 work injury claim. *See* R.R. at 370a-373a; *see also* Notes of Testimony, February 17, 2011 at 34-35.

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

[4] Employer filed an application for supersedeas, which was granted only as to the attorney's fee award.

Board Op. at 9-10. The Board recognized that the WCJ "did not specify that indemnity benefits paid for the July 2006 and August 4, 2007 injuries were to be suspended and indemnity benefits paid for the August 31, 2007 injury. Since it is within the [WCJ's] discretion to make that determination, *Hockenberry*, we remand for clarification." Board Op. at 11.

By May 10, 2013 decision on remand, the WCJ[5] incorporated the Board's remand order and his predecessor's original findings, conclusions and order, and clarified the original WCJ's order as follows:

> 1. [Claimant's] three Claim Petitions are GRANTED. [Claimant] is entitled to receive total disability benefits based upon the compensation rate from the August 31, 2007 work injury in the amount of $779.00 a week. [Claimant's] total disability compensation rate shall begin on June 3, 2008, which represents the day after [Claimant's] release from the Houston Texans, through the present and continuing thereafter pursuant to the [Act] and his compensation shall be paid by [Employer]. Benefits for [Claimant's] July 30, 2006 injury and August 5, 2007 injury are suspended until [Claimant's] entitlement to benefits for the August 31, 2007 injury changes.

WCJ Remand Dec. at 3. In accordance with *Hockenberry*, the WCJ gave preference to the August 31, 2007 injury because it paid the greatest wage loss benefits, and it occurred latest in time. Employer appealed and, on December 18, 2013, the Board affirmed the WCJ's decision on remand. Employer timely appealed to this Court.[6]

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[5] Because WCJ Nathan Cohen who issued the original decision had retired, the remand was decided by WCJ Steven Minnich.

[6] "Our review is limited to determining whether the WCJ's findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated." *Dep't of Transp. v. Workers' Comp. Appeal Bd. (Clippinger)*, 38 A.3d 1037, 1042 n.3 (Pa. Cmwlth. 2011).

Employer argues that the WCJ abused his discretion by closing the record and precluding Employer from presenting its medical expert witness and documentation of Claimant's post-injury earnings. We disagree.

> This Court has explained that 'it is within the WCJ's discretion to control his docket by ordering parties to comply with litigation in a timely manner.' *US Airways v. Workers' Comp*[.] *Appeal B*[*d.*] *(McConnell)*, 870 A.2d 418, 423 (Pa.[]Cmwlth.[]2005). If they do not comply, the WCJ may close the record and preclude the submission of evidence, provided he first warns the parties that the record will close.[7]

Wagner v. Workers' Comp. Appeal Bd. (Ty Constr. Co., Inc.), 83 A.3d 1095, 1098 (Pa. Cmwlth. 2014). This Court has held that a WCJ does not abuse his discretion by closing the record over objection where the objecting party has failed to present evidence as directed. *Bachman Co. v. Workmen's Comp. Appeal Bd. (Spence)*, 683 A.2d 1305 (Pa. Cmwlth. 1996).

In the instant case, the WCJ ordered Claimant's counsel at the August 25, 2009 hearing to file Claimant's list of medical witnesses within 30 days and Employer to respond to Claimant's list within 15 days thereafter. The WCJ further ordered Claimant's counsel to take Claimant's deposition within 60 days and Employer's counsel to conduct Claimant's independent medical examination (IME) within 30 to 45 days after Claimant's deposition. *See* R.R. at 39a-42a. Following the August 25, 2009 hearing, Claimant timely filed his medical witness list which named James P. Bradley, M.D. (Dr. Bradley), UPMC spine specialist Joseph Maroon, M.D. (Dr. Maroon) and other unnamed physicians. *See* R.R. at 60a.

At the February 4, 2010 hearing, the WCJ recognized that Claimant filed an amended first hearing filing since the August 25, 2009 hearing. Claimant's counsel submitted Claimant's deposition transcript into evidence and notified the

[7] *See* 34 Pa. Code § 131.101(e).

WCJ that Claimant would be evaluated by orthopedic surgeon Gerald W. Pifer, M.D. (Dr. Pifer) on February 25, 2010. Despite having been instructed at the August 25, 2009 hearing, Employer did not file a first hearing filing or its response to Claimant's medical witness list with the WCJ. After the WCJ noted that he "didn't see something from [Employer's] counsel," Employer's counsel stated that he would make Employer's initial filing within 30 days. R.R. at 51a, 65a. Employer's counsel also represented that Claimant's IME would be conducted within 45 days of when Dr. Pifer's report was issued. *See* R.R. at 62a.

At the June 15, 2010 hearing, Claimant's counsel reported that Dr. Pifer evaluated Claimant as scheduled, and that his report was sent to Employer on March 24, 2010. Employer's counsel explained that Claimant's IME with a Dr. Cosgrove, originally scheduled for June 8, 2010, had to be rescheduled for July 2, 2010. The WCJ approved the parties' agreement that Dr. Pifer's deposition would be taken after Dr. Cosgrove issued his IME report. *See* Notes of Testimony, June 15, 2010 at 6. The WCJ ordered Dr. Pifer's deposition to take place within 60 to 90 days after Claimant's counsel received Dr. Cosgrove's IME report. *Id.* at 7-8. The WCJ also ordered Employer to conduct the deposition of its medical witness within 60 to 90 days after Dr. Pifer's deposition. *Id.* at 8.

At the November 2, 2010 hearing, Claimant's counsel explained that Dr. Pifer's deposition had been delayed due to Dr. Cosgrove having issued a preliminary report, but not finalizing it because he wanted to review diagnostic films, which were delayed in getting to him. Claimant's counsel acknowledged that Dr. Pifer would be his only medical witness. After noting that Employer failed to supply Claimant's statements of wages, the WCJ ordered Employer to supply the documents or a subpoena to the appropriate party within that week. *See* Notes of Testimony, November 2, 2010 at 7. The WCJ warned: "[W]e want to move it along. . . . So let's try to make some estimated time frames." *Id.* After Employer's counsel mentioned

deposing Employer's director of player personnel Kevin Colbert (Colbert), the WCJ gave him 60 days to do so. *Id.* at 8-9.

On December 15, 2010, the WCJ issued an Interlocutory Scheduling Order which required:

> 1. Claimant's counsel shall write me within 15 days to state the dates of all residual depositions for [Claimant], and identify any other residual evidence.
>
> 2. Claimant's counsel shall file the needed affidavit and web[]site search within 15 days, and identify any other residual evidence.
>
> 3. [Employer's] counsel shall write me within 15 days to state the dates of all residual depositions for [Employer].
>
> 4. [Employer's] counsel shall file the needed statement of wages for each petition within 30 days.
>
> 5. This [WCJ] may dismiss one or more petitions for failure to properly prosecute them or bar any added evidence if this Order is not complied with.
>
> 6. The next hearing is planned for February, 2011 and it is planned as the final hearing in this matter.
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> 7. All needed sets of proposed findings are due on or before the date of the final hearing.
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> 8. All depositions shall be completed on or before February 1, 2011, so they can be transcribed and available for the final hearing.

R.R. at 369a (emphasis added).

At the February 17, 2011 hearing, in response to the WCJ's inquiry about why Claimant's counsel, as opposed to Employer's counsel, submitted Claimant's statement of wages, Claimant's counsel explained:

> [A]t the hearing of November 2nd, 2010, you had indicated that [Employer's] Counsel was to have [its] Statement of Wages within a week and, if not, to subpoena . . . Employer

> for what of it they would need. And since this was to be the final hearing, I prepared the Statements of Wages.

R.R. at 80a. Employer's counsel offered no comment regarding its failure to supply the wage statements, but stated: "I reviewed [them] and we can stipulate to [Claimant's counsel's] calculation." R.R. at 80a. When the WCJ asked about the medical depositions, Claimant's counsel recounted that even though it did not receive Dr. Cosgrove's final IME report from Employer, in light of the Interlocutory Scheduling Order, Claimant nevertheless went forward with Dr. Pifer's deposition.[8] Claimant's statement of wages and Dr. Pifer's deposition were admitted into evidence without objection.[9]

In response to the WCJ's question as to whether Employer had any exhibits to offer, Employer's counsel disclosed:

> Your Honor, after the November 2 hearing, we did receive the supplemental report from Dr. Cosgrove. Unfortunately, I failed to schedule his deposition in a timely fashion and --- Unfortunately, in addition to asking for more time, I contacted Dr. Cosgrove's office regarding possible deposition dates and they can schedule him for the beginning of April . . . .

R.R. at 89a; *see also* R.R. at 91a. Employer's counsel also admitted that he did not get Colbert's deposition scheduled and that he did not communicate any difficulties with either deposition to the WCJ. Nevertheless, Employer's counsel requested 30 additional days in order to conclude Employer's case. Claimant's counsel objected. The WCJ denied Employer's request, but stated that since his decision would not be issued for two to three weeks, he would consider and give appropriate weight to physician statements or post-hearing findings submitted by either party before his

[8] Claimant's counsel acknowledged that Employer's counsel handed Dr. Cosgrove's final IME report to him at Dr. Pifer's deposition.

[9] The WCJ also accepted without objection from Claimant's counsel the player waiver and release addendum to Claimant's Houston Texans contract, a bill of costs and Claimant's counsel's time record.

decision was issued. *See* R.R. at 94a-95a. Before the hearing concluded, the WCJ permitted Claimant to testify regarding his current status. Despite being afforded an additional two to three weeks, Employer did not furnish to the WCJ any witness statements, exhibits or proposed findings after the February 17, 2011 hearing. *See* R.R. at 389a, 391a, 393a.

Employer contends that *US Airways* and *Baird v. Workmen's Compensation Appeal Board (MCTEL)*, 602 A.2d 452 (Pa. Cmwlth. 1992) require a finding of prejudice to a party before a claim petition will be dismissed for lack of prosecution. This argument is without merit for several reasons. First, both *US Airways* and *Baird* involved claimants, rather than employers, who failed to prosecute their cases. Second, assuming that the holdings apply equally to employers and claimants, the *Wagner* Court held that there is an exception to the prejudice requirement where, as here, the evidence shows that the offending party (*i.e.*, Employer) made no attempt to prosecute its case. *Id*. *See also Cipollini v. Workmen's Comp. Appeal Bd. (Phila. Elec. Co.)*, 647 A.2d 608 (Pa. Cmwlth. 1994); *Fremont Farms v. Workmen's Comp. Appeal Bd. (Phillips)*, 608 A.2d 603 (Pa. Cmwlth. 1992). Third, arguably, Claimant was prejudiced in this case by Employer's failure to timely produce the IME report, which resulted in the delayed scheduling of Dr. Pifer's deposition and the taking of his deposition without the benefit of Dr. Cosgrove's conclusions.

Because the record in this case clearly reveals that the WCJ offered numerous reminders and accommodations to Employer, and that Employer disregarded all of the WCJ's deadlines despite being warned that the record would close, we cannot conclude that the WCJ abused his discretion by closing the record and precluding Employer from presenting its expert medical witness and documentation of Claimant's post-injury earnings. Therefore, the Board properly affirmed the WCJ's decision.

Employer next argues that the WCJ erred by verbatim adopting Claimant's proposed findings of fact that were not supported by substantial evidence. We disagree. The law is well-established, as Employer acknowledged in its brief:

> It has been held, *ad nauseum*, . . . that a WCJ may adopt, verbatim, findings of fact submitted by a party so long as substantial evidence in the record supports the findings. *Dillon v. Workers' Comp*[.] *Appeal B*[*d.*] *(City of Philadelphia)*, 853 A.2d 413 (Pa.[]Cmwlth.[]2004); *Jenkins v. Workmen's Comp*[.] *Appeal B*[*d.*] *(Woodville State Hosp.)*, 677 A.2d 1288 (Pa.[]Cmwlth.[]1996); *C*[*nty.*] *of Delaware v. Workmen's Comp*[.] *Appeal B*[*d.*] *(Thomas)*, . . . 649 A.2d 491, 495 ([Pa. Cmwlth.] 1994) . . . .

Cmty. Empowerment Ass'n v. Workers' Comp. Appeal Bd. (Porch), 962 A.2d 1, 9 n.8 (Pa. Cmwlth. 2008).

> Substantial evidence is such relevant evidence as a reasonable person might accept as adequate to support a conclusion. In performing a substantial evidence analysis, this court must view the evidence in a light most favorable to the party who prevailed before the factfinder. Moreover, we are to draw all reasonable inferences which are deducible from the evidence in support of the factfinder's decision in favor of that prevailing party.

Waldameer Park, Inc. v. Workers' Comp. Appeal Bd. (Morrison), 819 A.2d 164, 168 (Pa. Cmwlth. 2003) (citations omitted). "We review the entire record to determine if it contains evidence a reasonable mind might find sufficient to support the WCJ's findings. If the record contains such evidence, the findings must be upheld . . . ." *Lahr Mech. v. Workers' Comp. Appeal Bd. (Floyd)*, 933 A.2d 1095, 1101 (Pa. Cmwlth. 2007) (citation omitted).

> A claimant seeking disability benefits [by Claim Petition] must prove that he has suffered a disability caused by a work-related injury. The claimant must show not only physical impairment, but also a loss of earning power. A 'disability' means a loss of earning power . . . . If the

> claimant's loss of earnings is the result of the work injury, he is entitled to disability benefits . . . .

Brewer v. Workers' Comp. Appeal Bd. (EZ Payroll & Staffing Solutions), 63 A.3d 843, 848 (Pa. Cmwlth. 2013) (citations omitted).

At the February 4, 2010 hearing, Claimant's counsel presented the transcript of Claimant's November 4, 2009 deposition, during which Claimant testified that he was drafted by Employer from Purdue University (Purdue) in 2001. He explained: "In college, there were a handful of times when I experienced low back pain. I received treatment for it and was better." R.R. at 122a. During the "couple of incidents" during his college years for which his low back required treatment, he did rehabilitation exercises and received ice and electrical stimulation therapy. R.R. at 123a. Claimant contended: "When I had left college, I didn't have any lower back issues that I knew of." R.R. at 122a. However, his low back pain became progressively "more and more painful" during the course of playing, practicing and working out for Employer. R.R. at 123a. He stated: "I was able to play, but towards the end it was more and more difficult to play. But being a professional athlete, you fight through it, you know?" R.R. at 123a.

Claimant described that, as an offensive lineman, his job was to block defenders to make room for running backs to run and to afford the quarterback time to throw the ball. His position required him to repeatedly bend over in a crouched position and physically fend off opposing players ranging in weight from 260 to 390 pounds with his body and arms. If the opposing team had the football, his job required him to chase and tackle the other team's players. Claimant recounted: "[E]very single day I was bending over and thrusting at full force, bending over, extending and flexing my back in full force constantly over and over and over again for six consecutive years in Pittsburgh." R.R. at 127a. He explained that, in order to prepare for such a physically taxing job, he worked out by running, sprinting and

doing extensive weight training. In order to maintain strength levels in his legs and back, he did squat exercises with weights in excess of 500/600/700 pounds and bench pressed over 300 pounds.

Claimant articulated that, over time, his low back became increasingly unstable, making it difficult for him to lift the necessary weight to maintain his strength levels, and thus unable to withstand the impact of blocking and effectively stopping opposing players. When he felt his low back symptoms, he sought treatment from Employer's athletic trainers that included rehabilitation exercises, ice and electrical stimulation therapy and anti-inflammatory medications. Claimant continued his strength training program, but did not use as much weight. Although he recorded his weightlifting statistics in a file provided by Employer, he could not say whether Employer's training staff was aware that he had reduced his weights during workouts due to back pain. Claimant maintained that in the year leading up to his deposition, his low back has "been horrible." R.R. at 132a. Claimant asserted that his low back pain alone prohibits him from returning to play professional football because it prohibits him from doing the training necessary to gain the strength he needs to do the job. *See* R.R. at 144a-145a.

Claimant recounted that his neck injury occurred while he was running play drills during training camp on July 30, 2006. He felt a pop where his neck and his upper back meet. He recalled: "At first[,] I did not think it was as serious as it was, but as each day went by, consistently it got more and more painful to the point where my left arm didn't operate correctly. At that point, I knew there was something more to it." R.R. at 135a. Claimant testified that within 24 to 48 hours of that incident, Claimant sought treatment from Employer's athletic trainer, who sent him for an MRI which reflected a C7-T1 disk herniation. Thereafter, the trainer referred Claimant to Dr. Maroon, who surgically repaired Claimant's neck. Claimant recalled that after several weeks of rehabilitation he was cleared to play; however, his

neck was unstable and painful. Due to the pain, he was not able to strike with the same kind of force as he had prior to the injury, rendering him unable to perform at the level required for him to maintain his job. Claimant contended that the neck pain continued for the remainder of his career, and that his neck remains unstable. Accordingly, he still regularly treats with a chiropractor and takes pain medication. Claimant asserted that his neck pain and instability alone prohibit him from returning to play professional football because it keeps him from striking defenders as necessary to do the job. *See* R.R. at 144a-145a.

Claimant also discussed the August 5, 2007 pre-season Hall of Fame game against the New Orleans Saints wherein a defender ran helmet-first into his extended left elbow at the point at which his triceps attach. Employer's trainer immediately applied ice to the injured area to control the swelling. Although he continued to apply ice for swelling and took anti-inflammatory medications, he described: "[F]rom that point forward, I had extreme pain in that elbow . . . for the remainder of the year. . . . The arm got progressively weaker." R.R. at 141a. Claimant later underwent left triceps repair surgery. Thereafter, he received physical therapy, but the strength in his left arm never returned to its pre-injury level. As of the date of his deposition, his arm "still hurt[] at times." R.R. at 144a. Claimant asserted that his left triceps injury alone prohibits him from returning to play professional football because it prevents him from doing the training necessary to gain the strength he needs to perform the job. *See* R.R. at 145a.

Claimant explained that Employer required him to have regular physical examinations. He admitted that on the Training Camp 2005 Physical Reporting Form he completed on July 31, 2005, he did not list any injuries, medical problems or physical complaints he was having. *See* R.R. at 236a. On his February 6, 2006 End of Season Physical form, Claimant noted that he experienced left knee and right quadriceps injuries since the time of his last physical. *See* R.R. at 239a. On his

Training Camp 2006 Form dated July 28, 2006, where Claimant was to list any complaints or injuries, he wrote "None." R.R. at 237a. On his December 31, 2006 End of Season Physical form, Claimant designated that he had a right shoulder sprain and a right thumb sprain since the time of his last physical. *See* R.R. at 240a. On his Training Camp 2007 Form dated July 23, 2007, Claimant wrote "None" where he was to list any complaints or injuries. R.R. at 238a. Each of the Training Camp forms Claimant signed for Employer reflected: "I am in agreement that, at this time, I am capable of full and unlimited participation in the sport of professional football." R.R. at 236a-238a. Claimant signed Employer's February and December 2006 End of Season Physical forms under the statement: "I represent that I am not now suffering from any physical disability[] which prevents me from playing professional football." R.R. at 239a-240a. Claimant admitted that he completed the forms in that manner because admitting that he had physical problems would put him at a competitive disadvantage and hurt his chances of being on Employer's roster. *See* R.R. at 219a-220a. He expressed that it is common practice among professional players to conceal injuries. *See* R.R. at 220a. He explained that he listed the injuries on his End of Season Physical forms because they were not as serious and, at the end of the season, there was still time to fix the problem before the new season began.

Regarding how the three injuries in combination affect his ability to be a professional football player, Claimant stated:

> In layman's terms, it's like operating with duct tape on a couple of weak links. . . . I don't have the confidence to put my body out there in the way that [I] would need to to play football at that level, so there [are] a lot of mental impacts.
>
> . . . .
>
> All three are preventing me from training at the level I need to to maintain the strength levels I need to perform the tasks consistent with the job description of an offensive lineman.

R.R. at 147a-148a. He acknowledged that Employer released him in the third year of his second four-year contract because "[i]n the judgment of the Club, [his] skill or performance [was] unsatisfactory as compared with that of other players competing for positions on the Club's roster." R.R. at 196a.

Claimant further testified that he works out three or four times a week, primarily doing low-impact cardio training and some limited running, depending on how he feels on any particular day. Due to his changed workout routines, he has lost approximately 30 pounds. He stated that if he was contacted by a team about playing, he could not physically do it. He contends that he could not train with the weight necessary to return to his playing weight.

Claimant described that, during college, in addition to his low back pain, he experienced a left biceps rupture and a right wrist injury that resulted in surgery. He also sprained both ankles and sprained his knee. The low back pain he experienced in college was in the same general area that he experienced while working for Employer, and he treated for it, but since "it wasn't as big a problem," his treatments then were not as extensive or as frequent. R.R. at 166a-167a. Claimant reported that he could not recall a specific injury that may have caused it. He stated that he never injured his neck or his left triceps at Purdue or at any other time before playing for Employer.

Claimant articulated that although he did not have to try out for the Arizona Cardinals, he submitted to a pre-employment physical. He testified that he did not reveal his left triceps injury, but rather obtained ice and anti-inflammatory medication from the Arizona Cardinals' trainers as needed. He reported that no one questioned him about these steps since it is typical for players to take these measures, and although he signed a contract for an entire season, he was a back-up center for only four games before he was released. Claimant did not recall whether he was given a post-release physical examination. He recounted that although his left arm

pain was constant since August 5, 2007, he did not seek treatment with Dr. Bradley until after he was released from the Arizona Cardinals. Claimant disclosed that if he had not been released from the Arizona Cardinals, he would have stopped playing due to the pain in his left arm because his condition worsened daily. He also stated that if he had not undergone surgery to fix his left triceps, he would not have been able to play for the Houston Texans.

Claimant testified that although he did not try out for the Houston Texans, he underwent a pre-employment physical on December 31, 2007 during which he disclosed his low back, neck and left triceps injuries. He recalled that the doctor examined his neck and left triceps, but does not remember if he checked his back. Although Claimant did not have first-hand knowledge of the discussions that took place, he is aware that a nearly two-week negotiation occurred before he signed his contract in mid-January 2008. He believed his injuries were in discussion during that time, since he had not signed his contract on examination day and, when he received his contract, it contained an injuries clause that did not appear in his previous contracts. However, he reported that he was ultimately released from the Houston Texans without playing a game due to a right triceps injury he sustained during mini-camp.

Claimant explained that since he stopped playing professional football, he invested in some car washes, and he runs a bed and breakfast in which he also lives. He stated that his work is purely administrative, and that he has no employees at the bed and breakfast. Rather, he hires contractors to run the physical operation, and vendors take care of event planning. As far as he knows, Employer has paid all of his medical bills.

Claimant also offered testimony at the February 17, 2011 hearing to update the record regarding his condition. Although he was not treating with physicians for his work injuries, he stated that his back regularly aches, particularly in

the mornings, and it limits his physical activity. He contended that he could still feel tingling in his arm where his left triceps repair was done. He also reported that he continues to have neck pain that has persisted since his surgery and affects his right arm down to his fingers. He explained that he still operates his bed and breakfast, but business has been poor due to publicity stemming from a local zoning matter. He claimed that he was forced to sell his shares in the car washes in order to fund the bed and breakfast's continued operation. He stated that he has not taken a salary, but is able to meet his basic needs and has no other source of income.

In support of his claim petitions, Claimant further offered the deposition testimony of Dr. Pifer, who evaluated Claimant on February 25, 2010. Dr. Pifer reviewed Claimant's medical records and diagnostic reports. He mentioned having reviewed a February 2001 MRI of Claimant's lumbar spine which reflected that he had a right paracentral L5-S1 disk herniation, L3-4 spinal canal stenosis and a congenitally narrow spinal canal. In addition, he referred to an MRI of Claimant's cervical spine that revealed the C7-T1 disk herniation on which Dr. Maroon operated in 2006.

Dr. Pifer also conducted a physical examination. Dr. Pifer opined that Claimant had no major difficulty with his left triceps at the time of his examination. Claimant had full range of motion and good strength in both arms. Dr. Pifer admitted that continuing to play football would place Claimant at risk for further triceps injury; however, unlike spinal injuries resulting from disc herniation, new triceps ruptures could be repaired and would not necessarily result in a lifelong disability affecting Claimant's activities of daily living.

Of primary importance to Dr. Pifer was that Claimant had residual symptoms from his August 2006 disc herniation and surgery. Dr. Pifer declared that playing contact sports after an injury sufficient to rupture a disk and require surgery in which bone was removed and anatomy was re-arranged leads to a greater risk of

cervical spine disruption including "paralysis or some other catastrophic injury." R.R. at 270a. Accordingly, Dr. Pifer concluded that, unlike the Arizona Cardinals' physician, "[he] would never have released [Claimant] to play football after having that injury to his cervical spine." R.R. at 287a.

Dr. Pifer prioritized Claimant's low back injury below his neck injury. He described that Claimant's low back pain complaints were very typical of offensive linemen, due to their training and how they play football. He further stated that Claimant's current low back condition is the result of the cumulative effect of Claimant's football history since high school, and playing for Employer and then the Arizona Cardinals compounded his difficulties.

He testified that continuing to play professional football is more risky to Claimant because his medical records reveal that he has a congenital narrowing of the nerve root canal, which places him at higher risk for experiencing back problems. He opined that training and playing football would place more stress on his back and would lead to more severe symptoms and may require surgery. Employer offered no evidence to the contrary.

It is well established that "[t]he WCJ is the ultimate factfinder and has exclusive province over questions of credibility and evidentiary weight." *Univ. of Pa. v. Workers' Comp. Appeal Bd. (Hicks)*, 16 A.3d 1225, 1229 n.8 (Pa. Cmwlth. 2011). "The WCJ, therefore, is free to accept or reject, in whole or in part, the testimony of any witness . . . ." *Griffiths v. Workers' Comp. Appeal Bd. (Red Lobster)*, 760 A.2d 72, 76 (Pa. Cmwlth. 2000). Here, following a lengthy description of the record evidence, the WCJ deemed the testimony of both Claimant and Dr. Pifer credible, finding:

> The credible testimonies of [Claimant] and Dr. Pifer established that [Claimant's] injuries to his cervical spine, lumbar spine and left triceps, separately and in combination, disable [Claimant] from performing his job duties as a

> professional football player for [Employer]. In addition, this [WCJ] finds that [Claimant's] injuries to his cervical spine, lumbar spine and left triceps, continue to disable him from playing professional football.

R.R. at 405a.

On appeal to the Board, Employer specifically averred that the WCJ erred in Finding of Fact 5(c) by stating that Claimant "sustained numerous low back injuries and problems" when he played for Employer. R.R. at 436a. Employer also argued that the WCJ erred in Finding of Fact 5(d) because Claimant did not describe his job duties as "extremely physical" and involving "intensive physical contact." R.R. at 436a. Employer further asserted that the WCJ erred in Finding of Fact 5(e) because Claimant never stated that over six years of crouching, bending, running and tackling "took a tremendous toll on his low back." R.R. at 436a. In addition, Employer contended that the WCJ erred in Findings of Fact 5(i) and 5(g) because Claimant did not say that he was unable to play at the level required to maintain his job. *See* R.R. at 436a. Finally, Employer claimed that the WCJ erred as to his credibility determinations and his reconciliation of the evidence. *See* R.R. at 437a-446a.

"The Board may review the nature of the evidence submitted to determine if it is sufficient to state a claim, however reinterpretation of the evidence by the Board is in excess of its scope of review." *Bartholetti v. Workers' Comp. Appeal Bd. (Sch. Dist. of Phila.)*, 927 A.2d 743, 747 (Pa. Cmwlth. 2007). Here, the Board reviewed the record evidence with Employer's objections in mind, and found no reversible error on the WCJ's part, stating:

> [W]e cannot agree that Claimant failed to meet his burden of proving work-related injuries and a loss of earnings resulting from those injuries by unequivocal medical evidence. Dr. Pifer's opinion, accepted as credible by the [WCJ], is substantial competent evidence establishing that Claimant sustained injuries in the course and scope of his

> employment with [Employer], and is unable to return to his pre-injury job as a result of those injuries. We determine no error.

Board Op. at 9.

Like the Board, this Court lacks the authority to reweigh the WCJ's credibility determinations. *Sell v. Workers' Comp. Appeal Bd. (LNP Eng'g)*, 771 A.2d 1246 (Pa. 2001). Thus, we examine the evidence to determine whether there is ample record evidence to support the WCJ's findings and conclusions. *Lahr Mech.* In response to Employer's specific claims of error, we conclude that although in Finding of Fact 5(c) the WCJ stated that Claimant "sustained numerous low back **injuries**," Claimant's claim petition and his testimony make clear that Claimant suffered a single low back problem that progressively worsened over time. R.R. at 396a (emphasis added). While the WCJ may have used imprecise wording to describe Claimant's low back condition, under the circumstances, we deem it harmless error.

Employer's assertion that the WCJ erred in Finding of Fact 5(d) because Claimant did not describe his job duties as "extremely physical" and involving "intensive physical contact," and its claim that the WCJ erred in Finding of Fact 5(e) because Claimant never stated that years of crouching, bending, running and tackling "took a tremendous toll on his low back," are without merit. R.R. at 436a. Although Claimant may not have used those precise words, his descriptions of his job duties make clear that his job was extremely physical, involved intense physical contact and took such a toll on Claimant's back that he is no longer able to play professional football. In the remaining portions of Findings of Fact 5(d) and 5(e), the WCJ described his bases for those findings. *See* R.R. at 396a. Employer provided no evidence to the contrary.

Employer's contention that the WCJ erred in Findings of Fact 5(g) and 5(i) because Claimant did not say that he was unable to play at the level required to

maintain his job is contrary to the evidence. *See* R.R. at 436a. Both Claimant and Dr. Pifer credibly testified that due to the condition of his neck, low back and left triceps injuries caused by Claimant's work for Employer, Claimant cannot condition and train to the degree necessary to be a professional football player. He was released by Employer and by the Arizona Cardinals because he could no longer perform at his pre-injury level. *See* R.R. at 128a-131a, 145a-148a. Employer provided no evidence to the contrary.

Employer's remaining claims of error relate to the WCJ's credibility determinations, his reconciliation of the evidence and his failure to make findings related to Claimant's history with the Arizona Cardinals and the Houston Texans. *See* R.R. at 437a-446a. To the contrary, in Findings of Fact 5(b) and 5(g), the WCJ specifically acknowledged Claimant's history of playing for the Arizona Cardinals and the Houston Texans, and when and how his injuries affected him. *See* R.R. at 395a-397a. The WCJ found Claimant and Dr. Pifer to be credible. Both testified that Claimant's level of performance and his ability to attract a contract offer would be affected by his injuries. Dr. Pifer unequivocally testified that in light of Claimant's neck and low back instability, he is unable to work out in the manner necessary to play, and continuing to play would place Claimant at significant risk of more serious and potentially debilitating injuries. Moreover, although Claimant has owned and operated a bed and breakfast, it has yet to afford Claimant an income. Employer offered no evidence to the contrary. We can find no basis on which to disturb the WCJ's credibility determinations and/or evidence reconciliation.

Based upon our extensive review of the record, we find there is substantial record evidence to support the WCJ's findings of fact, and hold that the Board properly affirmed the WCJ's determination that Claimant met its burden of proving the averments in his claim petitions.

Employer next argues that the WCJ failed to comply with the reasoned decision standard. Section 422(a) of the Act provides, in pertinent part:

> All parties to an adjudicatory proceeding 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. The workers' compensation judge shall specify the evidence upon which the workers' compensation judge relies and state the reasons for accepting it in conformity with this section. When faced with conflicting evidence, the workers' compensation judge must adequately explain the reasons for rejecting or discrediting competent evidence.

77 P.S. § 834. This Court has stated:

> To constitute a reasoned decision within the meaning of Section 422(a) [of the Act], a WCJ's decision must permit adequate appellate review. . . . '[S]ome articulation of the actual objective basis for the credibility determination must be offered for the decision to be a 'reasoned' one which facilitates effective appellate review.'

Green v. Workers' Comp. Appeal Bd. (US Airways), 28 A.3d 936, 940 (Pa. Cmwlth. 2011) (quoting *Dorsey v. Workers' Comp. Appeal Bd. (Crossing Constr. Co.)*, 893 A.2d 191, 194–95 (Pa. Cmwlth. 2006)). The reasoned decision requirement in "Section 422(a) [of the Act] does not permit a party to challenge or second-guess the WCJ's reasons for credibility determinations. Unless made arbitrarily or capriciously, a WCJ's credibility determinations will be upheld on appeal." *Dorsey*, 893 A.2d at 195 (citation omitted). "A capricious disregard of evidence occurs only when the fact-finder deliberately ignores relevant, competent evidence." *Williams v. Workers' Comp. Appeal Bd. (USX Corp.-Fairless Works)*, 862 A.2d 137, 145 (Pa. Cmwlth. 2004). Capricious disregard, by definition, does not exist where, as here, the WCJ expressly considers and rejects the evidence. *Williams*. "[T]he fact that a

WCJ may not reiterate and/or pass specific review upon any particular line or portion of testimony does not necessarily constitute a capricious disregard thereof." *Id.* at 145-46. "The reasoned decision requirement is simply that the WCJ must articulate some objective reasoning to facilitate appellate review of the same." *Green*, 28 A.3d at 940.

The WCJ's decision in this case, which included lengthy summations of the respective witnesses' testimony, reveals that the WCJ considered the full testimony of all the witnesses and he set forth the reasons for his determinations. *See* R.R. at 395a-405a. Because the WCJ's findings are supported by the record evidence, and the Board and this Court are able to determine why and how he reached the result he did, we hold that the WCJ issued a reasoned decision.

Finally, Employer argues that the WCJ erred by finding Employer's contest unreasonable. Employer specifically argues that its contest was reasonable because when Claimant filed his claim petitions in 2009: (1) there was no medical report which stated that Claimant was disabled from playing professional football; (2) the claim petitions, filed nearly 3 years after the injuries occurred, did not allege a date on which Claimant was forced by his work-related injuries to stop working; and (3) Employer was aware that Claimant had been cleared to play for Employer in 2007 and, after Employer released him, he contracted with and played for two other professional football teams until he "sustained a season-ending 2008 injury." Employer Br. at 49. We disagree.

"The employer has the burden of presenting sufficient evidence to establish a reasonable basis for its contest. Whether a reasonable basis exists for an employer's contest of liability is a question of law and therefore subject to this Court's review." *City of Phila. v. Workers' Comp. Appeal Bd. (Andrews)*, 948 A.2d 221, 230 (Pa. Cmwlth. 2008) (citation omitted).

Section 440(a) of the Act[10] provides in relevant part:

> In any contested case where the insurer has contested liability in whole or in part, . . . the employe . . . 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 . . . : 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.

77 P.S. § 996(a). Pursuant to Section 440 of the Act, an award of attorney's fees to a prevailing claimant is mandatory, unless the employer can establish a reasonable basis for its contest. *Bell's Repair Serv. v. Workers' Comp. Appeal Bd. (Murphy, Jr.)*, 850 A.2d 49 (Pa. Cmwlth. 2004). "An employer's contest is reasonable if the contest was brought to resolve a genuinely disputed issue, not merely to harass the claimant." *Jordan v. Workers' Comp. Appeal Bd. (Phila. Newspapers, Inc.)*, 921 A.2d 27, 42 (Pa. Cmwlth. 2007).

To be eligible for workers' compensation benefits, a claimant must establish both that he suffered a work-related injury and that the injury resulted in disability. *Jordan*. "Disability is synonymous with loss of earning power." *Ginyard v. Workers' Comp. Appeal Bd. (City of Phila.)*, 733 A.2d 674, 676 (Pa. Cmwlth. 1999). Employer has not contested that Claimant suffered work-related injuries, has paid for medical treatment related thereto and stipulated that it had notice of all of the injuries referenced in the claim petitions. *See* R.R. at 136a; *see also* R.R. at 395a. Employer does, however, challenge that Claimant suffers a disability related to those injuries. This Court has found employer contests to be reasonable where the employer has reasonably questioned whether work-related injuries resulted in disability. *See Hurst v. Workers' Comp. Appeal Bd. (Preston Trucking Co.)*, 823 A.2d 1052 (Pa. Cmwlth. 2003); *Ginyard*.

[10] Added by Section 3 of the Act of February 8, 1972, *as amended*, P.L. 25, 77 P.S. § 996(a).

However, in the instant matter, despite that Employer claims to contest only the issue of Claimant's purported disability, Employer did not issue a notice of compensation payable, a notice of temporary compensation payable, or a notice of compensation denial. Rather, Claimant was required to file claim petitions in response to which Employer made a blanket denial, and Claimant was forced to litigate not only his disability but the work-relatedness of his injuries. We adopt the Board's conclusion regarding this issue:

> An employer has a duty under Section 406.1 of the Act, 77 P.S. § 717.1,[11] to investigate a report of a work injury and to issue a Notice of Compensation Payable [NCP] or Notice of Compensation Denial within 21 days of receiving notice. *Lemansky v.* [*Workers' Comp. Appeal Bd.*] *(Hagan Ice Cream Co.)*, 738 A.2d 498 (Pa. Cmwlth. 1999) . . . . The availability of the Notice of Temporary Compensation Payable allows an employer additional time to investigate a claim and determine its position regarding compensability. *Armstrong v.* [*Workers' Comp. Appeal Bd.*] *(Haines & Kibblehouse, Inc.)*, 931 A.2d 827 (Pa. Cmwlth. 2007).
>
> Where an employer's physician examines a claimant and determines that the claimant has a work-related injury before a claim petition is filed, it is unreasonable for the employer to contest the work-relatedness of the injury. *Milton S. Hershey Med. Ctr. v.* [*Workmen's Comp. Appeal Bd.*] *(Mahar)*, 659 A.2d 1067 (Pa. Cmwlth. 1995). An employer is liable for counsel fees for refusing to properly accept or deny a medical-only injury, even if it pays the employee's medical bills, where the employee then is forced to hire an attorney and incur fees to file a claim petition. *Wald*[*a*]*meer Park*[, *Inc.*] *v.* [*Workers' Comp. Appeal Bd.*] *(Morrison)*, 819 A.2d 164 (Pa. Cmwlth[.] 2003); *Lemansky*.
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> . . . .
>
> The [WCJ] found that [Employer] stated for the record that notice was not an issue for any of the injuries, and that [Employer] was aware of the injuries as Claimant was

[11] Added by Section 3 of the Act of February 8, 1972, P.L. 25.

> treated for them by its own medical staff. He therefore determined that [Employer's] failure to acknowledge the injuries and failure to produce any evidence to dispute the occurrence of the injuries, or mitigate the amount of indemnity benefits, caused its contest to be unreasonable. He further determined that the case was complex and difficult, involving issues that arise exclusively in cases involving professional athletes, interpretation of contracts and a collective bargaining agreement. He therefore found the fee request to be reasonable and granted it in full.
>
> . . . . It is undisputed that Claimant sustained injuries while employed by [Employer] and was treated for the injuries by [Employer's] medical staff. While [Employer's] contest related primarily to the causal connection between the injuries and Claimant's loss of earnings, [Employer's] failure to acknowledge the injuries by means of a medical-only NCP [and] forcing Claimant to litigate all of the issues, renders its contest unreasonable. *Wald*[*a*]*meer Park*.

Board Op. at 12-13. Moreover,

> [w]here [as here] the employer has no evidence whatsoever to dispute the claimant's account of [his] injury, and the employer's cross-examination of the claimant does not reveal a reasonable basis for calling the claimant's version of events into question, the employer has not proven a reasonable basis for its contest of the claim.

Lemon v. Workers' Comp. Appeal Bd. (Mercy Nursing Connections), 742 A.2d 223, 228 (Pa. Cmwlth. 1999). Given this case law and the evidence presented, we likewise conclude that Employer's contest was unreasonable. Accordingly, the Board properly affirmed the WCJ's assessment of counsel fees against Employer for an unreasonable contest.

Based upon the foregoing, the Board's order is affirmed.

ANNE E. COVEY, Judge

Judge McGinley did not participate in the decision in this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pittsburgh Steelers Sports, Inc. (State Workers' Insurance Fund), Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Okobi), Respondent	:	No. 94 C.D. 2014

O R D E R

AND NOW, this 4th day of March, 2015, the Workers' Compensation Appeal Board's December 18, 2013 order is affirmed.

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ANNE E. COVEY, Judge