

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Justine Witherspoon, :  
 :  
 Petitioner :  
 :  
 v. : No. 1050 C.D. 2010  
 :  
 : Submitted: October 15, 2010  
 Workers' Compensation Appeal :  
 Board (Lower Bucks Hospital and :  
 Scibal Associates, Inc.), :  
 Respondents :

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

**OPINION NOT REPORTED**

MEMORANDUM OPINION  
BY JUDGE McCULLOUGH

FILED: April 4, 2011

Justine Witherspoon (Claimant) petitions for review of the May 5, 2010, order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of a workers' compensation judge (WCJ) granting the termination petition filed by Lower Bucks Hospital (Employer). For the reasons that follow, we reverse.

Claimant was employed by Employer as an in-home phlebotomist. On January 31, 1996, Claimant was injured in a motor vehicle accident while in the course of her employment. Employer acknowledged Claimant's injury through the issuance of a notice of compensation payable (NCP) dated February 28, 1996, which described the injury as a cervical/trapezius/thoracic and lumbar strain. (Reproduced Record (R.R.) at 174a.)

On September 25, 1997, Claimant underwent cervical spine surgery. Subsequently, in December 1997, Claimant filed a petition to reinstate benefits and a petition to review medical treatment with respect to that surgery. The parties resolved the matter by way of a November 19, 1998, stipulation of facts (Stipulation) acknowledging that the surgery was causally related to the work injury and that Claimant was disabled as a result of the surgery. In relevant part, the Stipulation states as follows:

2. Claimant's injury was acknowledged through the issuance of a Notice of Compensation Payable dated February 28, 1996 acknowledging a cervical/trapezius/thoracic and lumbar strain and showing an average weekly wage of \$504.71, yielding a weekly compensation rate of \$336.47

3. On or about December 19, 1997, claimant filed a Petition to [reinstate] benefits and a petition to review medical treatment and/or billing. Claimant alleged she underwent cervical spine surgery on September 25, 1997, which was attributable to her work injury and that the employer should reinstate benefits and pay the surgical fees and related treatment.

4. The parties agree and stipulate that the claimant's surgery was causally related to the work injury and that claimant was disabled as a result of the surgery on September 25, 1997.

5. On or about June 8, 1998 claimant returned to work with restrictions, and a loss of earnings.

(R.R. at 174a-75a.)

The WCJ adopted the Stipulation in a November 24, 1998, order granting Claimant's petitions. (R.R. at 172a-76a.) Pursuant to the Stipulation,

Claimant received compensation for the expenses related to the surgery and continuing wage loss benefits. Claimant returned to work on June 8, 1998, with restrictions, and presently she is limited to working four hours per day.

On June 7, 2005, Employer filed a termination petition averring that Claimant was fully recovered from the work injury. Claimant filed an answer denying Employer's allegation and the matter was assigned to a WCJ for hearings.

In support of its petition, Employer presented the deposition testimony of Ira C. Sachs, D.O., who is board certified in orthopedic surgery. Dr. Sachs examined Claimant on September 24, 2002, and June 7, 2005. (R.R. at 276a.) Despite Claimant's complaints of reduced motion and continuing pain, Dr. Sachs opined that Claimant was fully recovered from the cervical strain, trapezius strain, thoracic strain, and lumbar strain. (R.R. at 294a–95a.) Dr. Sachs testified that, in his opinion Claimant could return to work without any restrictions related to the work injury and she was no longer in need of any medical care related to the work injury. (R.R. at 296a.)

Although he testified that Claimant was fully recovered and able to maintain gainful employment, Dr. Sachs' 2002 and 2005 medical evaluation reports both note that Dr. Sachs imposed physical restrictions on Claimant. Dr. Sachs stated that these ongoing restrictions relate to Claimant's preexisting cervical lumbar degenerative disease and not to any work injury. (R.R. at 298a.)

On cross-examination, Dr. Sachs opined that the cervical spine surgery Claimant underwent was not related to her work injury but was a result of preexisting degenerative disease. (R.R. at 301a-02a.) According to Dr. Sachs, the work injury may have exacerbated Claimant's preexisting problems, but the actual need for the surgery was related to Claimant's preexisting condition. Id. When asked to assume

that the cervical spine surgery was work related, Dr. Sachs opined that “the surgery worked out real well.” (R.R. at 294a.) Dr. Sachs was unaware of the parties’ Stipulation that the surgery was related to the work injury. After he was told this information, Dr. Sachs did not change his opinion, (WCJ’s Finding of Fact No. 5(a), R.R. at 42a), and he maintained that Claimant was fully recovered from any and all work injuries. (R.R. at 301a-05a.)

Claimant presented the testimony of Barry J. Snyder, M.D., who also is board certified in orthopedic surgery. Dr. Snyder examined Claimant on January 24, 2006, (R.R. at 208a), and he also opined that Claimant had fully recovered from any cervical, trapezius, thoracic, and lumbar strains. (R.R. at 246a–47a.) Regarding the cervical surgery, Dr. Snyder offered the following testimony:

During her course of treatment she [saw] a neurosurgeon Dr. Scogna and then in 1997 underwent surgical treatment for her continuing complaints of neck pain and arm and left upper extremity pain. ... The fusion itself healed, but she still had residual symptoms that were studied by additional x-ray imaging, magnetic resonance studies and then [she] subsequently was seen by a number of other physicians.

(R.R. at 214a.) According to Dr. Snyder, Claimant’s residual symptoms included issues corresponding to the C5 or C6 nerve root, with loss of sensation in a number of areas, subtle sensory changes in her right upper extremity, decreased sensation in her left thumb and index finger, sensory changes in her right thumb, decreased sensation in her thighs, and a limitation in the rotational motion of her cervical spine. (R.R. at 217a–21a.) When specifically asked if his physical examination demonstrated findings of an ongoing work injury, Dr. Snyder opined that Claimant’s ongoing symptoms were causally related to the work injury.

Well, when you consider it in the context of several points, one, that she had surgery and the surgery relates to the level of her spine that was symptomatic both in her neck as well as her upper extremity. That with the understanding that the surgery would be related to the work injury. Then certainly any other complaints she has surrounding that area and that are concordant with that level that was operated would relate directly or indirectly to the work injury. And because there has been concordance in all of that, her ongoing symptoms and the physical findings that were noted on this examination are entirely consistent with those being directly related to the injury at work in January of '96.

(R.R. at 222a.) Dr. Snyder further explained the surgery and impairment relationship:

Having had surgery in and of itself leaves you with some permanent impairment. Even for an individual who was entirely relieved of symptoms, there will be some loss of motion of the neck and cervical spine and some limitations that are imposed so that there will be some impairment. ... But that impairment relates very specifically to the levels that were fused and that were fused because of the injury that resulted from the January 1996 work related incident.

(R.R. at 233a-34a.)

Claimant testified that she had been employed by Employer since 1972 and that her job as an in-home phlebotomist required extensive driving. Claimant described the motor vehicle accident on January 31, 1996, stating that she suffered injuries to her neck, lower back, and ankle. (R.R. at 183a-87a.) Claimant acknowledged that she previously had neck issues during 1991 or 1992 but stated that they had resolved before the 1996 work injury. (R.R. at 186a.) Claimant added that, prior to the 1996 accident, she was not under a doctor's care nor was she

experiencing any problems with her neck, back, or ankle. Claimant further testified that although she underwent surgery on September 25, 1997, she continued to have neck pain. (R.R. at 188a.) Claimant stated that, since returning to work on June 8, 1998, she has been performing light-duty work and she continues to experience pain. (R.R. at 190a.)

In a decision and order dated September 27, 2006, the WCJ accepted the testimony of both medical experts as credible. The WCJ noted that Employer provided an incomplete copy of the Stipulation and found that Employer's evidence was inadequate to identify the accepted injuries for purposes of a termination. (WCJ's Finding of Fact No. 8.) Accordingly, the WCJ denied Employer's petition, and Employer appealed to the Board.

On April 4, 2007, the Board issued an order vacating and remanding the case to the WCJ. The Board noted that, although Employer had submitted an incomplete copy of the Stipulation, the material submitted actually contained a reference to the cervical/trapezius/thoracic and lumbar strain as the accepted work injury. Therefore, the Board remanded the matter with instructions to the WCJ to determine whether the evidence is credible and sufficient enough for the WCJ to support a termination of benefits.

The WCJ circulated a remand decision and order on February 7, 2008, again denying the termination petition. The WCJ found that Employer had "again failed to submit evidence sufficient to impart to the undersigned what the accepted injuries are that are sought to be terminated." (WCJ's Finding of Fact No. 8.) The WCJ stated that, pursuant to the Stipulation, the cervical surgery was attributable to Claimant's work injury, and "cervical surgery is not a condition from which the undersigned might find full recovery." (Id.) Therefore, the WCJ concluded that

Employer failed to meet its burden to show that Claimant had fully recovered from the work injury.

For the second time, on October 7, 2008, the Board issued an order vacating and remanding the matter to the WCJ. The Board stated that:

The WCJ correctly found that cervical surgery is not a condition from which she can find a full recovery. This is true because surgery is a treatment, not an injury. However, the WCJ erred when she found that, because the diagnosis which led to the surgery is not defined, Defendant failed to submit evidence sufficient to impart the accepted injuries. As noted above, the accepted injuries are contained in the stipulation. There is no evidence that Claimant ever filed a Review Petition to amend the injuries agreed upon by the parties in the stipulation that are contained in the NCP. Therefore, it must be inferred that the agreed upon compensable surgery is related to the agreed upon cervical injury enumerated in the NCP.

(R.R. at 77a.) The Board directed the WCJ to issue “additional findings and conclusions adjudicating the matter based on the accepted, credible injuries of cervical/trapezius/thoracic and lumbar strain.” (Id.)

In his second remand decision and order of July 28, 2009, the WCJ granted Employer’s termination petition. (R.R. at 39a-44a.) The WCJ found that both medical experts offered opinions that Claimant was fully recovered from the accepted work injuries. (WCJ’s Finding of Fact No. 8.) Although the medical experts offered conflicting opinions as to whether the surgery was causally related to the work injury and whether Claimant was impaired as a result of that surgery, the WCJ regarded differences in their opinions as “semantic discrepancies.” (Id.) The WCJ accepted Claimant’s testimony as credible but determined that it cannot supersede the testimony of the two medical experts who opined that Claimant had

fully recovered from the accepted work-related diagnoses. (WCJ's Finding of Fact No. 9.) Further, the WCJ noted that Claimant had failed to file a review petition; thus, he found that the work injuries were those set forth in the Stipulation and did not include the cervical surgery, which was a treatment rather than a diagnosis. (WCJ's Finding of Fact No. 10.) Therefore, the WCJ concluded that Claimant was fully recovered from her work-related injuries as of June 7, 2005. (WCJ's Finding of Fact No. 11.)

Claimant appealed to the Board, which affirmed the WCJ's order. The Board concluded that no error of law had been committed and that the record contained substantial, competent evidence to support the WCJ's findings. In particular, the Board noted that the credible testimony of Dr. Sachs established that Claimant's surgery was necessitated by a non-work-related, pre-existing condition. (R.R. at 16a-17a.)

On appeal to this Court,<sup>1</sup> Claimant argues that the WCJ's determination of a full recovery and termination of benefits is not supported by substantial and competent evidence. Claimant also asserts that the WCJ committed an error of law in failing to recognize the stipulated causal relationship between the accepted work injury and the cervical surgery.

An employer seeking to terminate workers' compensation benefits bears the burden of proving either that the employee's disability has ceased or that any current disability arises from a cause unrelated to the employee's work injury. Campbell v. Workers' Compensation Appeal Board (Antietam Valley Animal

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<sup>1</sup> Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.



Hospital), 705 A.2d 503 (Pa. Cmwlth. 1998) (holding that termination was improper where employer's expert did not rebut the claimant's credible complaints of ongoing pain and fatigue). Termination is proper where the WCJ credits the testimony of the employer's medical expert, who testifies unequivocally, that within a reasonable degree of medical certainty, the employee is fully recovered and can return to work without restrictions, and there are no objective medical findings that either substantiate the complaints of pain or connect them to the work injury. Udvari v. Workers' Compensation Appeal Board (US Air, Inc.), 550 Pa. 319, 705 A.2d 1290 (1997).<sup>2</sup>

In Gillyard v. Workers' Compensation Appeal Board (Pennsylvania Liquor Control Board), 865 A.2d 991 (Pa. Cmwlth. 2005) (en banc), a WCJ denied the employer's first termination petition, specifically finding that the claimant continued to suffer from disabling, chronic L5-S1 radiculopathy. In a subsequent termination proceeding, the employer's medical expert testified that the claimant only

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<sup>2</sup> In Udvari, the employer filed a termination petition, and, in support thereof, the employer's medical expert testified that the claimant had fully recovered from the work injury. The WCJ granted termination, and the Board affirmed. This court reversed the termination, citing the expert's acknowledgement that the claimant continued to have subjective complaints of pain. The employer appealed, arguing that there was substantial evidence to support a termination. Our Supreme Court agreed and held as follows:

We must keep in mind that the employer bears the burden of proof in a termination proceeding to establish that the work injury has ceased. In a case where the claimant complains of continued pain, this burden 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 any restrictions and that there are no objective medical findings which either substantiate the claims of pain or connect them to the work injury.

Udvari, 550 Pa. at 327, 705 A.2d at 1293.

suffered sprains and strains as a result of the work injury and had fully recovered from the sprains and strains. We held on appeal that the testimony of the employer's medical expert was legally insufficient to support a termination of benefits because it did not establish that the claimant had recovered from all his work-related injuries.

Claimant argues that in this case, Employer's burden required proof that she was recovered from any disability related to the cervical surgery. In making this argument, Claimant relies on the WCJ's November 24, 1998, order adopting the parties' Stipulation. We agree with Claimant.

This Court has held that stipulated facts are controlling and conclusive; “[a]s a general rule, once a stipulation of facts has been effectively entered into, there can be no valid contention or conclusion that facts within the scope of the stipulation are unsupported by substantial evidence.” Kostecky v. Mattern, 452 A.2d 100, 104 (Pa. Cmwlth. 1982) (holding that a stipulation of facts was sufficient to prove that property owners filed only one of three plans required for subdivision approval); Singer v. Workmen's Compensation Appeal Board (Fruehauf), 496 A.2d 67, 69 (Pa. Cmwlth. 1985) (holding that stipulated facts are legally binding on the parties, the [WCJ], the [B]oard, and this court.”). Concessions made in stipulations become the law of the case, and the parties who make them may not later contradict their previous admissions. Klingler v. Workmen's Compensation Appeal Board, 413 A.2d 432 (Pa. Cmwlth. 1980) (holding that where parties executed a stipulation of facts the claimant could not challenge those facts via testimony adduced prior to the execution of the parties' stipulation).

Here, the parties' Stipulation acknowledges that the cervical spine surgery was related to the work injury and resulted in disability. (R.R. at 174a-75a.) In light of this binding Stipulation, Employer was required to prove that Claimant

was fully recovered from any disability resulting from the surgery to meet its burden in the termination proceeding. Udvari; Kostecky.

Moreover, our courts have repeatedly held that where claimant in good faith seeks medical treatment for a work injury and the medical treatment itself either aggravates the existing injury or causes new, additional injury, the law regards the latter being causally related to the original work injury. Workmen's Compensation Appeal Board v. Ira Berger & Sons, 470 Pa. 239, 368 A.2d 282 (1977) (holding that disability in the nature of a conversion neurosis which resulted from negligent treatment of a compensable injury was causally related to the initial work injury); Parker v. Workers' Compensation Appeal Board (Dock Terrace Nursing Home), 729 A.2d 102 (Pa. Cmwlth. 1999) (holding that termination was improperly granted where employer's medical expert testified that the claimant was deconditioned and unable to return to her pre-injury position as a result of passive chiropractic care the claimant received for her work injury).

In the present case, the parties have stipulated that the surgery was casually connected to the work injury, i.e., that it was medical treatment for the original work injury. Pursuant to the holdings above, any resulting injury, disability, or impairment is deemed to be caused by the original work injury. Accordingly, the WCJ erred in relying on Dr. Sachs' contrary opinion to grant a termination of benefits.

In that regard, Claimant notes that while both medical experts opined that Claimant had recovered from the cervical/trapezius/thoracic and lumbar strain, Dr. Snyder testified in detail that Claimant continued to suffer pain and impairment as a result of the cervical surgery. Claimant asserts that the WCJ's failure to recognize

and comment on that testimony was a capricious disregard of substantial and credible evidence.<sup>3</sup> We agree.

The medical experts offered contrasting views of both the cause and the effects of the cervical surgery. Dr. Snyder opined that the surgery was necessitated by the work injury and that Claimant is impaired as a result of the surgery. Dr. Sachs opined that the surgery is not causally related to the work injury and added that Claimant is fully recovered and is able to return to work without restrictions related to the work injury. We cannot agree with the WCJ's characterization of these conflicting statements as "semantic discrepancies." (WCJ's Finding of Fact No. 8.)

We conclude that Employer failed to present competent evidence establishing that Claimant had fully recovered from all disability related to the work injury, Udvari, Campbell, and, accordingly, we reverse.

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PATRICIA A. McCULLOUGH, Judge

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<sup>3</sup> Review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in which that question is properly before the court. Leon E. Wintermeyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002).

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Board (Lower Bucks Hospital and	:	
Scibal Associates, Inc.),	:	
Respondents	:	

**ORDER**

AND NOW, this 4<sup>th</sup> day of April, 2011, the order of the Workers' Compensation Appeal Board (Board), dated May 5, 2010, is reversed.

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PATRICIA A. McCULLOUGH, Judge