IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Dankanich, III, Petitioner	:	
	:	No. 1051 C.D. 2014
v.	:	
	:	Submitted: October 24, 2014
Workers' Compensation Appeal Board (H.B. Frazer Company), Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: March 19, 2015

Michael Dankanich, III (Claimant) petitions for review of the June 11, 2014 order of the Workers' Compensation Appeal Board (Board), which affirmed the February 15, 2013 decision and order of a workers' compensation judge (WCJ). The WCJ's order: approved and adopted a stipulation of facts entered into by the parties; consistent with the stipulation of facts, granted H.B. Frazer Company's (Employer) modification petition and Claimant's review petition and revised the description of the work injury to a left knee injury; granted Employer's termination petition; denied Claimant's review petition alleging an incorrect injury description; denied and/or dismissed Claimant's reinstatement petition as moot; and granted Claimant's penalty petition. We affirm.

Facts/Procedural History

On December 10, 2009, during the course of his employment as a journeyman wireman electrician for Employer, Claimant slipped and fell into a trench, sustaining a lumbar spine and left knee sprain and strain. Employer accepted Claimant's injuries as compensable pursuant to a temporary notice of compensation payable that converted to a notice of compensation payable (NCP). Subsequently, Employer filed a modification petition, alleging that Claimant was still working and receiving wages as of September 1, 2010, and requesting *supersedeas*. Employer also filed a termination petition, alleging that Claimant was fully recovered from his work injury as of June 13, 2011, and again requesting *supersedeas*. By order dated September 1, 2011, the WCJ denied the requests for *supersedeas* on the modification and termination petitions. (WCJ's Findings of Fact Nos. 1-4; Stipulation of Facts Nos. 1-2;[1] Reproduced Record (R.R.) at 6-7, 28-30, 54.[2])

Claimant filed a reinstatement petition, without any allegations, seeking relief as of June 22, 2011. Claimant next filed a petition to review compensation benefits alleging that the NCP did not reflect that he had concurrent earnings and that the description of his injury as a right knee injury on the notice of compensation payable was incorrect. Lastly, Claimant filed a penalty petition alleging that Employer violated the Workers' Compensation Act (Act)[3] when Employer failed to

[1] The WCJ adopted the parties' stipulation of facts into her findings of fact. (WCJ's Finding of Fact No. 10.)

[2] We note that Claimant's reproduced record does not include the lower case "a" following the page number as required by Pa.R.A.P. 2173.

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

pay benefits in accordance with the decision and order circulated on September 1, 2011. In September 2011, the parties entered into a stipulation of facts disposing of all the issues raised in the modification petition and the issue of average weekly wage raised in the petition to review compensation benefits. The stipulation of facts also corrected the injury description from a right knee injury to a left knee injury. (WCJ's Findings of Fact Nos. 5-7, 9.) The WCJ held multiple hearings on the remaining petitions and issues.

Claimant testified before the WCJ on September 20, 2011, and on October 11, 2012, in support of his reinstatement, review, and penalty petitions. Claimant stated that, while working for Employer in December 2009, he fell into a seven-foot trench when the ground gave out beneath him. Claimant added that the slope of the trench actually made for an eleven-foot fall and that he landed on a four-inch PVC conduit pipe at the bottom of the trench. Claimant stated that, as a result of the fall, he injured his left knee and right leg and had abrasions on his back and arms. Contrary to Employer's contention, Claimant denied having karate kicked a door when leaving the jobsite after the accident occurred. (R.R. at 56-57, 135-36.)

Claimant testified that he also worked as a head instructor at Joint Apprenticeship Training Committee during and after the time that he worked for Employer. He stated that he continued working for Joint Apprenticeship Training Committee until he was asked not to return without any reason given. Although Claimant said that he feels capable of returning to his teaching job if available, he does not feel capable of returning to work for Employer because of the bending, lifting, and walking involved in his work as an electrician. Claimant stated that he has not had one day without pain since the 2009 work injury, that he did not have

these types of complaints prior to the work injury, and that he has not completely recovered. (R.R. at 58-61, 141.)

Claimant testified that he saw Joseph Verna, D.C. (Dr. Verna) on August 11, 2011, and was scheduled to see him again on September 22, 2011. During his testimony on September 20, 2011, Claimant stated that he was not currently receiving physical therapy because his case managers from the insurance company stopped scheduling appointments, adding that he thought it was the insurance company's responsibility to do so. Claimant complained that it took eight months to a year before a case manager was even assigned to handle his case.[4] Claimant noted that he has not received any workers' compensation payment since Employer's *supersedeas* requests were denied and stated that his doctors have stopped treating him because the insurance company will no longer pay his medical bills. (R.R. at 63, 65-66, 68.)

Claimant offered the December 13, 2011 deposition testimony of Dr. Verna, who stated that he first examined Claimant on August 8, 2011, at which time Claimant provided him with a history of the work accident. (R.R. at 171.) Dr. Verna described his examination of Claimant as follows:

> Palpatory findings included muscle spasm in the lumbar spine. He also had taunt [sic], tender fibers along the medial knee and pain on palpation along the left medial knee. He did ambulate with a shortened stride length. He had a five to ten degree lumbar kyphotic posture.
>
> Orthopedic examination found leg lowering test to be positive for low back pain bilaterally. He reported his subjective symptoms to be moderate to severe during this test. He was able to walk on his heels and toes without difficulty. Kemp's test was positive on the left, however,

[4] However, Claimant entered into evidence a letter dated January 13, 2010, from a case manager stating that she had scheduled Claimant for an appointment with a back specialist on January 19, 2010, and an appointment for his knee on January 25, 2010. (R.R. at 264.)

> negative on the right. Positive to the left elicited low back pain that was moderate with radiating pain into the left posterolateral thigh. Straight leg raise was positive at 30 to 60 degrees on the left with severe pain radiating into the left posterolateral thigh.

(R.R. at 172-73.)

Dr. Verna also testified that he reviewed a January 21, 2010 MRI of Claimant's lumbar spine that revealed disc bulges, an annular tear, and disc herniation, and a February 9, 2010 MRI of Claimant's left knee that revealed mild tearing of the medial meniscus along the posterior horn. (R.R. at 174, 176.) Dr. Verna diagnosed Claimant with "left lumbar radiculopathy secondary to lumbar disc displacement as well as a Grade III lumbar sprain/strain and spasm of muscle. There was also derangement of the posterior horn of the medial meniscus as well as a strain of the medial collateral ligament." (R.R. at 177.) Dr. Verna opined that Claimant's work injury caused these conditions and that Claimant was not capable of returning to work. Dr. Verna acknowledged that he was concerned that Claimant was exaggerating pain, but he stated that his clinical examination of Claimant correlated with Claimant's complaints. (R.R. at 177-79.)

Dr. Verna testified that Claimant initially was not compliant with treatment, but Claimant came back under his care on December 1, 2011. Dr. Verna stated that, at the December 1, 2011 examination, he ordered an MRI of Claimant's lumbar spine that showed improvement. (R.R. at 179, 181-82.)

Dr. Verna stated that he examined Claimant on the day of the deposition but that Claimant's last documented visit occurred on December 9, 2011. (R.R. at 185.) Dr. Verna described his findings in that examination as follows:

> [Claimant] is in the middle of his treatment regiment [sic]. So [the exam] is limited to palpatory findings, which are continued muscle spasm in the lumbar spine which were

> unchanged. He had continued biomechanical alterations of the L4 and the sacrum. Minor's sign remained present. He had a global decreased range of motion in the lumbar spine. However, I did not perform lumbar spine measurements. It was on visual evaluation.

(R.R. at 185.) He acknowledged that Claimant is still demonstrating symptom magnification. Dr. Verna noted that Claimant's decreased range of motion in his left knee and his pain complaints are consistent with a medial meniscus tear. Dr. Verna testified that his diagnosis of Claimant remains unchanged from his initial impression and that Claimant remains unable to return to work. He stated that Claimant still has abnormalities but is improving. (R.R. at 186, 212, 214, 224.)

Claimant submitted the November 12, 2012 deposition testimony of Andrew Freese, M.D. (Dr. Freese), who is board certified in neurosurgery and to whom Dr. Verna referred Claimant on January 13, 2012. Dr. Freese stated that, at this examination, Claimant informed him that he injured his back on December 9, 2009, during which he fell ten feet upon the ground giving way underneath him. Dr. Freese performed a physical examination, where he noted that Claimant was in moderate distress, was uncomfortable, and would adjust his position. He stated that Claimant had limited range of motion in his lower back or lumbar region that occurred in particular with extension. Dr. Freese further stated that Claimant had tenderness to palpation in the lumbar region, decreased sensation in his right leg in posterolateral distribution similar to Claimant's complaints of pain, had nerve tension, and had an antalgic or crooked gait. Dr. Freese noted that he reviewed a December 6, 2011 MRI that revealed the presence of a low back injury for Claimant. (R.R. at 301-02, 304-06.)

Dr. Freese diagnosed Claimant with "injuries to the L4-5 and L5, S1 discs in his lumbar spine with annular tear, broad protrusion and resulting in a

combination of radiculopathy, which is nerve pain as well as discogenic pain. The discogenic pain far out weighs [sic] the radicular component." (R.R. at 307.) Dr. Freese opined that the injuries were related to the December 9, 2009 work incident. Dr. Freese also diagnosed Claimant with radiculopathy in his leg. (R.R. at 307, 324-25.)

Dr. Freese acknowledged that if Claimant only fell one to two feet it would be hard to explain Claimant's pain but that a fall of more than four to five feet would have a significant impact on Claimant's back injury. He stated that he disagrees with Douglas C. Sutton's, M.D. (Dr. Sutton), Employer's medical expert, conclusion that Claimant's injury would resolve on its own with little intervention and that at the time of his evaluation, Claimant was not physically capable of resuming his pre-injury job. However, Dr. Freese also acknowledged that there was no specific indication in the MRI report that he reviewed that indicated Claimant's injury was related to a trauma. (R.R. at 309-10, 315-16, 318.)

Mike Goldcamp (Goldcamp), a journeyman electrician for Employer, testified that he worked a couple of days with Claimant. Goldcamp stated that he witnessed Claimant's accident, noting that Claimant fell two to three feet onto the conduit pipe at the bottom of a trench when the edge of the trench collapsed. He acknowledged that he did not see the exact distance that Claimant fell but he did actually see Claimant fall into the trench. He said that Claimant stated that he was alright and continued working after he fell into the trench. Goldcamp stated that Claimant's back struck the edge of the trench that was made of dirt. (R.R. at 368-72.)

Gregory Wark (Wark), Claimant's foreman at the time of the accident, testified that he witnessed Claimant's fall and that he fell fifteen inches to two feet maximum into the trench. He stated that Claimant said he was fine, did not want to

fill out a claim form, and continued to work the rest of the day. After reviewing a photograph taken the day after the incident, Wark testified that Claimant kicked a door forty inches high when he was leaving work at the end of the work day. Wark also stated that Claimant again declined to fill out a claim form at the end of the work day. Wark noted that Claimant's back struck the handle of a metal drill when he fell into the trench. (R.R. at 374-78, 383.)

Employer presented the deposition testimony of Dr. Sutton, board certified in orthopedic surgery, who testified that he examined Claimant on May 20, 2011, which included receiving an account from Claimant regarding his medical history. Dr. Sutton stated that Claimant informed him that he fell seven to nine feet and that his back slammed against a drilling device. He said that Claimant told him that he went to the emergency department that night because of pain. Dr. Sutton testified that Claimant complained of low back pain with sensation of paresthesias in his left lateral thigh but that Claimant did not appear in any acute distress. (R.R. at 402-03, 405-07.)

Dr. Sutton testified to his findings as follows:

> Inspection of the lumbar spine showed no masses, scars, or lesions. He had 30 degrees of forward flexion and about 20 degrees of lumbar extension, both of which reproduced back pain. He described diffuse discomfort through the lower lumbosacral region. There was tenderness to palpation over the iliolumbar ligament and lumbar paraspinal insertion into the top of his pelvis. There was no flank tenderness. There was no interspinous ligament tenderness. There was no tenderness over the sacroiliac joints. He had no difficulty with toe and heel ambulation. There was no pain reproduction with rotation of the hip in the sitting position on the right. Internal rotation of the left hip caused no groin or hip pain, but did cause medial knee pain.

> Straight leg raising maneuvers were negative for radicular pain bilaterally. He had 5 out of 5 strength for the major muscle groups of both lower extremities including his iliopsoas, quadriceps, hamstring, anterior tibialis, gastrocnemius muscle groups.
>
> His reflexes were 2 out of 4 at the knee and ankle. His sensation was intact to light touch for both lower extremities. He had no lymph edema [sic] and he had palpable pedal pulses. In the supine position, straight leg raising maneuvers caused discomfort on the right but no radicular pain. He had full, active motion of the left knee. There was no effusion. There was some medial joint line tenderness to palpation, but there was [no] varus or valgus instability. Valgus testing did reproduce his medial knee pain. Lachman's testing was negative. McMurray's testing was equivocal. There was no evidence of any gait abnormalities or any evidence of an antalgic gait pattern.

(R.R. at 408-10.) He opined that Claimant's clinical examination of the lumbar spine was normal and that Claimant's left knee showed no structural abnormalities. (R.R. at 410.)

Dr. Sutton stated that he reviewed a September 2010 MRI report of Claimant's lumbar spine, a September 2010 MRI report of Claimant's left knee, a January 21, 2010 MRI of Claimant's lumbar spine, and records from a February 9, 2010 MRI study of Claimant's knee. Dr. Sutton testified that the MRIs of Claimant's back showed moderate degenerative changes that predated the work accident. He stated that the MRI studies of Claimant's knee did not reveal a medial meniscus tear or any injury associated with Claimant's work injury. Dr. Sutton opined that Claimant's knee ligaments and meniscus are intact. (R.R. at 411-14.)

Dr. Sutton testified that Claimant sustained a lumbar strain and left knee strain as a result of the work accident. He opined that, as of April 10, 2010, any issues related to the lumbar strain and the left knee strain would have been resolved without residuals. (R.R. at 415.) Dr. Sutton noted that he based his opinion on the

fact that Claimant did not receive any treatment for his injuries from April 2010 until September 2010 and that his "history in treating patients with symptomatic meniscal tears is that those patients have ongoing pain and mechanical complaints which limit and preclude their activity level to a significant degree that if they are symptomatic, they seek ongoing treatment." (R.R. at 417, 436-37.) He testified that there was no definitive tear of Claimant's medial meniscus noted in the initial left knee MRI. Dr. Sutton opined that Claimant was fully recovered from his lumbar strain and left knee strain without residuals and was capable of returning to his job without restrictions. (R.R. at 416, 418.)

By decision and order dated February 15, 2013, the WCJ rejected Claimant's testimony of ongoing work-related complaints and the inability to perform his pre-injury position as not credible or persuasive. The WCJ found the testimony of Goldcamp and Wark more credible and persuasive than Claimant's contrary testimony. The WCJ also found Dr. Sutton's testimony more credible and persuasive than any contrary testimony of Dr. Verna or Dr. Freese. In so finding, the WCJ noted that Dr. Sutton is a board-certified orthopedic surgeon and that Dr. Verna is a chiropractor.

The WCJ found that Claimant had fully recovered from his work-related lumbar spine and left knee strain and sprain as of May 20, 2011, and that Claimant's request for reinstatement of benefits as of June 22, 2011, was moot because Claimant had fully recovered from his injuries prior to that date. Based on Claimant's uncontradicted testimony that he had not received workers' compensation benefits from September 1, 2011, the date that *supersedeas* was denied, until the time of his testimony on September 20, 2011, the WCJ found that Employer violated the Act by failing to pay Claimant during this time period.

The WCJ concluded that Claimant failed to sustain his burden of proving that he sustained work injuries other than those documented in the notice of compensation payable as amended by the stipulation of facts. The WCJ also concluded that Employer sustained its burden of proving that all disabilities related to Claimant's work injury have ceased. The WCJ further found that Claimant sustained his burden of proving a violation of the Act warranting the assessment of a penalty, Claimant failed to sustain his burden of proving that he stopped working for his concurrent employer for reasons related to his work injury, and Employer sustained its burden of proving a reasonable contest.

Thus, the WCJ adopted and approved the stipulation of facts, and granted Employer's modification petition and Claimant's petition to review compensation benefits alleging concurrent earnings consistent with the terms of this stipulation. The WCJ ordered that the NCP be amended to reflect a left knee instead of a right knee injury consistent with the stipulation of facts. The WCJ denied Claimant's petition to review compensation benefits alleging an incorrect injury description. The WCJ granted Employer's termination petition as of May 20, 2011, and denied and/or dismissed Claimant's reinstatement petition as moot. The WCJ granted Claimant's penalty petition and awarded litigation costs in the amount of $122.50 for the cost of the September 20, 2011 notes of testimony containing the only evidence in support of the penalty petition. Claimant appealed to the Board.

By opinion and order dated June 11, 2014, the Board found that Employer met its burden of proving that Claimant had fully recovered from his work injury through Dr. Sutton's credited testimony. The Board also found that, because the WCJ rejected Claimant's testimony, Claimant failed to establish reinstatement or an inaccurate description of his work injury.

The Board also addressed Claimant's arguments that the WCJ's treatment of his case evidenced bias that deprived him of a fair and impartial hearing as provided under 34 Pa. Code §131.54(a). Specifically, Claimant alleged that the WCJ improperly limited his rebuttal evidence in off-the-record conversations; admitted inadmissible evidence, such as allowing Employer's questioning of Claimant concerning prior arrests, discharge from previous employment, untruthfulness during testimony, and a prior back injury; presented limited summaries of the evidence in order to support the WCJ's desired outcome; and limited Claimant's responses, misunderstood evidence, and made errors in the treatment of evidence.

Citing 34 Pa. Code §131.53(e), the Board noted that Claimant never alleged, nor does the record reflect, that he provided a written request for rebuttal testimony. Nevertheless, the WCJ allowed Claimant to present Dr. Freese's deposition testimony in rebuttal. Thus, the Board found that the WCJ did not err in limiting Claimant's rebuttal evidence to the deposition of Dr. Freese. Citing *Gibson v. Workers' Compensation Appeal Board (Armco Stainless & Alloy Products)*, 861 A.2d 938 (Pa. 2004), the Board also stated that, although the WCJ may have admitted inadmissible evidence, workers' compensation proceedings are not bound by the technical rules of evidence and all evidence of a reasonable probative value may be received. The Board found that the WCJ did not rely on any inadmissible evidence in rendering her decision, such as prior arrests and allegations of misconduct regarding his training position with the union, and that these matters concerned untruthful or incomplete statements previously made by Claimant.

The Board also concluded that the WCJ did not err in summarizing evidence because, pursuant to *Montgomery Tank Lines v. Workers' Compensation*

Appeal Board (Humphries), 792 A.2d 6, 13 n.10 (Pa. Cmwlth. 2002), WCJs are not required to summarize all evidence presented and need only set forth the findings necessary to resolve the issues before them, which the Board found that the WCJ's findings adequately addressed the issues that Claimant presented. Citing *Vols v. Workers' Compensation Appeal Board (Alperin, Inc.)*, 637 A.2d 711 (Pa. Cmwlth. 1994), the Board also noted that any attack on the WCJ's credibility determinations will not be overturned on appeal, because credibility determinations are within the sole purview of WCJs.

The Board further noted that the WCJ did not improperly limit any of Claimant's responses, as the WCJ merely addressed Claimant's failure to answer the question posed. The Board stated that Claimant's counsel was given the opportunity to redirect Claimant's examination and address any previously limited responses. Citing *Hoffmaster v. Workers' Compensation Appeal Board (Senco Products, Inc.)*, 721 A.2d 1152 (Pa. Cmwlth. 1998), the Board explained that it is irrelevant whether substantial evidence exists to support contrary findings; the relevant inquiry is whether substantial evidence supports the WCJ's necessary findings. The Board stated that Dr. Sutton's credible testimony alone supports the WCJ's decision and that the decision was further supported by the credible testimony of Goldcamp and Wark. Thus, the Board determined that the WCJ issued a reasoned decision supported by substantial evidence and did not err in granting Employer's termination petition and denying Claimant's reinstatement and review petitions.

On appeal to this Court,[5] Claimant argues that: (1) the Board failed to review the evidence in its entirety, which evidence demonstrates the WCJ's bias in favor of Employer; (2) the WCJ applied the incorrect burden of proof for the reinstatement petition; and (3) Claimant should have been awarded litigation costs, at least in part.

Discussion

A. Evidence in its Entirety and Bias

Claimant argues that, upon review of the record as a whole, including erroneous rulings on objections, an insufficient summary of the evidence, and unsupported credibility determinations, the WCJ demonstrated bias in favor of Employer, and he asks this Court to order the matter remanded to a different WCJ for a new hearing.

Section 422(a) of the Act states as follows:

> 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. Uncontroverted evidence may not be rejected for no reason or for an irrational

[5] Our scope of review is limited to determining whether constitutional rights have been violated, whether an error of law has been committed, or whether findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704.

> reason: the workers' compensation judge must identify that evidence and explain adequately the reasons for its rejection. The adjudication shall provide the basis for meaningful appellate review.

77 P.S. §834. A WCJ's decision is "reasoned" under section 422(a) if it provides for adequate appellate review without the need for further elucidation. *Daniels v. Workers' Compensation Appeal Board (Tristate Transport)*, 828 A.2d 1043, 1052 (Pa. 2003).

In a termination proceeding, the employer bears the burden of establishing that the work injury has ceased and/or that the claimant's current disability is unrelated to the work injury. *Paul v. Workers' Compensation Appeal Board (Integrated Health Services)*, 950 A.2d 1101, 1104 (Pa. Cmwlth. 2008). However, in seeking reinstatement, it is a claimant's burden to establish that he is once again disabled because his work injury has increased or recurred. *Bufford v. Workers' Compensation Appeal Board (North American Telecom)*, 2 A.3d 548, 588 (Pa. 2010). Further, it is also a claimant's burden to establish the work-relatedness of newly alleged injuries upon the filing of a review petition to amend the description of injury. *Degraw v. Workers' Compensation Appeal Board (Redner's Warehouse Markets, Inc.)*, 926 A.2d 997, 1000 (Pa. Cmwlth. 2007).

1. Rulings on Objections

Claimant argues that the WCJ erroneously ruled on Claimant's objections, and, thus, allowed inadmissible testimony and/or documents to be admitted. Claimant asserts that the inadmissible evidence influenced the WCJ's credibility determinations, regardless of whether the WCJ included the evidence in her findings. Although workers' compensation proceedings are not bound by the technical rules of evidence and all evidence of a reasonable probative value may be

received, *Gibson v. Workers' Compensation Appeal Board (Armco Stainless & Alloy Products)*, 861 A.2d 938, 947 (Pa. 2004), a WCJ must not rely on such evidence where inadmissible. *See Thompson v. Workers' Compensation Appeal Board (Bethlehem Steel Corporation, Freight Division)*, 683 A.2d 1315, 1318 (Pa. Cmwlth. 1996). The admission of evidence is committed to the sound discretion of the WCJ. *Coyne v. Workers' Compensation Appeal Board (Villanova University)*, 942 A.2d 939, 950 (Pa. Cmwlth. 2008). Rulings will be reversed only when there has been an abuse of discretion. *Id.*

The only specific contention Claimant had about Employer's conduct during the hearings was the line of questioning concerning a prior arrest. Further, as the Board noted in its opinion, the WCJ allowed Employer to question Claimant regarding reasons for leaving the Pennsylvania State Police, the reason for Claimant leaving his position with Joint Apprenticeship Training Committee, an altercation with the police that Claimant reported to his doctor that may have resulted in injuries, and a prior injury involving Claimant's upper back that occurred at a gym. (Board's op. at 10.) However, the WCJ did not rely on any of this evidence in reaching her decision. A review of the WCJ's findings reveals that the WCJ relied on her credibility determinations, rather than any inadmissible evidence, in reaching her decision on the petitions. Thus, the WCJ did not commit prejudicial error in allowing this questioning. *Coyne*; *Gibson*; *Thompson*.

Claimant also asserts that the WCJ improperly limited Claimant's ability to present rebuttal evidence. "A party wishing to present testimony in the form of rebuttal or surrebuttal shall notify the judge in writing within 21 days after conduct of the hearing or deposition at which the testimony to be rebutted or surrebutted has been given." 34 Pa. Code §131.53(e). Claimant does not contend that he notified the

WCJ in writing that he wished to present rebuttal evidence. However, at the hearing, Claimant asserted that he reached an agreement through an e-mail exchange with Employer's counsel to present rebuttal evidence, which Employer denied at the hearing. (R.R. at 153-54.) Claimant never sought to have these e-mails admitted into evidence. Nevertheless, after an off-the-record discussion, the WCJ allowed Claimant to present the rebuttal deposition testimony of Dr. Freese upon agreement of counsel. (R.R. at 154-55.) Although Claimant failed to comply with 34 Pa. Code §131.53(e), the WCJ still allowed Claimant to present one rebuttal witness. Thus, when reviewing the record as a whole as Claimant requests us to do, we cannot say that the WCJ erred or abused her discretion in ruling on Claimant's objections and in limiting Claimant's rebuttal evidence.

2. Insufficient Summary of Evidence

Claimant also argues that the WCJ's summaries of the evidence presented do not accurately depict the evidence in its entirety. Section 422(a) of the Act does not require the WCJ to discuss all of the evidence presented. *Stout v. Workers' Compensation Appeal Board (Pennsbury Excavating, Inc.)*, 948 A.2d 926, 932 (Pa. Cmwlth. 2008). WCJs are required to set forth the findings necessary to resolve the issues relevant to the issued decision and need not summarize all testimony set forth. *Montgomery Tank Lines*. A synopsis or summary of evidence is not a finding of fact. *Marcks v. Workers' Compensation Appeal Board (City of Allentown)*, 442 A.2d 9, 11 (Pa. Cmwlth. 1982). As factfinder, the WCJ is not required to accept even uncontradicted testimony. *Capasso v. Workers' Compensation Appeal Board (RACS Associates, Inc.)*, 851 A.2d 997, 1002 (Pa. Cmwlth. 2004).

Here, the WCJ summarized the testimony of each witness at length. However, these summaries are not considered findings, *Marcks*, and the WCJ is free to summarize the evidence in a manner necessary to resolve the issues. *Montgomery Tank Lines*. The WCJ's findings focused on the credibility of the witnesses, and the WCJ provided detailed reasons for her credibility determinations. The WCJ specifically rejected Claimant's testimony as not credible, and provided reasons therefor. The WCJ's findings of fact and conclusions of law also addressed Employer's burden for the termination petition and Claimant's burden for the reinstatement and review petitions, and these findings and conclusions have provided an adequate basis for appellate review. Claimant further contends that the WCJ's reliance on Dr. Yang's notes was improper as they were inadmissible hearsay. However, Claimant never objected to these notes as hearsay and subsequently referred to them on examination of Dr. Freese. Accordingly, the WCJ did not abuse her discretion in providing a summary of the evidence and testimony presented.

3. Unsupported Credibility Determinations

Claimant also argues that the WCJ's determination that Dr. Sutton's testimony was more credible than the testimony of Dr. Verna and Dr. Freese was not supported by the record. In his brief, Claimant, citing *Giant Eagle v. Workers' Compensation Appeal Board (Bensy)*, 651 A.2d 212 (Pa. Cmwlth. 1994), broadly states that "the entire basis of [Employer's] case rested on establishing the 'illusion' that [C]laimant is a 'Bad Person' without any evidence to support the suggestion." (Claimant's brief at 18.) In *Bensy*, a referee[6] dismissed an employer's petitions to either suspend or terminate a claimant's benefits because the employer had not met

[6] At the time of *Bensy*, WCJs were known as referees.

its burden of proof. In doing so, the referee merely listed each witness who testified and stated whether the testimony was credible or not credible—finding the testimony of two medical witnesses credible on cross-examination and not credible on direct examination—without giving any reasons for such determinations. The Board affirmed the referee's dismissal of the petitions.

On appeal to this Court, the employer argued that the referee's findings were capricious and should be reviewed as a matter of law and that the Board erred in not remanding for a rehearing. Although we stated that it is a rare case where a referee's decision has no rational basis or scheme and thus is capricious, we found that "we can make no sense of the [referee's] patchwork of credibility findings as to portions of each individual's testimony." *Id.* at 218. We noted that the referee did not set forth any findings concerning the testimony of the medical witnesses and provided no reasons for discrediting the direct testimony of each medical witness. We further noted that the referee's credibility determinations for the remaining witnesses had "no rhyme or reason." We concluded that no reasonable person could have made the findings of fact or conclusions of law set forth by the referee. Moreover, we stated that the referee's award was not rational, as the referee awarded the claimant benefits and expenses that the claimant neither requested nor had sufficient evidence to support. Thus, we found that the Board abused its discretion in not remanding the matter for a rehearing, and we vacated the Board's order with instructions to remand to a different referee for a rehearing.

The WCJ's opinion in this case does not resemble the referee's opinion in *Bensy*. Here, the WCJ provided specific reasons for each of her credibility determinations. The WCJ discredited Claimant's testimony regarding his ongoing work-related injury and his inability to perform his pre-injury position for the

following reasons: the WCJ's observation of Claimant's demeanor while testifying; Claimant's testimony that it took eight months to a year for the case manager to schedule treatment when a letter from the case manager stated otherwise; Claimant's sporadic treatment of his injury; Dr. Verna and Dr. Freese examined Claimant only after the filing of Employer's petitions and Dr. Freese only examined Claimant once; Dr. Verna treated Claimant sporadically; Dr. Verna testified that Claimant exaggerates his symptoms; Claimant did not inform Dr. Verna that he worked as an instructor after the work injury; and Claimant had difficulty in recalling specific events. (WCJ's Finding of Fact No. 22a-f.) The WCJ found the testimony of Goldcamp and Wark more credible than Claimant's testimony based on their demeanor while testifying and because they provided consistent testimony regarding the depth of the trench during Claimant's fall. (WCJ's Finding of Fact No. 23.) The WCJ further found that Claimant's testimony regarding the fall was contradictory to the distance that he reported to the doctors who examined him. (WCJ's Finding of Fact No. 23.)

The WCJ also explained that she found the testimony of Dr. Sutton more persuasive and credible than any contrary testimony of Dr. Verna or Dr. Freese for numerous reasons, specifically that Dr. Sutton is a board-certified orthopedic surgeon and that Dr. Verna and Dr. Freese failed to review all of Claimant's medical records. (WCJ's Finding of Fact No. 24a-k.) The WCJ further noted that she carefully reviewed the submitted medical evidence. (WCJ's Findings of Fact Nos. 13, 20-21.)

Essentially, Claimant is asking this Court to reassess the witnesses' credibility. The WCJ has the power to assess credibility and evidentiary weight, and is free to accept or reject, in whole or in part, the testimony of any witness, including medical witnesses. *Greenwich Collieries v. Workers' Compensation Appeal Board*

(Buck), 664 A.2d 703, 706 (Pa. Cmwlth. 1995). Determinations of credibility are at the sole discretion of the WCJ and will not be overturned on appeal. *Vols*. As previously noted, the WCJ set forth specific reasons for each of her credibility determinations and issued an award based on the evidence of record. Thus, contrary to Claimant's contentions, the WCJ's findings do not reflect error or an abuse of discretion.

In sum, having reviewed the record as a whole, we conclude that the WCJ appropriately ruled on objections, sufficiently summarized the evidence, and made credibility determinations supported by the record, and, therefore, did not err or abuse her discretion.

B. Whether the WCJ Applied an Erroneous Burden of Proof for Claimant's Reinstatement Petition

Claimant's entire argument is as follows:

> **FF 28.** The Judge applied an erroneous Burden of Proof to claimant's Petition for Reinstatement. The job was "no longer available, through no fault of his own". ***Pieper v. Ametek-Thermox Inst. Div.***, 584 A.2d 301 (PA 1990). Other than through insinuation of defense counsel, there is no *evidence* to the contrary.

(Claimant's brief at 25.) However, Claimant ignores the fact that the WCJ terminated Claimant's benefits prior to the date that the reinstatement petition sought relief. (WCJ's Findings of Fact Nos. 5, 26-27; WCJ's Conclusion of Law No. 10.) On the termination petition, Employer bore the burden of proving that the work injury had ceased and/or that the claimant's current disability is unrelated to the work injury. *Paul*. Employer met this burden through the credible testimony of Dr. Sutton, and, thus, the WCJ granted Employer's termination petition as of May 20, 2011. (WCJ's

Finding of Fact No. 26.) Because the WCJ determined that Claimant's work-related injury had ceased, the WCJ did not err in determining that Claimant's reinstatement petition was moot and correctly applied the burdens of proof in this case.

Conclusion

Because the WCJ's findings are supported by substantial evidence and because the WCJ placed the proper burdens of proof on the parties, the WCJ did not err or abuse her discretion in issuing her decision. Accordingly, we affirm.[7]

PATRICIA A. McCULLOUGH, Judge

[7] Claimant further asserts that the WCJ erred in not awarding him litigation costs for the petitions and issues resolved through the stipulation of facts and to the extent that he may be successful in regard to the issues presented herein. Claimant has not been successful on any issue on appeal, and, thus, is not entitled to litigation costs with respect to these issues. Further, Claimant failed to raise the issue of litigation costs in regard to the petitions and issues resolved by the stipulation of facts before the Board, and, thus, it is waived. *Riley v. Workers' Compensation Appeal Board (DPW/Norristown State Hospital)*, 997 A.2d 382, 388 (Pa. Cmwlth. 2010) ("An issue is waived unless it is preserved at every stage of the proceedings"). Even if Claimant had not waived this issue, Claimant would still not be entitled to litigation costs based on the stipulation of facts. A claimant shall be awarded litigation costs when "the matter at issue has been finally determined in whole or in part" in favor of the claimant. Section 440(a) of the Act, added by the Act of February 8, 1972, P.L. 25, 77 P.S. §996(a); *see Prebish v. Workers' Compensation Appeal Board (DPW/Western Center)*, 954 A.2d 677, 684 n.5 (Pa. Cmwlth. 2008) ("For a claimant to be awarded litigation costs, the claimant must prevail on the particular issue or petition for which she seeks costs."). Here, the parties' stipulation of facts removed all resolved issues from dispute during litigation, and, thus, Claimant did not prevail on any of these issues.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Dankanich, III, Petitioner	:	
	:	No. 1051 C.D. 2014
v.	:	
Workers' Compensation Appeal Board (H.B. Frazer Company), Respondent	:	

ORDER

AND NOW, this 19th day of March, 2015, the June 11, 2014 order of the Workers' Compensation Appeal Board is affirmed.

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PATRICIA A. McCULLOUGH, Judge