IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Deirdre McNally, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Wawa, Inc.), Respondent	:	No. 1037 C.D. 2010
	:	Submitted: October 15, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: February 7, 2011

Deirdre McNally (Claimant) challenges the order of the Workers' Compensation Appeal Board (Board) which reversed the Workers' Compensation Judge's (WCJ) decision to grant Claimant's reinstatement petition and affirmed the WCJ's decision in all other respects.

Claimant worked for Wawa, Inc. (Employer) as a food preparer. On February 17, 2003, Claimant suffered a work-related back injury when she worked longer than a normal workday cutting meat and lifting trash. Claimant petitioned for benefits. The WCJ granted the claim petition and awarded Claimant benefits at the rate of $141.08 per week from February 22, 2003, until January 19, 2004. From January 19, 2004, forward, the WCJ awarded partial disability benefits of $25.75 per week because a modified duty job was offered to Claimant as of that date within her work restrictions but Claimant did not respond. The WCJ also denied a penalty petition filed by Claimant. The Board affirmed.

Claimant petitioned for review with this Court which affirmed. McNally v. Workers' Compensation Appeal Board (Wawa, Inc.), No. 2290 C.D. 2006, (Pa. Cmwlth. Filed July 25, 2007).

On December 26, 2006, Claimant petitioned to reinstate benefits as of September 24, 2003, which was the date of the deposition of Neil J. Mallis, M.D. (Dr. Mallis), a panel physician for Employer, in which Dr. Mallis testified that Claimant could not return to work.

On September 18, 2007, Employer petitioned for physical examination and alleged that Claimant was scheduled to submit to a physical examination on July 23, 2007, and did not appear.

On March 17, 2008, Employer petitioned to modify, suspend and/or review compensation benefits on the basis that Claimant received unemployment compensation benefits without notifying Employer and worked other jobs without advising Employer.

On April 15, 2008, Claimant sought review of the utilization review determination which found the treatment of Eric Williams, M.D. (Dr. Williams) was not compensable because Dr. Williams did not submit his medical records. Employer had previously sought the utilization review.

The petitions were all consolidated by the WCJ.

Claimant testified that while she received partial disability benefits she worked for "Northtec, LLC" from June 2005, until September 2005, until "I couldn't work because it was just too hard for me. That pain that I had it's just terrible." Notes of Testimony, May 24, 2007, (N.T.) at 11-12; Reproduced Record (R.R.) at 116a-117a. Claimant's work at Northtec consisted of packing makeup gift sets. Prior to that job, she worked at the Boys and Girls Club of Philadelphia as a group leader in an afterschool program from April 2005, until June 2005, when she was laid off. N.T. at 13, 15-17; R.R. at 118a, 120a-122a.

Claimant testified that her back pain was such that "I can't bend. I can't do anything really. My pain worsened, badly, I mean it increased badly." N.T. at 17; R.R. at 122a. Claimant related that she could not run, play with her child, bathe her child, work or clean her house. N.T. at 18; R.R. at 123a. She took many medications for pain including illegal drugs. N.T. at 18-19; R.R. at 123a-124a. She explained that she fell "into a deep depression trying to kill my pain." N.T. at 25; R.R. at 130a. Claimant did not believe that she could perform a light duty job with Employer because of her physical condition. N.T. at 30; R.R. at 135a.

Claimant presented the deposition testimony of Dr. Mallis, Claimant's treating physician and board-eligible in internal medicine. Dr. Mallis first treated Claimant on March 24, 2003. Dr. Mallis again examined Claimant on June 29, 2007, for the first time since 2004. Dr. Mallis testified that Claimant could not work because her:

> back disease looks to me clinically to be worse based on my physical examination. The medications that she's

> requiring for pain control are narcotic medications that to me in themselves would preclude her ability to work. I know she's having difficulties with the narcotic medications. She seemed depressed when I saw her, which is very common with patients with chronic pain syndromes as also as well as with chronic narcotic use. And I think it's kind of things are spiralling [sic] downward. And unless there's some kind of surgical intervention I don't see how she can work. And even with the surgical intervention it's hard to know how much improvement there would be. Hopefully, there would be some."

Deposition of Neil J. Mallis, M.D., September 14, 2007, (Dr. Mallis Deposition) at 12-13; R.R. at 169a-170a.

Dr. Mallis diagnosed Claimant with chronic lumbar disc disease, chronic lumbar radiculopathy, and chronic pain syndrome. He opined that the "lumbar disc disease, the disc herniations that she has, directly result from the injury that occurred that day [the work-related injury]." Dr. Mallis Deposition at 14; R.R. at 171a. He explained that Claimant had two disc herniations at L4-5 and L5-S1, an annular tear surrounding the discs, a narrowing of her spinal canal as a result of the disc problems, and nerve damage as a result of the disc problems. Dr. Mallis Deposition at 14-15; R.R. at 171a-172a. Dr. Mallis opined within a reasonable degree of medical certainty that Claimant was totally disabled. Dr. Mallis Deposition at 29; R.R. at 186a.

Dr. Mallis again examined Claimant on May 15, 2008. After a records review Dr. Mallis reported that Claimant underwent surgery for her disc located at L4-5. Deposition of Neil J. Mallis, M.D., June 27, 2008, (Dr. Mallis Deposition 6/27/08) at 9; R.R. at 227a. Dr. Mallis explained that the surgery was a

decompressive laminectomy and discectomy at L4-L5. Dr. Mallis Deposition 6/27/08 at 14; R.R. at 232a. Dr. Mallis reiterated that Claimant could not work at all. Dr. Mallis Deposition 6/27/08 at 18; R.R. at 236a.

Employer presented the deposition testimony of Richard Schmidt, M.D. (Dr. Schmidt), a board-certified orthopedic surgeon. On January 7, 2008, Dr. Schmidt examined Claimant, took a history, and reviewed medical records. Dr. Schmidt testified that Claimant could perform light duty work because the surgery was successful and improved Claimant's condition such "that her clinical examination was objectively within normal limits referable to the lower back and legs without evidence of ongoing radiculopathy or disc herniation." Deposition of Richard Schmidt, M.D., May 5, 2008, (Dr. Schmidt Deposition) at 12; R.R. at 269a. Dr. Schmidt believed that Claimant's use of medication should be lessened. Dr. Schmidt Deposition at 14; R.R. at 271a. On cross-examination, Dr. Schmidt stated that he found nothing wrong with Claimant upon examination. Dr. Schmidt Deposition at 15; R.R. at 272a. Dr. Schmidt believed that there was no need for Claimant to take the medications she was taking. Dr. Schmidt Deposition at 29; R.R. at 286a.

The WCJ made the following relevant findings of fact:

> 9. Exhibits C-3 and C-4 are reports from Albert Einstein Medical Center detailing surgery performed on Deirdre McNally's lumbar spine by Eric Williams, M.D. ('Dr. Williams') on October 8, 2007. Although the preoperative diagnosis indicates a right L5-S1 microdiscectomy was contemplated, Dr. Williams opted to perform surgery at L4-L5 due to the '. . . size of the disk herniation . . .' at that site and her '. . . symptoms

> clinically were more consistent . . .' with a defect at this location. During surgery, a large extruded disc fragment was removed. To Dr. Williams, the L5-S1 disc site was '. . . amenable to conservative treatment. . .' If that failed, Ms. McNally could elect to undergo an L5-S1 discectomy.
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> . . . .
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> 24. Upon review of all evidence as described above, the Court [sic] deems as follows:
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> a) all testimony of Deirdre McNally and Dr. Mallis regarding a change in her condition such that she could no longer perform light duty work at Wawa found within her retained physical capacity by WCJ Seelig is unpersuasive and not credible thru [sic] October 7, 2007;
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> b) that upon undergoing lumbar spinal surgery on October 8, 2007, Ms. McNally's condition changed, precluding performance of light duty work at Wawa;
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> c) that findings and conclusions of Dr. Schmidt as of his January 8, 2008 examination are persuasive, credible and establish Ms. McNally regained the physical ability to perform light duty at Wawa;
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> d) that Wawa failed to forward a Section 306(b)(3) Notice of Ability to Return to Work following receipt of Dr. Schmidt's report and medical release;
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> e) that Deirdre McNally improperly failed to disclose unemployment compensation benefits and wages earned from 2004 thru [sic] 2006 to Wawa or WCJ Seelig until May 24, 2007; and
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> f) that Deirdre McNally failed to attend a requested medical examination with Schmidt on July 23, 2007 without a reasonable work-related excuse and made no effort to seek a new examination until October 11, 2007.

WCJ's Decision, October 21, 2008, Findings of Fact Nos. 9, 24 at 4, 7; R.R. at 20a, 23a.

The WCJ granted Claimant's reinstatement petition, granted Employer's petition for physical examination, granted Employer's petition to modify/suspend/review compensation benefits, and dismissed Claimant's petition for review of utilization review determination. The WCJ ordered Employer to pay temporary total weekly indemnity benefits of $141.08 with interest at ten percent per annum from January 7, 2008, subject to credits due Employer for all partial disability weekly indemnity benefits already remitted as well as for unemployment compensation benefits received and wages earned by Claimant in the period from 2004 to 2006. Further, the WCJ ordered all entitlement to indemnity benefits from October 8, 2007, through January 6, 2008, forfeited because she failed to submit to a physical examination until January 7, 2008. As of that date, the WCJ found that Claimant was able to work light duty but because Employer failed to issue a notice of ability to return to work form, the WCJ did not modify benefits.

Both Claimant and Employer appealed to the Board. Claimant contended that the WCJ's conclusion not to reinstate benefits until October 8, 2007, was not supported by substantial evidence, that the WCJ erred when he suspended benefits after she failed to attend the requested physical examination, and that the WCJ erred when he ordered a credit for unemployment compensation benefits received between 2004 and 2006. The Board denied Claimant's appeal.

Employer appealed and contended that the WCJ erred when he concluded that Claimant met her burden to establish that her work-related condition worsened as of her October 7, 2008, surgery such that she was unable to

perform the refused light-duty position, as Claimant presented no evidence which established her inability to perform the light duty position.

> The Board agreed with Employer and reversed:
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> > Upon review, the Judge erred in concluding that Claimant met the burden of proof on her Reinstatement Petition. . . . [A] reinstatement is not appropriate where a claimant's evidence fails to establish a 'worsening of this work-related injury that affects his ability to perform the [refused modified-duty position],' and in this respect, we note again that Claimant bore the 'burdens of both production and persuasion.'. . . As we see no indication either that Claimant produced any evidence indicating that the surgery resulted in her inability to perform the light-duty position, or that the Judge was qualified to independently arrive at that finding, the Judge erred in concluding that Claimant 'could not perform light duty.'. . .
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> > On the contrary, we believe that the production of specific evidence of incapacity to perform the refused position was required. For example, in J.A. Jones Constr. Co. v. WCAB (Nelson), 784 A.2d 280, 281 (Pa. Cmwlth. 2001), a reinstatement case where an issue before the judge was whether surgery for a work-related back condition resulted in incapacity to perform a previously refused position, the judge concluded that the claimant met his burden to establish that his 'work-related condition has worsened to the extent that he could no longer perform a position previously made available to him by Employer' where the credible surgeon testified that the surgery was work-related and disabled the claimant from performing the previously refused position.
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> > Because Claimant produced no such evidence in this case, she failed to meet the burden of proof on her Reinstatement Petition, and we must reverse the Judge's

> conclusion granting the reinstatement. (Citations and footnote omitted).

Board Opinion, April 29, 2010, (Opinion) at 9-10; R.R. at 11a-12a.

Claimant argues that the Board erred when it reversed the WCJ's decision to reinstate benefits, that the Board erred when it failed to recognize that the WCJ ignored uncontroverted evidence that Claimant became totally disabled as of September 30, 2006, that the Board erred when it failed to reverse the WCJ's decision that Claimant was entitled to a reinstatement of benefits only from October 8, 2007, when it should have ruled that Claimant was disabled as of September 30, 2006, that the Board erred when it failed to recognize that the WCJ erred when he suspended Claimant's benefits from October 8, 2007, through January 8, 2008, for her failure to attend a medical examination, that the WCJ erred when it accepted the testimony of Dr. Schmidt that Claimant regained the ability to perform light duty work as of January 7, 2008, and that the Board committed an error of law when it affirmed the WCJ's decision that Employer was entitled to a credit for all money Claimant received in unemployment compensation benefits instead of a credit that was limited to the amount that Employer would have paid in benefits.[1]

Initially, Claimant contends that the Board erred when it reversed the WCJ's decision that granted Claimant's reinstatement petition.

[1] This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact were supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

In Cyprus (RAG) Cumberland Resources v. Workers' Compensation Appeal Board (Stewart), 767 A.2d 1151 (Pa. Cmwlth. 2001), Correan Stewart (Stewart) was totally disabled due to work-related injuries suffered in a mine cave-in. Cyprus (RAG) Cumberland Resources (Cyprus) petitioned to modify and alleged that Stewart had failed to make good faith applications for available jobs within her physical limitations. The workers' compensation judge granted Cyprus's petition and reduced Stewart's benefits to partial disability based on the availability of a part-time telemarketer position which paid $6.00 per hour, twenty hours per week. Stewart petitioned to modify and alleged that her physical condition had deteriorated to the extent that she was totally disabled due to her work-related injuries. Six months after Stewart filed her petition, Cyprus notified her that a sedentary position as a weight room supervisor with the YMCA was available. Stewart was hired for the position but only worked five days before resigning. Cyprus petitioned to modify and alleged that Stewart failed to make a good faith attempt to perform the duties of the YMCA job. The workers' compensation judge denied both petitions and ordered Cyprus to make total disability payments to Stewart. Both parties appealed to the Board. The Board reversed and remanded on the basis that there were inconsistencies in the findings of fact and conclusions of law. On remand, the workers' compensation judge granted Stewart's petition and denied Cyprus's petition. The Board affirmed. Cyprus petitioned for review with this Court. Cyprus, 767 A.2d at 1152-1153.

This Court determined:

> Under Dillon v. Workmen's Compensation Appeal Board (Greenwich Collieries), 536 Pa. 490, 640 A.2d 386 (1994), a claimant is entitled to a modification of benefits

> from partial to total disability upon a showing that work within the claimant's physical limitations, as caused by the work injury, is not available. . . . Applying these principles to this case, we must conclude that Ms. Stewart has not met her burden of proof as a matter of law. The record shows, and the WCJ concluded, that Ms. Stewart could not return to her time of injury position and that she was unable to return to the weight room supervisor's position at the Washington YMCA. However, no evidence was adduced, nor was there a finding made, that Ms. Stewart was unable to continue to perform the sedentary telemarketing work on a part-time basis. Because this was the benchmark established by the parties in the August 1993 proceedings, Ms. Stewart was required to show that her condition had deteriorated and that she was more physically impaired than she had been when she rejected the telemarketer position in 1993. This was the burden required of Ms. Stewart to convert her partial disability benefits into total disability benefits. (Footnote omitted).

Cyprus, 767 A.2d at 1153-1154.

Here, in the original proceeding, Claimant received partial disability benefits because she did not in good faith pursue a light duty position with Employer. Under Cyprus, it was Claimant's burden to prove that her condition had deteriorated and that she was more physically impaired so that she could not perform the light duty position with Employer.

In an attempt to shoulder this burden, Claimant testified on her own behalf and presented the deposition testimony of Dr. Mallis. The WCJ did not find this evidence credible. The WCJ, as the ultimate finder of fact in compensation cases, has exclusive province over questions of credibility and evidentiary weight, and is free to accept or reject the testimony of any witness, including a medical

witness, in whole or in part. General Electric Co. v. Workmen's Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 529 Pa. 626, 600 A.2d 541 (1991). This Court will not disturb a WCJ's findings when those findings are supported by substantial evidence. Nevin Trucking v. Workmen's Compensation Appeal Board (Murdock), 667 A.2d 262 (Pa. Cmwlth. 1995). Because Claimant presented no credible evidence regarding the change in her condition, she did not shoulder the burden necessary to change her disability status from partial to total.[2]

Claimant next contends that the WCJ ignored uncontroverted evidence that Claimant became totally disabled on September 30, 2006. She argues that she testified that she had to stop working at NorthTech in October 2006, and that Dr. Mallis testified that she was disabled as of September 30, 2006. Once again, neither Claimant nor Dr. Mallis were found credible. Further, it is hard to understand how Claimant could be totally disabled on September 30, 2006, when she admitted working in October of 2006. This argument has no merit.

Claimant next contends that the Board erred when it failed to reverse the WCJ's decision that Claimant was entitled to a reinstatement of benefits only from October 7, 2007, and not from September 30, 2006. Because this Court has determined that Claimant was not entitled to a reinstatement, this Court need not address this issue.

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[2] The WCJ believed that the post-operative report of Claimant's back surgery established a change in condition. The Board reversed on this issue. Claimant concedes that the discharge form or report contained no support or verification in testimonial evidence. Claimant does not argue that the report supported a modification of benefits.

Claimant next contends that the Board erred when it affirmed the WCJ's decision to suspend her benefits from October 8, 2007, through January 8, 2008, for failure to attend a medical examination scheduled by Employer and which Claimant agreed to attend. Claimant asserts that she did not attend the examination scheduled for July 23, 2007, because she was hospitalized in a psychiatric hospital from July 20, 2007, to July 27, 2007.

Section 314 of the Workers' Compensation Act (Act)[3] provides that a claimant who refuses or neglects to submit to such an examination without reasonable cause or excuse for missing it forfeits the right to compensation during the period of refusal or neglect. What constitutes a reasonable excuse is a matter within the sound discretion of the workers' compensation judge, and, absent a manifest abuse of discretion will not be disturbed. Pancoast v. Workers' Compensation Appeal Board (City of Philadelphia), 734 A.2d 52 (Pa. Cmwlth. 1999).

Here, Claimant did not appear for the scheduled independent medical examination in July 2007, and did not seek to reschedule the examination until October 11, 2007, after back surgery. Claimant argues that because she was hospitalized during the week of the scheduled examination, the WCJ abused his discretion when he determined the admission was voluntary and that Claimant did not have a justifiable reason for missing the examination. While hospitalization certainly seems to be a reasonable excuse, it does not explain why Claimant did not

[3] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §651.

reschedule the examination until after her back surgery. This Court agrees with the Board that the WCJ did not abuse his discretion.

Claimant next contends that the WCJ erred when he accepted the opinion of Dr. Schmidt that Claimant had regained the ability to perform light duty work as of January 7, 2008. Because this Court has determined that Claimant never lost the ability to perform light duty work, this Court need not address this issue.

Finally, Claimant contends that the Board committed an error of law when it affirmed the WCJ's decision that Employer was entitled to a credit for all money received for unemployment compensation benefits instead of a credit that was limited to the amount that Employer actually paid in benefits.

The Board addressed this issue and determined, "On the contrary, we see no error in the Judge's Order, noting that the word 'all' does not appear as Claimant asserts. We believe the Judge properly granted Defendant [Employer] a credit for Claimant's weekly wages and unemployment compensation benefits and reject Claimant's argument." Opinion at 7.

Claimant neither informed Employer that she worked these two jobs nor that she received unemployment compensation. Section 204(a) of the Act, 77 P.S. §71(a), provides that "if the employe receives unemployment compensation benefits, such amount or amounts so received shall be credited as against the

amount of the award made . . . ." This Court discerns no error on the part of the WCJ.

Accordingly, this Court affirms.

BERNARD L. McGINLEY, Judge

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v.	:	
Workers' Compensation Appeal Board (Wawa, Inc.), Respondent	:	No. 1037 C.D. 2010

O R D E R

AND NOW, this 7th day of February, 2011, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge