IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dolores L. Berger, Petitioner	:	
v.	:	No. 907 C.D. 2014
Workers' Compensation Appeal Board (Lehigh University), Respondent	:	Submitted: October 31, 2014

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED:** January 8, 2015

In this appeal, Dolores L. Berger (Claimant), representing herself, asks whether the Workers' Compensation Appeal Board (Board) erred in affirming a workers' compensation judge's (WCJ) decision that granted Lehigh University's (Employer) termination petition and denied Claimant's petitions to review and reinstate compensation benefits. Claimant primarily challenges the WCJ's reliance on the testimony of Employer's medical expert in determining Claimant fully recovered from her accepted work injury. Upon review, we affirm.

Beginning in 1981, Claimant began working for Employer as a bus driver. In February 1987, Claimant sustained a work injury when the bus she was driving was rear-ended.[1] A little over a month later, Claimant returned to work for Employer pursuant to a supplemental agreement.

[1] The record does not contain a precise description of Claimant's 1987 injury.

Thereafter, in September 2010, Claimant suffered another work injury after Employer assigned her to a new bus with a new seat. Employer accepted liability for a "lumbar sprain" through issuance of a Notice of Compensation Payable (NCP). Certified Record (C.R.), Ex. C-1.

In September 2011, Employer filed a termination petition alleging Claimant fully recovered from her work injury and was able to return to unrestricted work. Employer also filed a suspension petition alleging it offered Claimant a specific job, which it subsequently amended to a modification petition. Claimant denied the allegations.

In January 2012, Claimant filed a review petition alleging an incorrect description of her September 2010 injury. Claimant also filed a review and reinstatement petition alleging an incorrect description of injury and worsening of condition relating to her 1987 work injury. Employer denied the allegations. The petitions were consolidated, and hearings ensued before a WCJ at which Claimant was represented by counsel.

Claimant testified she began working for Employer as a full-time bus driver in January 1982. At that time, she had no neck or back problems. During the course of her employment, Claimant frequently drove over speed bumps. In September 2010, Claimant was assigned to a new bus with a new seat that "wasn't conducive to [her] back. It hurt." WCJ Op., 6/28/12, Finding of Fact (F.F.) No. 4(d). She made various attempts to become comfortable with the new seat without success. As a result, she experienced back problems for which she received

physical therapy and chiropractic treatment. Claimant continues to suffer back pain, pain down her leg, pain in her knee, numbness in her leg, and an inability to raise her arm. Additionally, Claimant began to experience dizziness in May 2011. She received a letter from Employer offering her a return to work in August 2011, but she did not return at that time because she considered herself unable to perform the job. Claimant also became "very depressed." F.F. No. 4(h).

On cross-examination, Claimant admitted she had no problems performing her job until she began driving the new bus in September 2010. She admitted Employer purchased a new seat for her; however, she ceased working at the end of March 2011. Claimant admitted she did not complain of any arm problem to a physician until May 2011, although she testified it began sometime sooner. Claimant admitted the dizziness started after she ceased working. She stated the reason she left work on the last day was that her entire leg was numb from her foot to her knee.

At a subsequent hearing, Claimant testified that she sustained a prior injury in 1987 while driving a bus. She testified that, since her prior testimony a couple months earlier, her condition worsened. "The nerves down the leg are starting to get real bad." F.F. No. 5(c). Claimant uses a cane, and she continues to undergo therapy and take various medications.

In support of her petitions, Claimant presented the deposition testimony of Dr. Vito Loguidice (Claimant's Physician), a board-certified orthopedic surgeon, who began treating her in September 2011. Claimant's

Physician obtained a history that Claimant injured her back in 1982 and 1987 in motor vehicle accidents. Claimant noticed her back began hurting a year before she began treating with Claimant's Physician when she began driving a new bus. She received physical therapy and chiropractic treatment as well as treatment from various other doctors. Claimant complained of pain in the neck and left upper arm as well as dizziness.

Claimant's Physician noted that on examination Claimant's gait was normal, her range of motion was limited, and she had discomfort but normal strength, normal sensation and normal reflexes. Claimant's Physician's review of an MRI of Claimant's lumbar spine from December 2010 revealed degenerative disc disease at the lower L4-L5 lumbar segments. He recommended facet injections for the spine and an injection for the left shoulder. When Claimant's Physician saw her again in October, Claimant complained of neck and back pain. The back pain traveled down Claimant's left side, but it recently traveled down her right side. Claimant experienced pain when bending, twisting and lifting.

Claimant's Physician initially diagnosed Claimant with chronic low back pain with radiculopathy, facet arthropathy, left shoulder rotator cuff tendinopathy, acromion bursitis and dizziness. On Claimant's second visit, Claimant's Physician added left lumbar radiculopathy and left cervical radiculopathy with an ulnar shoulder impingement. He ordered MRIs of Claimant's cervical and lumbar spine, which revealed an annular tear at L5-S1 on the right and a disc bulge at L3-4. There were arthritic changes or facet arthropathy at C2-3 and C3-4 on the right with degenerative changes at C4-5 and a

bulge at C5-6. Claimant's Physician referred Claimant to a neurologist for pain management and ordered a functional capacity evaluation, which indicated Claimant was incapable of driving a bus.

Claimant's Physician opined that as a result of Claimant's September 2010 injury, she developed a chronic sprain and strain and an aggravation of pre-existing degenerative arthritis in both her cervical and lumbar spine. As a result, she was unable to drive a bus. He also opined Claimant's current disability was related to the "micro-traumas" incurred over her long history of driving a bus, including the 1987 event. F.F. No. 6(j).

On cross-examination Claimant's Physician admitted that when he formed his opinion he was unaware that Employer provided Claimant with a new bus seat. He admitted that when he saw Claimant he assumed all of the pain she complained of already existed when she stopped working in March. He admitted Claimant's left shoulder problem was not related to the work injury, and he admitted that the dizziness was not directly related, but stated that if Claimant's back pain caused anxiety and the anxiety caused dizziness, then it was related. Claimant's Physician also admitted that Claimant never told him she experienced numbness in her feet. He further admitted that Claimant's age was related to her problems and that she could have improved once the uncomfortable seat was removed. Claimant's Physician admitted there were indications on the functional capacity evaluation of a sub-maximal effort. He also admitted there was no new "anatomic change in [Claimant's] spine." F.F. No. 6(q).

In response, and in support of its termination petition, Employer presented the deposition testimony of Dr. Scott Sexton (Employer's Physician), a board-certified orthopedic surgeon. Employer's Physician examined Claimant in June 2011; he testified Claimant reported pain down the front and side of her left leg, in her back, predominantly on the left side, and in the front of her left arm with difficulty lifting her left arm. She complained of swelling in the left leg and numbness from the knee to the foot of the left leg. Her medications included Ibuprofen, Tramadol and Vicodin. In the past she also used Lyrica and Gabapentin. Claimant noted that she had difficulty maintaining one position for a long time such as sitting and walking. She also reported difficulty sleeping and rated her pain as high as a nine out of ten.

Based on his physical examination, Employer's Physician found no gait abnormalities and a full range of motion at the cervical spine with minimal discomfort at the end arc of flexion and extension. He found no pain with lateral rotation side bending, a full range of motion in the shoulders bilaterally, sensation was intact and reflexes were normal. He noted no clinical deformities, no scoliosis, no swelling and no muscle spasm. A seated straight leg raising test was negative bilaterally.

Employer's Physician's review of an MRI report of the lumbar spine showed mild, multi-level degenerative arthritic changes in the lumbar spine. He also reviewed Claimant's treatment since the work injury. He opined Claimant had chronic back issues over the last 20 years and her condition was aggravated by the change of her bus seat beginning in September 2010. Employer's Physician also

explained he found no evidence of radiculopathy, opining that if Claimant had radiculopathy, it resolved as of his examination. Employer's Physician opined that Claimant suffered a lumbar sprain and strain and an aggravation of pre-existing lumbar arthritis. He opined that, although Claimant had symptoms of a multi-level arthritic condition, her work-related lumbar sprain and strain resolved. He opined Claimant was completely recovered from her work injuries and she was capable of returning to work insofar as the work injuries were concerned. He opined that Claimant requires no work-related restrictions or treatment, and she can return to work with appropriate ergonomic modifications to accommodate her pre-existing arthritic condition.[2]

Ultimately, the WCJ found Claimant's testimony credible; however, to the extent Claimant related her current difficulties to the September 2010 injury, the WCJ found Claimant's testimony unpersuasive in light of the credible medical testimony. With regard to the medical evidence presented, the WCJ found (with emphasis added):

> 9. To the extent the medical experts disagree, the opinions of [Employer's Physician] are more credible and are accepted as fact. We note that the accepted work injury is a sprain and strain from an uncomfortable bus seat. Although [Claimant's Physician] offered a theory of aggravation and a long history of aggravations involving micro-trauma and previous accidents going back almost 30 years, [C]laimant's testimony was that the new bus was not 'conducive to my back.' Many of the symptoms of which she currently complains did not exist at the

[2] Employer also presented the testimony of Christopher J. Christian, its Director of Transportation & Parking Services, regarding Employer's offer of the bus driver position to Claimant in August 2011 after Employer learned Claimant was released to return to work. Christian testified Claimant did not return to work following the job offer.

> time she stopped working more than a year ago. [Claimant's Physician] initially assumed these symptoms existed when she stopped working. Moreover, although [C]laimant has not worked now for more than a year, her condition continues to deteriorate even between the time of her testimony in January and March of this year. [C]laimant offered no testimony from any medical provider who treated her during her employment while these problems were occurring, but relied upon a physician who did not see her until after the independent medical examination.
>
> 10. [C]laimant was completely recovered from the accepted work injury as of June 24, 2011.

F.F. Nos. 9-10.

Based on these findings, the WCJ determined that Employer proved through credible, competent expert evidence that Claimant completely recovered from her work injury as of June 24, 2011. Thus, he granted Employer's termination petition. The WCJ dismissed as moot Employer's suspension/modification petition. Further, the WCJ determined Claimant did not offer credible evidence that her disability recurred or is related to her employment. As such, the WCJ denied Claimant's review and reinstatement petitions.

Claimant, through counsel, appealed. The Board affirmed. Claimant, representing herself, now petitions for review to this Court.

Initially, we note, as the ultimate fact-finder in workers' compensation cases, the WCJ "has exclusive province over questions of credibility and evidentiary weight …." A & J Builders, Inc. v. Workers' Comp. Appeal Bd.

(Verdi), 78 A.3d 1233, 1238 (Pa. Cmwlth. 2013). The WCJ may accept or reject the testimony of any witness in whole or in part. Id.

Moreover, "[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." Furnari v. Workers' Comp. Appeal Bd. (Temple Inland), 90 A.3d 53, 60 (Pa. Cmwlth. 2014) (citation omitted). We examine the entire record to see if it contains evidence a reasonable person might find sufficient to support the WCJ's findings. Id. If the record contains such evidence, the findings must be upheld, even though the record may contain conflicting evidence. Id. Additionally, we must view the evidence in the light most favorable to the prevailing party and give it the benefit of all inferences reasonably deduced from the evidence. Id.

On appeal,[3] Claimant argues the WCJ erred in relying on Employer's Physician's testimony, which she asserts did not constitute competent medical evidence to support the WCJ's decision. Claimant contends the WCJ erred in ignoring the "true facts" of her work injuries caused by both traumatic accidental injuries and course of time repetitive motion. Pet'r's Br. at 13. She contends the WCJ erred in not accepting the unequivocal testimony of Claimant's Physician, which is based on sound medical practices and supported by a comprehensive examination. Also, Claimant's Physician was aware of Claimant's past injury

[3] This Court's 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. 2 Pa. C.S. §704; Dep't of Transp. v. Workers' Comp. Appeal Bd. (Clippinger), 38 A.3d 1037 (Pa. Cmwlth. 2011).

complaints and ordered appropriate medical tests. Thus, Claimant's Physician's testimony together with his vast experience should receive "absolute credibility as opposed to [Employer's Physician]." Id. at 15. As a result, Claimant maintains the WCJ erred in concluding she fully recovered from her work injury and could return to work.

"An employer seeking to terminate a claimant's benefits must prove that a claimant's disability has ceased, or that any existing injury is not the result of the work-related injury. An employer may satisfy this burden by presenting unequivocal and competent medical evidence of the claimant's full recovery from the work-related injury." O'Neill v. Workers' Comp. Appeal Bd. (News Corp. LTD.), 29 A.3d 50, 53 (Pa. Cmwlth. 2011) (citations omitted). Where a claimant complains of pain, the burden in a termination petition is met when "an employer's medical expert unequivocally testifies that it is his opinion, within a reasonable degree of medical certainty, that the claimant is fully recovered, can return to work without restrictions and that there are no objective medical findings which substantiate the claims of pain or connect them to the work injury." Udvari v. Workmen's Comp. Appeal Bd. (USAir, Inc.), 705 A.2d 1290, 1293 (Pa. 1997).

Whether a medical opinion is equivocal is a question of law fully reviewable on appeal. O'Neill. A determination as to equivocality must be based on a review of the entire testimony. Id. Medical testimony is unequivocal if a medical expert testifies, after providing a foundation for the testimony, that in his professional opinion, he believes or thinks a fact exists. Id. However, to be unequivocal, every word of a medical expert's testimony or opinion "does not have

to be certain, positive, and without reservation or semblance of doubt." Id. at 57. "Even if a medical expert admits to uncertainty, reservation or lack of information with respect to medical details, the testimony remains unequivocal so long as the expert expresses a belief that, in his or her professional opinion a fact exists." Id. at 58; see also Somerset Welding & Steel v. Workmen's Comp. Appeal Bd. (Lee), 650 A.2d 114 (Pa. Cmwlth. 1994) (appearance of inconsistencies in medical expert's opinion does not render expert's testimony equivocal where he does not contradict himself).

Here, the WCJ credited Employer's Physician's opinion that Claimant fully recovered from her accepted work injury, a lumbar sprain, and that any remaining condition is unrelated to the work injury. F.F. Nos. 9, 10. Indeed, Employer's Physician's credible testimony established Claimant fully recovered from her work-related injuries, Claimant required no further treatment related to her work injuries, and Claimant could return to work with no restrictions related to the work injuries (although she did require ergonomic modifications for her unrelated, preexisting arthritis). C.R., Ex. D-3, Dep. of Scott E. Sexton, M.D., 11/14/11 at 18-23. More particularly, Employer's Physician testified as follows (with emphasis added):

> Q. Doctor, as a result of your history, physical examination, review of the records, did you reach any summary conclusions?
>
> A. Yes. I felt that [Claimant] had suffered from chronic back issues dating to multiple issues over the past 20 years. I felt her condition was aggravated due to a change in her bus and bus seat beginning in September of 2010. I believe she suffered a lumbar sprain and strain due to the alteration of her work environment and aggravation of her lumbar arthritic condition which was pre-existing. There was mention of a radiculopathy

and testing performed. At the time of my evaluation I did not detect any evidence on objective testing of ongoing radiculopathy. So I was unclear whether she had at one point exhibited signs but by the time of my evaluation I felt this had resolved if ever present.

Q. Doctor, with regard to your diagnostic impressions[,] what are they?

A. I felt she continued to experience symptoms on the basis of a multi level arthritic condition, but I felt her work related condition of lumbar sprain and strain and aggravation of her arthritic condition were resolved.

* * * *

Q. … Doctor, and you believe to a reasonable degree of medical certainty that … [Claimant] was fully recovered from her lumbar strain and sprain, aggravation of lumbar arthritic condition and lumbar radiculopathy?

A. Yes.

* * * *

Q. Doctor, we acknowledged an injury of a lumbar sprain and strain; did [Claimant] fully recover from that?

A. Yes, I believe she was fully recovered from the lumbar sprain and strain.

Q. If [C]laimant suffered from an aggravation of a lumbar arthritic condition, has she fully recovered without restrictions and without residuals?

A. Yes.

Q. If [C]laimant sustained a lumbar radiculopathy as a result of the work injury, is she fully recovered without restrictions or residuals?

A. Yes.

* * * *

> Q. … Doctor, did you release [C]laimant to her full duty job as [a] bus driver?
>
> A. Yes.

Id. at 18, 20, 21, 23. The WCJ properly concluded that this unequivocal, credible medical testimony was sufficient to satisfy the burden of proof on Employer's termination petition. Udvari; Davis. Although Claimant assigns error in the WCJ's decision to credit Employer's Physician's opinions over those offered by Claimant's Physician, we may not disturb the WCJ's credibility determinations or his resolution of conflicting medical testimony, which is within the WCJ's exclusive province as fact-finder. Furnari; A&J Builders.[4]

[4] Claimant asserts Employer's Physician's testimony is flawed and contradictory because, although Employer's Physician opined Claimant recovered and could return to work, he conceded: Claimant uses narcotic pain relievers, including Vicodin; Claimant has difficulty staying in one position for a long time; some of Claimant's medications could make her dizzy or drowsy; and, Claimant's bus seat aggravated her previous injuries. Claimant also argues Employer's Physician only examined Claimant once, never ordered more tests to determine the severity of Claimant's injuries, and chose to characterize Claimant's injuries as sprains or strains despite the fact that Claimant's Physician opined that an MRI showed annular tears at the LS-SI disc. We reject these assertions.

Specifically, although Employer's Physician acknowledged Claimant uses Vicodin, our review of Employer's Physician's testimony reveals that he testified Claimant takes this medication "at night," which he assumed was because of the medication's sedative effect. Sexton Dep. at 34 (emphasis added). Also, while Claimant contends Employer's Physician conceded some of Claimant's medications could cause dizziness, he testified Claimant ceased taking the two medications that were known to cause dizziness. Id. Further, although Claimant asserts Employer's Physician admitted Claimant has difficulty staying in one position for a long period, Employer's Physician actually provided this testimony in describing what activities *Claimant informed him* she could not perform when he conducted his independent medical examination; Employer's Physician did not offer such testimony as part of *his* opinion. Also, while Claimant asserts Employer's Physician examined her only once and did not order additional tests, such assertions go to the weight of the testimony, not its competence. Coyne v. Workers' Comp. Appeal Bd. (Villanova Univ.), 942 A.2d 939 (Pa. Cmwlth. 2008); Degraw v. Workers' Comp. Appeal Bd. (Redner's Warehouse Mkts.), 926 A.2d 997 (Pa. Cmwlth. 2007);
(Footnote continued on next page…)

Accordingly, we affirm.[5]

ROBERT SIMPSON, Judge

(continued…)

Williams v. Workmen's Comp. Appeal Bd. (Montgomery Ward), 562 A.2d 437 (Pa. Cmwlth. 1989). Finally, contrary to Claimant's assertion, Employer's Physician did not simply *choose* to describe Claimant's injury as a sprain. Rather the NCP accepted liability for a lumbar sprain.

Claimant further argues the WCJ erred in failing to acknowledge Employer's Physician is not qualified to perform a commercial driver's physical pursuant to U.S. Department of Transportation standards. However, Claimant did not raise this issue at Employer's Physician's deposition or in her appeal to the Board; thus, it is waived. See Budd Baer, Inc. v. Workers' Comp. Appeal Bd. (Butcher), 892 A.2d 64 (Pa. Cmwlth. 2006).

[5] In her Statement of Questions Involved, Claimant identifies several additional issues. She asks whether the WCJ erred in: denying her review and reinstatement petitions; misstating the frequency with which her bus traveled over speed bumps; failing to consider the timing of a notice of ability to return to work; and, not issuing a reasoned decision. However, Claimant did not raise these issues in her petition for review, nor does she develop these issues in her brief. "When issues are not properly raised and developed in briefs, when the briefs are wholly inadequate to present specific issues for review, a court will not consider the merits thereof." Commonwealth v. Feineigle, 690 A.2d 748, 751 n.5 (Pa. Cmwlth. 1997). "Mere issue spotting without analysis or legal citation to support an assertion precludes our appellate review of [a] matter." Commonwealth v. Spontarelli, 791 A.2d 1254, 1259 n.11 (Pa. Cmwlth. 2002). Thus, these issues are waived. Id.; see also Pa. State Univ. v. Workers' Comp. Appeal Bd. (Sox), 83 A.3d 1081 (Pa. Cmwlth. 2013), appeal denied, 94 A.3d 1011 (Pa. 2014) (failure to preserve issue in petition for review or properly develop issue in brief results in waiver).

In any event, even if properly preserved, these issues lack merit. As to the denial of Claimant's review and reinstatement petitions, the WCJ rejected Claimant's medical evidence, and he determined: "Claimant has failed to offer evidence herein found credible, that her disability has recurred or is related to her employment. Therefore, the Petitions for Review and Reinstatement must be denied." WCJ's Op., 6/28/12, Concl. of Law No. 3. Further, as set forth above, the WCJ granted Employer's termination petition based on his determinations that Claimant's work-related injuries fully resolved and that any remaining conditions are non-work-related. In light of these determinations, and in the absence of any contrary explanation, no error is apparent in the denial of Claimant's review and reinstatement petitions. Moreover, although the WCJ stated Claimant traveled over speed bumps at 20 miles per hour rather than 20 times per day as Claimant testified, Claimant offers no explanation as to how this minor inaccuracy would compel reversal. Additionally, because the WCJ dismissed Employer's modification petition as moot in light of his grant of the termination petition, any issue as to the notice of ability to return to work (which Claimant admitted she received) is not relevant. Finally, the WCJ made the determinations necessary to resolve the issues presented, and he adequately explained his credibility determinations, thereby issuing a reasoned decision.

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Workers' Compensation Appeal Board (Lehigh University), Respondent	:	

O R D E R

AND NOW, this 8th day of January, 2015, the order of the Workers' Compensation Appeal Board is **AFFIRMED**.

ROBERT SIMPSON, Judge