

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Beverly Berfield,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Workers' Compensation	:	
Appeal Board	:	
(Holy Redeemer Hospital),	:	No. 564 C.D. 2014
Respondent	:	Submitted: October 24, 2014

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COVEY

FILED: April 10, 2015

Beverly Berfield (Claimant) petitions this Court for review of the Workers' Compensation Appeal Board's (Board) February 25, 2014 order affirming the Workers' Compensation Judge's (WCJ) decision denying and dismissing Holy Redeemer Health System's (Employer) Termination Petition, granting Claimant's Petition to Review a Utilization Review Determination (UR Review Petition) and denying Claimant's request for attorney's fees for an unreasonable contest. The sole issue for this Court's review is whether the WCJ erred in failing to award Claimant attorney's fees for an unreasonable contest. Upon review, we affirm.

Claimant was employed full-time as a certified nursing assistant for Employer. On September 21, 1994, Claimant suffered a work-related injury that Employer acknowledged as a cervical strain, and for which it paid Claimant temporary total disability benefits under a Notice of Compensation Payable (NCP). In March 1995, Claimant began treating with Mark D. Avart, D.O. (Dr. Avart). In

2001, while litigating petitions to modify/suspend/terminate Claimant's benefits, the parties agreed that Claimant's work injury included a cervical strain and a left suprascapular nerve lesion, and resolved Claimant's entitlement to indemnity benefits. On September 11, 2001, a WCJ approved a Compromise and Release Agreement, whereby, Employer remained liable for payment of reasonable and necessary medical bills related to treatment of Claimant's work injuries. *See* Reproduced Record (R.R.) at 80a-91a.

On August 8, 2005, Claimant underwent an independent medical evaluation (IME) performed by John P. Nolan, Jr., M.D. (Dr. Nolan) at Employer's request. Dr. Nolan concluded that Claimant was recovered from her work-related injuries. Accordingly, on November 21, 2005, Employer filed the Termination Petition seeking to end payments for Claimant's medical bills effective August 8, 2005. Claimant denied that she was fully recovered, claiming that she continued to suffer residual effects from her September 21, 1994 work injury and that she was entitled to attorney's fees due to Employer's unreasonable contest because she "believes and therefore avers that said [Termination] Petition is being filed solely to harass [Claimant] due to the fact that she is in need of ongoing medical care." R.R. at 4a.

On April 19, 2006, Employer filed a utilization review request seeking an assessment of whether treatments provided to Claimant by Dr. Avart on or after March 16, 2006 were reasonable and necessary. *See* R.R. at 5a-6a. On June 28, 2006, Mitchell E. Antin, D.O. (Dr. Antin) issued a determination wherein he concluded that Dr. Avart's treatments on or after March 16, 2006 were neither reasonable nor necessary (UR Determination). On July 5, 2006, Claimant filed her UR Review Petition.

Employer's Termination Petition and Claimant's UR Review Petition were consolidated for purposes of litigation and decision. Hearings were held before

WCJ Michael Snyder on January 3, 2006, September 14, 2006, November, 14, 2006 and December 18, 2007. At the hearings, Employer offered Dr. Nolan's testimony in support of its Termination Petition. Dr. Nolan testified that when performing Claimant's IME, he reviewed Claimant's history, Dr. Robert Bachman's January 1999 IME report, Dr. Avart's May 27, 2005 office notes and the WCJ's September 11, 2001 decision. Dr. Nolan recalled that Dr. Bachman's report discussed an October 1994 cervical spine MRI which reflected a minor bulge at C6-7, and a left shoulder MRI that discussed "focal tendonitis of the supraspinatus tendon without tear[.]" R.R. at 183a.

When Dr. Nolan examined Claimant on August 8, 2005, she complained of left neck discomfort and constant pain in the trapezius and scapular areas of her left shoulder with occasional spasms. During Claimant's examination, although she had complaints of tenderness, Dr. Nolan found that she had full range of motion in both areas with no evidence of spasms, and with no indication of cervical or thoracic radiculopathy. Dr. Nolan concluded within a reasonable degree of medical certainty that Claimant was no longer suffering from cervical and left shoulder strain, that she could return to her pre-injury activities without restrictions, and that she was no longer in need of medical treatment for those injuries on or after August 8, 2005. On cross-examination, Dr. Nolan admitted that, at the time of Claimant's IME, he was not aware that Claimant's work injuries included a lesion at the left suprascapular nerve. He stated that after Claimant's IME, he received additional office notes from Dr. Avart from December 2000, February 2001 and March 2001 to the present. He opined that since Claimant did not have upper extremity strength loss, atrophy or local tenderness of the supraspinatus, there was no evidence of a suprascapular nerve lesion.

Claimant testified in opposition to Employer's Termination Petition and in support of her UR Review Petition. Claimant described that she experiences

constant, aching pain in her left shoulder blade area, and left arm weakness, numbness and tingling during flare-ups, but no longer has tingling in her hands or left arm pain. Claimant explained that treatments with Dr. Avart over the years since her work accident consisted of manipulation of the affected areas and muscle relaxer prescriptions to be taken as needed. Although Claimant initially saw Dr. Avart on a monthly basis, at the time of her testimony, she saw him only approximately once every three months. Claimant reported that the manipulations afford her relief for a couple of weeks. She also noted that Dr. Avart gave her injections between her spine and left shoulder areas when Claimant experienced flare-ups one or two times per year and that she gets relief from the injections for up to three months at a time. Claimant testified that without Dr. Avart's treatments, she would not be able to perform her limited activities of daily living and her part-time work.¹ Claimant stated that she is unable to return to her pre-injury job.

Claimant also offered Dr. Avart's testimony in support of her UR Review Petition. Dr. Avart had treated Claimant since March 9, 1995 and, as of the time of his deposition, had seen her 50 to 60 times. Dr. Avart testified that during Claimant's first visit, she described that she had injured her neck, upper back and shoulder at work and, although she continued to work for several weeks thereafter, her symptoms progressively worsened. Dr. Avart noted pain and spasms in Claimant's neck, tingling and weakness in her left arm, and pain in her shoulder blade. He reviewed Claimant's MRI and EMG tests from December 1994 which reflected that Claimant had a minimal disc bulge at C6-7 and some carpal tunnel, but nothing significant for her neck. Dr. Avart diagnosed that Claimant had thoracic outlet syndrome, left arm possible cervical radiculopathy, shoulder sprain, bulging

¹ Claimant returned to work for Employer for a short time in a light-duty capacity which involved no lifting. Thereafter, she worked for her husband's contracting business performing occasional office work. Claimant also earned her real estate license and, at the time of her testimony, worked as a realtor 15-20 hours per week.

cervical disc and cervical and thoracic strain caused by her September 21, 1994 work-related injury. Dr. Avart reported that he conducted spinal manipulations and prescribed physical therapy, medication and intermittent cortisone injections in Claimant's neck and shoulder, additional testing and follow-up with a neurologist. Dr. Avart further testified that neurologist Steven Mandel, M.D. (Dr. Mandel) diagnosed Claimant with a left suprascapular nerve lesion and a brachial plexus lesion (i.e., thoracic outlet syndrome) based upon Claimant's two consultations with him on May 23, 1996 and July 29, 1998, and imaging tests.

Dr. Avart described that he initially treated Claimant monthly; however, at the time of his deposition, he only treated her quarterly. Dr. Avart explained that his manipulations were conducted in order to decrease Claimant's spasms and pain, and increase her range of motion. He stated that the injections offered Claimant decreased pain, swelling and spasms for weeks at a time. Dr. Avart reported that during his 2004 examinations, Claimant demonstrated similar lower neck, upper left back spasms, with pain in her left shoulder blade, for which he continued manipulations, medications and injections, which gave Claimant relief. Dr. Avart testified that during Claimant's August 18, 2005 visit, an interim history revealed that Claimant had flare-up with a significant increase in her neck pain and spasms for which he provided manipulations and an injection. Dr. Avart explained that Claimant's condition worsened somewhat in December 2005 and he again treated her and that she experienced flare-ups when the injection effects wore off. He stated that a similar pattern continued during 2006.

Dr. Avart concluded within a reasonable degree of medical certainty that, based upon his examinations and treatments of Claimant and her diagnostic test results, Claimant had a left suprascapular nerve lesion and left thoracic outlet syndrome caused by her September 21, 1994 work injury. He pronounced at his deposition that notwithstanding Dr. Nolan's conclusion, Claimant continued to suffer

residuals of her accepted work injuries and that continued treatments therefor are reasonable and necessary because she has gained stability with them, and they allow her to function. Although he acknowledged that Claimant's 1994 EMG should have but did not reflect a suprascapular nerve lesion, Dr. Mandel made the diagnosis in 1996 and 1998. Moreover, Dr. Avart stated that he found Claimant's complaints to be consistent, she has never been free of spasms with full range of motion, and that she has not shown signs of symptom magnification. Dr. Avart further disputed Dr. Nolan's conclusion that Claimant recovered from her work injuries since Dr. Nolan did not evaluate her left suprascapular nerve lesion. He also disagreed with Dr. Nolan's conclusion that Claimant could return to her job which involved medium to heavy lifting. Rather, Dr. Avart asserted that Claimant could work in a part-time, sedentary to light-duty job.

Employer presented Dr. Antin's UR Determination in opposition to Claimant's UR Review Petition. *See* Notes of Testimony, November 14, 2006 (N.T. 11/14/06) Ex. D-2. The UR Determination reflects that Dr. Antin reviewed Claimant's medical records and concluded:

Dr. Avart's progress notes are based upon subjective reported complaints of a chronic nature. Dr. Avart's progress notes indicate a stable chronic pain pattern that is unchanged over many years. Clearly, in lieu of Dr. Avart's interventions over the past years, the unproductive and continual reevaluations of stable pain pattern for the purpose of reiteration and conservative recommendations does not meet the osteopathic standards of ongoing care and treatment. Documentation supplied is not adequate to support treatment under review.

Therefore, any and all treatment (soft tissue myofascial, myofascial release and active osteopathic manipulative techniques) including therapy (referral for aquatic and land therapy), prescriptions (Vicodin, Soma, and Celebrex – doses and frequencies not noted), injections, etc[.] provided

by [Dr. Avart] to [Claimant] on 03/16/2006 past, present, and future treatments is not reasonable and necessary.

N.T. 11/14/06 Ex. D-2 at 5-6.

The law 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, including medical witnesses.” *Griffiths v. Workers’ Comp. Appeal Bd. (Red Lobster)*, 760 A.2d 72, 76 (Pa. Cmwlth. 2000).

Here, the WCJ deemed Dr. Nolan’s testimony credible and persuasive because diagnostic tests supported that Claimant no longer has problems attributable to her work injury. The WCJ also stated that Claimant’s testimony was credible to the extent that it was not contradicted by Dr. Nolan. The WCJ found Dr. Avart significantly less credible than Dr. Nolan, in that his conclusions were contradicted by objective test results. The WCJ held that Dr. Antin’s opinions were credible and persuasive since they are supported by Dr. Nolan’s conclusions. Based upon his credibility determinations, the WCJ specifically found that “Claimant made a full recovery from her work-related injuries as of August 8, 2005,” and “[a]ny treatment of Dr. Avart on and after August 8, 2005 was not provided as a result of [Claimant’s] work-related injuries[.]” R.R. at 17a. Accordingly, on October 23, 2008, the WCJ granted Employer’s Termination Petition, denied and dismissed Claimant’s UR Review Petition and held that “Employer had a reasonable basis for a contest.” R.R. at 17a.

Claimant appealed to the Board. On October 29, 2010, a majority of the Board remanded the matter to the WCJ to reconsider the UR Review Petition because Dr. Nolan’s testimony was “legally insufficient” from which to make specific

findings as to whether Claimant was also fully recovered from her left suprascapular nerve lesion.²

While the action was pending on remand, WCJ Snyder retired. The case was re-assigned to WCJ Holly San Angelo who, contrary to WCJ Snyder, found Dr. Avart's testimony credible and rejected the testimony of Dr. Nolan and Dr. Antin. By decision issued July 9, 2012, WCJ San Angelo denied and dismissed Employer's Termination Petition and granted Claimant's UR Review Petition, thereby requiring Employer to pay outstanding medical bills for Claimant's treatment with Dr. Avart,³ and to continue paying Claimant's reasonable and necessary medical bills related to her left suprascapular nerve injury. WCJ San Angelo further ordered Employer to reimburse Claimant for her litigation costs in the amount of \$3,946.13. In addition, WCJ San Angelo concluded: "Employer engaged in a reasonable contest." Employer Br. App. C at 6.⁴

Claimant appealed to the Board from WCJ San Angelo's determination that Employer's contest was reasonable. Neither the Board nor the Court may review the evidence or reweigh the WCJ's credibility determinations. *Sell v. Workers' Comp. Appeal Bd. (LNP Eng'g)*, 771 A.2d 1246 (Pa. 2001). This Court has stated: "[I]t is irrelevant whether the record contains evidence to support findings other than those made by the WCJ; the critical inquiry is whether there is evidence to support the findings actually made." *Lahr Mech. v. Workers' Comp. Appeal Bd. (Floyd)*, 933 A.2d 1095, 1101 (Pa. Cmwlth. 2007) (quoting *Minicozzi v. Workers' Comp. Appeal*

² Commissioner McDermott dissented on the basis that "Dr. Nolan offered a clear opinion as to Claimant's recovery from the recognized injuries," which was deemed credible by the WCJ. R.R. at 54a.

³ Subject to the repricing provisions of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 531.

⁴ Page 6 of the WCJ's July 9, 2012 decision is missing from both Claimant's brief and her reproduced record. However, the full decision is attached to Employer's brief and the Board's certified record.

Bd. (Indus. Metal Plating, Inc.), 873 A.2d 25, 29 (Pa. Cmwlth. 2005)). Having determined that this case turned on credibility determinations, by decision issued February 25, 2014, the Board affirmed WCJ San Angelo's decision. Claimant appealed to this Court.⁵

Claimant argues that the WCJ erred in failing to award her attorney's fees for Employer's unreasonable contest. Section 440(a) of the Pennsylvania Workers' Compensation Act (Act)⁶ provides:

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[']s 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).

The reasonableness of an employer's contest depends upon whether the contest was prompted to resolve a genuinely disputed issue. **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.

⁵ "Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated." *Williams v. Workers' Comp. Appeal Bd. (POHL Transp.)*, 4 A.3d 742, 744 n.1 (Pa. Cmwlth. 2010).

⁶ Act of June 2, 1915, P.L. 736, *as amended*, added by Section 3 of the Act of February 8, 1972, P.L. 25, 77 P.S. § 996(a).

City of Phila. v. Workers' Comp. Appeal Bd. (Andrews), 948 A.2d 221, 230 (Pa. Cmwlth. 2008) (citations omitted; emphasis added). “Because the issue of reasonable contest is a question of law, this Court **must examine the entire record** to determine if the evidence presented supports the WCJ’s conclusion.” *Hansen v. Workers' Comp. Appeal Bd. (Stout Rd. Assocs.)*, 957 A.2d 372, 375 (Pa. Cmwlth. 2008) (emphasis added). “A reasonable contest is established when medical evidence is conflicting or susceptible to contrary inferences, and there is an absence of evidence that an employer’s contest is frivolous or filed to harass a claimant.” *Id.* (quoting *U.S. Steel Corp. v. Workers' Comp. Appeal Bd. (Luczki)*, 887 A.2d 817, 821 (Pa. Cmwlth. 2005)).

Here, although the WCJs’ credibility determinations and conclusions differed, they both held that Employer reasonably contested Claimant’s claims. After thoroughly examining the entire record, and finding no evidence that Employer’s Termination Petition or its defense of the UR Review Petition were frivolous or intended to harass Claimant, we hold that the Board properly affirmed WCJ San Angelo’s determination that Employer presented a reasonable contest. Accordingly, we affirm the Board’s order.

ANNE E. COVEY, Judge

