IN THE COMMONWEALTH COURT OF PENNSYLVANIA

J.J. White, Inc. and Risk Enterprise Management, Petitioners	:	
v.	:	No. 1240 C.D. 2010
Workers' Compensation Appeal Board (Sunoco, Inc., ESIS, and Coyle), Respondents	:	Submitted: December 10, 2010

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: January 20, 2011

J.J. White, Inc. and Risk Enterprise Management (White) petition for review of an order of the Workers' Compensation Appeal Board (Board) granting Steven Coyle's (Claimant) reinstatement petition and the joinder petition of Sunoco, Incorporated (Sunoco). We affirm.

Claimant suffered a work-related injury to his right knee on October 4, 1997. At the time of this injury, Claimant was employed by White as a welder and pipe fitter; however, the injury to Claimant's right knee occurred at the premises of Sunoco, which was the site of Claimant's employment with White. Claimant began receiving total disability benefits pursuant to a notice of compensation payable issued by Sunoco. Thereafter, Claimant returned to a

modified light duty position in January 1998. Claimant received either total or partial disability benefits at various times during the period between October 4, 1997, and early November 1998. Claimant has been receiving partial disability benefits since the middle of November 1998.

On or about November 5, 2008, Claimant filed a reinstatement petition naming Sunoco as the employer, wherein Claimant sought reinstatement of workers' compensation benefits as of October 10, 2008. Claimant alleged that he was "back out of work" due to his previous October 4, 1997, work-related injury. Sunoco filed a timely answer denying the material allegations of Claimant's reinstatement petition.

On January 8, 2009, Sunoco filed a joinder petition seeking to join White as an additional defendant. Sunoco alleged in the joinder petition that Claimant suffered a new injury on May 9, 2007, in the course of his employment with White when he aggravated his right knee condition when he was walking in the shop, stepped over something and heard a pop in his right knee. Sunoco alleged further that the May 9, 2007, incident resulted in surgery on Claimant's right knee on October 10, 2008. White filed a timely answer to the joinder petition denying the material allegations contained therein.

Hearings before a WCJ ensued wherein the WCJ treated Claimant's reinstatement petition as a claim petition. In support of his petition, Claimant testified on his own behalf and submitted into evidence, *inter alia*, medical reports prepared by his treating physician, Andrew J. Collier, Jr., dated February 22, 2007, through October 10, 2008. In opposition to Claimant's petition, Sunoco submitted into evidence the April 3, 2009, medical report of James Bonner, M.D., the July 12, 2007, medical report of Thomas Dwyer, M.D., and the February 22, 2007, and October 16, 2007, medical reports of Dr. Collier. Also in opposition to Claimant's

petition, White submitted into evidence the February 26, 2009, deposition of Claimant, the medical reports of Jess Lonner, M.D., dated June 19, 2007, and July 3, 2007, an MRI report dated June 22, 2007, the medical report of Dr. Dwyer dated July 16, 2007, and the August 5, 2008, office visit note of Dr. Collier.

The WCJ found Claimant's testimony and medical evidence credible. The WCJ also accepted as credible the statements of Dr. Bonner as set forth in his April 3, 2009, medical report. As such, the WCJ found that Claimant sustained a new injury in the nature of a medial meniscus tear of his right knee on May 9, 2007, in the course of his employment with White. Thus, White was the proper employer. The WCJ found that as a result of the May 9, 2007, work-related injury, Claimant underwent surgery causing Claimant to become disabled from October 10, 2008, to November 3, 2008. The WCJ found that there was no evidence to establish that Claimant had fully recovered from either the October 4, 1997, work-related injury or the May 9, 2007, work-related injury. The WCJ further found that Claimant had been laid off from work by White on April 24, 2009, that Claimant could have continued to perform his modified duty position at the time of and without the lay-off, and that Claimant continued treatment for his right knee condition throughout the date of the lay-off.

Accordingly, the WCJ circulated a decision on August 25, 2009, granting Claimant's petition and Sunoco's joinder petition. In conclusion of law number 4, the WCJ concluded that White was liable for the payment of workers' compensation benefits to Claimant for total disability for the period of October 10, 2008, to November 3, 2008, and that White could suspend Claimant's benefits after November 3, 2008, in accordance with the Workers' Compensation Act (Act).[1]

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

The text of the WCJ's order mirrored the WCJ's conclusion of law number 4. On September 2, 2009, the Board received White's appeal from the WCJ's August 25, 2009, decision and order.

In response to a request by Claimant that the WCJ's August 25, 2009, decision and order be vacated in part and amended, specifically conclusion of law number 4 and the order, the WCJ circulated an amended decision and order on September 10, 2009. Therein, the WCJ amended only conclusion of law number 4 and the order to provide that White was liable for the payment of workers' compensation benefits to Claimant for total disability for the period of October 10, 2008, to November 3, 2008, followed by a suspension, and then reinstated again as of April 25, 2009, forward. The findings of fact and the other conclusions of law set forth in the WCJ's September 10, 2009, amended decision and order were exactly the same as those set forth in the August 25, 2009, decision and order. On September 16, 2009, the Board received White's appeal from the WCJ's September 10, 2009, amended decision and order.

Before the Board, White alleged that the WCJ erred in issuing an amended decision and order without written permission from both parties. White alleged further that the WCJ's decisions were not supported by substantial evidence. Upon review, the Board affirmed both the August 25, 2009, WCJ decision and order and the September 10, 2009, WCJ amended decision and order. This appeal followed.[2]

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[2] This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of appeal board procedures, and whether necessary findings of fact are supported by substantial evidence. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Mrs. Smith's Frozen Foods v. Workmen's

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Herein, White raises three issues: (1) Whether the WCJ erred in finding that Claimant sustained an "injury" on May 9, 2007, when there was no evidence that the injury arose in the course and scope of his employment; (2) Whether Sunoco remained liable for the impairment caused by the original October 4, 1997, injury, as well as compensation for any alleged injury received on May 9, 2007, in a subsequent accident that would not have occurred had Claimant's body not been impaired in the first accident; and (3) Whether the WCJ's issuance of an amended decision and order, without written agreement of the parties that did not correct a typographical or clerical error, but rather evidenced a change in analysis that affected the substantive rights of the parties, rendered the amended decision and order null and void.

In support of the first issue raised, White argues that there was no evidence that Claimant suffered an injury on May 9, 2007. White contends that there was nothing about work or the way that Claimant was walking on May 9th that gave rise to an "injury." White contends further that following the May 9, 2007, episode, Claimant did not have problems and continued modified job duties that he had worked since January 1998 until he underwent surgery on October 10, 2008. White argues that in none of his testimony did Claimant state that a condition of White's premises caused or contribute to his condition. Thus, White argues the WCJ's substitution of a new injury based on a mere fortuitous event of Claimant hearing a popping noise in his knee on May 9, 2007, was in error. White contends that all Claimant experienced on May 9, 2007, was the result of the 1997 work-related injury; therefore, as a matter of law, Claimant did not sustain a new injury on May 9, 2007.

Compensation Appeal Board (Clouser), 539 A.2d 11 (Pa. Cmwlth. 1988).

White argues further with respect to the second issue raised that Sunoco remains liable for the impairment caused by Claimant's original injury as well as compensation for any alleged subsequent injury that would not have occurred had Claimant's body not been impaired in the first accident. White points out that there was no evidence presented that Claimant had fully recovered from his original October 4, 1997, work-related injury. Therefore, White argues Sunoco was liable for the payment of the surgery that was performed on October 10, 2008, and the period of lost time Claimant incurred as a result therefrom. White contends that the finding of a new and superseding injury date could not be reconciled with the evidence that before and after May 9, 2007, Claimant exhibited residual knee buckling from his October 4, 1997, injury with no break in causation.

This Court has held that if a compensable disability results directly from a prior injury but manifests itself on the occasion of an intervening incident which does not contribute materially to the physical disability, then the claimant has suffered a recurrence. Safety National Casualty Corporation v. Workers' Compensation Appeal Board (Draper and PMA Insurance Group), 887 A.2d 809, 816 (Pa. Cmwlth. 2005) (citing South Abington Township v. Workers' Compensation Appeal Board (Becker and ITT Specialty Risk Services), 831 A.2d 175, 181-182 (Pa. Cmwlth. 2003)). Conversely, where the intervening incident does not materially contribute to the renewed physical disability, a new injury, or aggravation, has occurred. Id. It is well settled that an "aggravation of a pre-existing condition" is deemed a new injury for purposes of workers' compensation law. Id.

A claimant who is alleging disability based on the aggravation of a pre-existing condition is entitled to workers' compensation benefits if he shows: (1) that the injury, or aggravation, arose in the course of employment; and (2) that

the injury, or aggravation, was related to that employment. Knapp v. Workmen's Compensation Appeal Board (GTE), 671 A.2d 258 (Pa. Cmwlth. 1996); Povanda v. Workmen's Compensation Appeal Board (Giant Eagle), 605 A.2d 478 (Pa. Cmwlth. (1992). To show that an injury was related to employment, the claimant must establish a causal connection between work and the disabling injury. Povanda.

The evidence deemed credible by the WCJ shows that the WCJ's finding that Claimant suffered a new injury on May 9, 2007, while in the course and scope of his employment with White is supported by the record. The WCJ accepted, as credible, Claimant's testimony, as well as the statements contained in the medical reports/notes prepared by Dr. Collier and Dr. Bonner.

Claimant testified that prior to May 9, 2007, his right knee would buckle occasionally. Reproduced Record (R.R.) at 22; 59. Claimant testified that on May 9, 2007, he was walking in the shop and that when he went to step over something, he felt a pop in his right knee. Id. at 20-21; 25; 55-56. Claimant testified further that after the incident, he had increased and longer lasting pain in his right knee and that the pain was shooting down his right calf. Id. at 21; 70. Claimant testified that the pain was more severe and that he had never had pain in his right calf before May 9, 2007. Id. at 70.

Claimant testified that he visited Dr. Lonner in June 2007 and had an MRI of his right knee. Id. The results of that June 2007 MRI show that Claimant suffered a tear of the mid-portion of the medial meniscus in his right knee. Id. at 46.

Dr. Collier's office notes support Claimant's testimony that his right knee was only buckling occasionally prior to the May 9, 2007, incident. Id. at 33. Dr. Collier's office notes also support Claimant's testimony that after May 9, 2007,

Claimant was experiencing increased pain in his right knee and in his right calf. Id. at 34. Specifically, Dr. Collier noted on October 16, 2007, that Claimant was in moderate discomfort, walked with an antalgic gait, and could only squat to 80 percent. Id. Later in March 2008 Dr. Collier noted that Claimant's right knee was buckling a couple times a week, that an MRI showed a tear in the posterior horn of the medial meniscus, that the tear was new and not there before, and that Claimant should undergo surgery. Id. at 35. There is no dispute that Claimant underwent surgery on his right knee on October 10, 2008.

Finally, Dr. Bonner credibly stated in his April 3, 2009, medical report that after reviewing Claimant's medical documentation from January 16, 1998, through 2008 and Claimant's deposition testimony, it was his medical opinion, within a reasonable degree of medical certainty, that Claimant sustained a new injury and a new meniscus tear and that this specific injury occurred while Claimant was working in the shop at White on May 9, 2007.[3] Id. at 84-87. Dr. Bonner stated further that it was his medical opinion, within a reasonable degree of medical certainty that the May 9, 2007, incident did accelerate and aggravate the pre-existing knee pathology so as to be an intervening cause of the medial meniscus tear, which resulted in the need for surgery on Claimant's right knee on October 10, 2008, and caused the ensuing period of disability. Id.

As shown by the foregoing credible evidence, the WCJ did not err in finding that Claimant sustained a new work-related injury on May 9, 2007, for which White is liable.[4] Accordingly, we reject White's assertions to the contrary.

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[3] The Court notes that White does not mention Dr. Bonner's April 3, 2009, medical report in arguing that the WCJ's amended decision and order are not supported by substantial evidence.

[4] It is well settled that the WCJ, as the ultimate fact finder in workers' compensation cases, has exclusive province over questions of credibility and evidentiary weight, and is free to

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Finally, White argues that the WCJ erred by issuing an amended decision and order without written agreement of the parties. We disagree.

Section 112 of the Special Rules allows a WCJ to correct or amend her decision and order after it has been circulated. 34 Pa. Code §131.112(a). The WCJ may correct a "typographical or clerical error or obvious omission or error on the part of the judge" on her own motion or on the motion of one or both parties. Id. Serious modifications or corrections that evidence a change in analysis that affects the substantive rights of the parties can be made only with the written agreement of both parties; requests for such modifications must be made within 20 days of the date the decision was circulated. Id.; see Varkey v. Workers' Compensation Appeal Board (Cardone Industries & Fireman Fund), 827 A.2d 1267 (Pa. Cmwlth. 2003) (holding that an amended order that did not correct a typographical or clerical error, nor addressed an oversight from the record, was improperly issued where it evidenced a change of analysis and affected the substantive rights of the parties without the written agreement of all parties). When a WCJ exceeds her authority under Section 112, her decision and order is null and void. Varkey.

In the present matter, the WCJ issued an amended decision and order in response to a request by Claimant within 20 days of the date the original decision was circulated. As stated previously herein, the WCJ found in the original August 25, 2009, decision, that Claimant had been laid off from work by White on

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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). Determinations as to witness credibility and evidentiary weight are not subject to appellate review. Hayden v. Workmen's Compensation Appeal Board (Wheeling Pittsburgh Steel Corp.), 479 A.2d 631 (Pa. Cmwlth. 1984).

April 24, 2009. White does not dispute this finding. However, the WCJ inadvertently failed to reinstate Claimant's benefits effective April 24, 2009, due to the lay-off. As determined by the Board, this was an obvious omission or error by the WCJ. Therefore, the WCJ properly issued the September 10, 2009, amended decision and order to correct that the reinstatement of Claimant's benefits is effective from October 10, 2008, through November 3, 2008, followed by a suspension, and then reinstated again as of April 25, 2009, forward.

Accordingly, the Board's order is affirmed.

JAMES R. KELLEY, Senior Judge

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O R D E R

AND NOW, this 20th day of January, 2011, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

JAMES R. KELLEY, Senior Judge