IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Felix Stepnowski, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Best Choice Plumbing), Respondent	:	No. 1358 C.D. 2011
	:	Submitted: November 18, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: December 30, 2011

Felix Stepnowski (Claimant) challenges the order of the Workers' Compensation Appeal Board (Board) which affirmed the decision of the Workers' Compensation Judge (WCJ) who granted Claimant's petition and awarded him benefits from September 6, 2007, through October 25, 2007.[1]

Claimant worked as a plumber for Employer. On August 30, 2007, Claimant was working on a job when the bucket of a backhoe struck Claimant in the chest and pinned him against a wall. Claimant experienced pain in his upper chest and back. He also experienced difficulty breathing. Claimant was terminated from his employment on September 5, 2007.

[1] Claimant also filed a penalty petition and alleged that Best Choice Plumbing (Employer) failed to file required Bureau documents. The WCJ granted the penalty petition on the basis that Employer failed to timely file a notice of compensation payable or a notice of compensation denial and ordered Employer to pay $500.00. No appeal of this penalty petition is before the Court.

On March 27, 2008, Claimant petitioned for benefits and alleged that he suffered "Intercostal Muscle Tear, Cervical, Thoracic and Lumbar Discs, Thorax Contusion and Fracture Ribs" as a result of the incident with the backhoe. Claim Petition, March 27, 2008, at 1; Reproduced Record (R.R.) at RR3a.

Claimant testified that as part of his job he "dug holes, carried heavy pipe, worked in basements and crawl spots." Notes of Testimony, May 13, 2008, (N.T.) at 6; R.R. at RR42a. Claimant testified that after the bucket of the backhoe struck him, he could not breathe until the operator of the backhoe released the bucket. N.T. at 9; R.R. at RR45a. Claimant had red marks on his chest and "heard a pop" when the bucket struck him. N.T. at 9; R.R. at RR45a. Claimant came to work the next day but had to leave after two or three hours because of pain. N.T. at 10; R.R. at RR46a. One week after the accident Claimant sought treatment with Northeast Hospital because when he woke up he could not "breathe right so I got scared and went to the hospital." N.T. at 12-13; R.R. at RR48a-RR49a. Claimant received Darvocet and Flexeril at the hospital as well as a note stating that he should not work for two days. N.T. at 13; R.R. at RR49a. Claimant gave the note to the owner of Employer, Robert Huttenlock, Sr. (Huttenlock), who "told me that he didn't want to see it; he didn't want to know nothing [sic] about it, just get my check and leave." N.T. at 13; R.R. at RR49a. Claimant began to treat with George L. Rodriguez, M.D. (Dr. Rodriguez) who prescribed acupuncture, ultrasound, and a medical patch as well as Percocet, Flexeril, and Motrin. Claimant continued to have pain in the middle of his back. N.T. at 16; R.R. at RR52a. On cross-examination, Claimant denied that he was operating a hose and yelling at the

operator of the backhoe before he was struck with the bucket. N.T. at 19; R.R. at RR55a.

Claimant presented the deposition testimony of Dr. Rodriguez, Claimant's treating physician and board-certified in physical medicine and rehabilitation, independent medical examinations, impairment rating evaluations, quality assurance and utilization review of medical records for third parties, and pain. Dr. Rodriguez first examined Claimant on September 13, 2007. At that time Claimant complained of constant soreness in the anterior rib cage where he experienced pain when he breathed deeply or coughed. He also experienced "intermittent mid back pain when rotating." Deposition of George L. Rodriguez, M.D., July 2, 2008, (Dr. Rodriguez Deposition) at 13; R.R. at RR171a. After the initial examination Dr. Rodriguez diagnosed Claimant with "contusion of the thorax . . . . a possible herniation of the thoracic spine . . . . a possible muscle tear . . . . and . . . the possibility of a hairline fracture of . . . the eighth rib." Dr. Rodriguez Deposition at 18-19; R.R. at RR176a-RR177a. Dr. Rodriguez opined that these conditions were caused by the August 30, 2007, work incident. Dr. Rodriguez Deposition at 18; R.R. at RR176a. Dr. Rodriguez subsequently prescribed acupuncture and chiropractic treatment to the spine as well as exercises. Dr. Rodriguez Deposition at 22-23; R.R. at RR180a-RR181a. Dr. Rodriguez reported that an MRI revealed an annular tear and herniation at T7-T8, T8-T9, and T10-11. Dr. Rodriguez Deposition at 24; R.R. at RR182a. Dr. Rodriguez opined that these herniations were the result of the backhoe bucket crushing him. Dr. Rodriguez Deposition at 26; R.R. at RR184a. Dr. Rodriguez restricted Claimant to sedentary work. Dr. Rodriguez Deposition at 28; R.R. at RR186a. On cross-

examination, Dr. Rodriguez admitted that his sister, Dr. Daisy Rodriguez, who worked for him, examined Claimant on October 25, 2007, and found that Claimant had no soreness in the anterior rib cage, no longer had increased pain with deep breathing or when he coughed, and no longer had intermittent back pain. Dr. Rodriguez through his sister discharged Claimant on October 25, 2007. Dr. Rodriguez Deposition at 43; R.R. at RR201a. Claimant did not return to Dr. Rodriguez's care until January 17, 2008, when Claimant again complained of right rib cage pain at a five on a scale of one to ten and mid back pain at one out of ten. Dr. Rodriguez Deposition at 44-45; R.R. at RR202a-RR203a.

Employer presented the deposition testimony of Paul J. Omelchuck (Omelchuck), a plumber for Employer. On August 30, 2007, Omelchuck observed Claimant and Carmen, the driver of the backhoe, "joking with each other, throwing stuff at each other, and then . . . Felix [Claimant] squirted Carmen with the hose." Deposition of Paul J. Omelchuck, January 13, 2009, (Omelchuck Deposition) at 6; R.R. at RR77a. Carmen was driving the backhoe and said to Claimant, "What if I hit you with the backhoe; and Felix [Claimant] said, Yeah, hit me with the backhoe go ahead." Carmen then hit Claimant with the backhoe. Omelchuck Deposition at 6; R.R. at RR77a. It did not appear to Omelchuck that Claimant was hurt after the incident. Omelchuck worked with Claimant one day the next week, and Claimant made no complaints about any injuries. Omelchuck Deposition at 8-9; R.R. at RR79a-RR80a.[2]

[2] Employer also presented the deposition testimony of Huttenlock who testified concerning Claimant's deficiencies as an employee, his termination, and notice Claimant provided to Employer.

Employer also presented the deposition testimony of Bong S. Lee, M.D. (Dr. Lee), a board-certified orthopedic surgeon. Dr. Lee examined Claimant on July 29, 2008, took a history, and reviewed medical records. Dr. Lee totally disagreed with Dr. Rodriguez's opinion that Claimant's ongoing complaints were related to herniated discs of the thoracic spine. Deposition of Bong S. Lee, M.D., October 15, 2008, (Dr. Lee Deposition) at 17; R.R. at RR244a. Dr. Lee diagnosed Claimant with some complaints of pain in the upper lumbar areas but he could not recognize the cause of the condition. Dr. Lee believed this condition to be totally unrelated to the August 30, 2007, incident. Dr. Lee placed no restrictions on Claimant based on the August 30, 2007, incident. Dr. Lee Deposition at 18; R.R. at RR245a.

The WCJ concluded that Claimant met his burden of establishing that he sustained an injury on August 30, 2007, in the course and scope of his employment which resulted in wage loss from September 6, 2007, until October 25, 2007. The WCJ concluded Claimant failed to establish ongoing disability after October 25, 2007. The WCJ found Omelchuck and Huttenlock credible regarding the work injury and that Claimant provided proper notice. The WCJ found Dr. Lee credible when he opined that the thoracic herniations were degenerative. The WCJ also made the following relevant findings of fact:

> 14. Based upon a review of the evidentiary record as a whole, this Judge accepts Claimant's testimony of sustaining an injury to his ribs and thoracic spine while in the course and scope of his employment as credible and persuasive. However, Claimant's testimony of ongoing disability after October 25, 2007 is rejected. Significant in reaching this determination is Claimant's treating

> physician's testimony that Claimant was discharged from treatment for a period of time following the injury.
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> 16. This Judge finds the testimony of Dr. Rodriguez credible in part. Dr. Rodriguez reviewed the hospital emergency room records, as did Dr. Lee, and while the x-rays may have been negative, Claimant's complaints which remained consistent since the injury, were documented. Furthermore, Dr. Rodriguez' opinions were made after multiple examinations of Claimant. Based upon Dr. Rodriguez' testimony, this Judge finds that Claimant sustained injuries of a contusion of the thorax, the right rib cage, and thoracic pain. However, this Judge rejects Dr. Rodriguez's testimony that the herniation of the thoracic spine at three levels, T7-8, T8-9 and T10-11 are related to the work incident. Dr. Rodriguez' testimony regarding ongoing disability is rejected after October 25, 2007 because this Judge does not find that Claimant's discharge was in error as suggested, but finds instead that the discharge was due to Claimant's full recovery as found by Dr. Daisy Rodriguez, who so found based upon Claimant's lack of complaints and her own findings that day. Claimant's return months later for treatment does not in any way dissuade this Judge from determining Claimant to have fully recovered as of October 25, 2007.

WCJ's Decision, December 31, 2009, Findings of Fact Nos. 14 and 16 at 4-5; R.R. at RR15a-RR16a.

Claimant appealed the cessation of benefits on October 25, 2007. The Board affirmed.[3]

[3] Employer filed a protective cross-appeal and argued that in the event the Board determined that the WCJ erred when she terminated benefits on October 25, 2007, the WCJ failed to address Dr. Lee's determination that Claimant was fully recovered. The Board dismissed Employer's appeal as moot.

Claimant contends that the WCJ's finding of full recovery as of October 25, 2007, was not supported by substantial evidence and that the record does not unequivocally establish that Claimant was fully recovered from his work injuries on October 25, 2007.[4]

Here, Claimant petitioned for benefits. "[T]he burden of proof in a claim petition rests on the claimant to demonstrate not only that he sustained a compensable injury but also that the injury continues to cause disability throughout the pendency of the claim petition…." Innovative Spaces v. Workmen's Compensation Appeal Board (DeAngelis), 646 A.2d 51, 54 (Pa. Cmwlth. 1994) citing Inglis House v. Workmen's Compensation Appeal Board (Reedy), 535 Pa. 135, 634 A.2d 592, 595 (1993). Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Board (Skirpan), 572 A.2d 838 (Pa. Cmwlth. 1990), affirm 531 Pa. 287, 612 A.2d 434 (1991).

The WCJ found Claimant and Dr. Rodriguez credible with respect to whether Claimant suffered a work related injury and was disabled beginning on September 6, 2007. Under Innovative Spaces, it was Claimant's burden to prove that his disability continued.[5] The WCJ did not believe that Claimant's disability continued because Dr. Daisy Rodriguez discharged Claimant on October 25, 2007,

[4] This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact are 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).

[5] For workers' compensation purposes, disability is equated with a loss of earning power. Inglis House.

based on Claimant's lack of complaints and Dr. Daisy Rodriguez's own examination. The WCJ did not find credible the testimony of Claimant and Dr. Rodriguez that Claimant was disabled beyond that date, October 25, 2007. The WCJ as the ultimate finder of fact in workers' 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 finding when those findings are supported by substantial evidence. Nevin Trucking v. Workmen's Compensation Appeal Board (Murdock), 667 A.2d 262 (Pa. Cmwlth. 1995). The October 25, 2007, medical note from Dr. Daisy Rodriguez and Dr. Rodriguez's testimony regarding that examination provided substantial evidence for the WCJ's findings.

Claimant misunderstands the burden here. He essentially asserts that once the WCJ found that he was entitled to benefits the burden shifted to Employer to prove that Claimant recovered. That is not the case as, once again, under Innovative Spaces, it was Claimant's burden to prove that disability continued during the pendency of the claim petition.

Claimant argues that Dr. Rodriguez's testimony should be taken as a whole to establish that Claimant's disability did not cease on October 25, 2007. Once again, Claimant misunderstands. The WCJ has the authority to accept any evidence in whole or in part. She rejected Dr. Rodriguez's testimony that

Claimant's disability continued based on the results of the October 25, 2007, examination. The WCJ was free to do so.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

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O R D E R

AND NOW, this 30th day of December, 2011, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge