

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

|                               |   |                              |
|-------------------------------|---|------------------------------|
| Resorts Group, Inc. and       | : |                              |
| Liberty Mutual Insurance Co., | : |                              |
| Petitioners                   | : |                              |
|                               | : |                              |
| v.                            | : |                              |
|                               | : |                              |
| Workers' Compensation Appeal  | : |                              |
| Board (Walker),               | : | No. 1503 C.D. 2010           |
| Respondent                    | : | Submitted: November 12, 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: January 27, 2011

Resorts Group, Inc. and Liberty Mutual Insurance Co. (Employer) appeal from the order of the Workers' Compensation Appeal Board (Board) which affirmed the Workers' Compensation Judge's (WCJ) grant of the claim petition of Daniel Walker (Claimant).

Claimant was employed as a ground maintenance worker. His job duties required him to perform heavy lifting. On November 26, 2007, Claimant was working with three other maintenance workers cutting and splitting logs. Claimant attempted to lift a 50-100 lb. log onto a log splitter and felt a sharp pain in his lower back. Claimant reported his injury to his supervisor, Peter Stephan (Stephan). Later that night the pain became so severe Claimant's parents drove him to the emergency room.

An MRI revealed a prominent, broad herniation across the L4-5 disc space with a large fragment to the right of midline and a right side thecal sac compression and displacement of the right L-5 nerve root of the right side, across the L5-S1 disc.

Claimant did not work from November 29, 2007, through December 3, 2007. He returned to the emergency room on December 3, 2007. He was referred to Employer's physician who kept him out of work until December 10, 2007. Claimant gave Employer a disability slip. After reviewing results of a CAT scan, the doctor took Claimant off work until December 27, 2007, and referred Claimant to an orthopedic surgeon. Claimant was apprehensive about surgery and went to a neurologist, Behzad Maghsoudlou, M.D., (Dr. Maghsoudlou) who treated him thereafter. Claimant did not return to work due to his back pain and radiating symptoms. He filled out a written incident report on January 18, 2008.

On February 11, 2008, Claimant filed a claim petition. Employer denied the allegations, including whether Claimant suffered any work injury.

In support of the claim petition, Claimant testified before the WCJ. He described how the injury occurred and testified that prior to the November 2007 incident he never complained to any of his coworkers or any of his supervisors that he had back problems or backaches. Hearing Transcript, March 13, 2008, (H.T., 3/13/08), at 42; Reproduced Record (R.R.) at 52a. Claimant explained that he had treated with a chiropractor two or three years earlier for approximately a month and a half for his lower back and had been diagnosed with mild scoliosis. H.T., 3/13/08, at 42-43; R.R. at 52a-53a.

Claimant also presented the deposition testimony of Dr. Maghsoudlou. He opined to a reasonable degree of medical certainty that (1) Claimant's back pain and symptoms were caused by the accident, and (2) the herniations were caused by the accident. He testified as follows:

Q. And did you formulate an opinion as to the cause of the condition and symptomology that he was suffering from on that first date you saw him?

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A. ... [A]ssuming the patient's excruciating back pain started at the time of the lifting that heavy object .... I believe that that was the cause of the patient's back pain and symptoms in the legs.

Q. And how about the herniations? Do you believe they were caused by that occurrence?

A. Yes sir.

Deposition of Behzad Maghsoudlou, M.D. (Dr. Maghsoudlou Deposition), May 27, 2008, at 12; R.R. at 79a.

Employer's independent medical examiner, Beth Cohen, M.D. (Dr. Cohen), agreed that Claimant had a L4-5 radiculopathy secondary to a paracentral and right L4-5 disc herniation. However, she did not believe Claimant sustained a work injury. She conceded that lifting a heavy log could cause such an injury, but she noted from medical records provided to her that Claimant had undergone a one-and-a-half month course of chiropractic treatment 10 months before the work injury. Dr. Cohen concluded that Claimant had a "chronic" low problem before the incident and that, therefore, "he did not sustain a [work] injury." Deposition of Beth Cohen, M.D. (Dr. Cohen Deposition) at 16, 35; R.R. at 131a, 150a.

The WCJ issued his decision on April 15, 2009. He concluded, based on Dr. Cohen's testimony that the disc herniations were not caused by the work incident. However, the WCJ accepted as credible the portion of Dr. Maghsoudlou's testimony that the lifting incident caused Claimant's back pain and symptoms in the legs. Based on Dr. Maghsoudlou's testimony, Claimant's credible testimony coupled with the fact that Claimant sought emergency treatment, and the fact that Claimant's last treatment for his prior back problems was in January 2007, the WCJ concluded that "Claimant did experience an onset of excruciating back pain contemporaneous with the November 26, 2007, lifting incident." Accordingly, this Judge will conclude that Claimant aggravated his underlying back condition...." WCJ Opinion, April 15, 2009, at 8. (Emphasis added).

The Board found the WCJ's decision was supported by substantial competent evidence and affirmed the award of benefits.

#### I.

On appeal<sup>1</sup>, Employer argues that the WCJ's decision was not supported by substantial competent evidence. Employer contends that the WCJ fabricated his own diagnosis without supporting medical testimony. Specifically, in his conclusion of law No. 2, the WCJ stated that Claimant's work injury was an aggravation of a pre-existing condition.

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<sup>1</sup> 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).

Employer argues that this conclusion was not supported by substantial evidence because the WCJ specifically rejected the testimony of the Claimant's treating physician regarding the diagnosis of the work injury and accepted Dr. Cohen's opinion. Employer's Brief at 8-9.

It is well settled that when considering medical evidence the WCJ is free to accept or reject any medical witness's testimony, in whole or in part. Hills Department Store No. 59 v. Workmen's Compensation Appeal Board (McMullen), 646 A.2d 1272 (Pa. Cmwlth. 1994); Kraemer v. Workmen's Compensation Appeal Board (Perkiomen Valley School District), 474 A.2d 1236 (Pa. Cmwlth. 1984). This means that a WCJ may accept or reject portions of competing experts opinions, which is precisely what happened here.

Contrary to Employer's argument, the WCJ did not reject the entire opinion of Dr. Maghsoudlou. The WCJ rejected Dr. Maghsoudlou's opinion to the extent that he testified that the herniations were caused by the lifting incident. However, the WCJ accepted Dr. Maghsoudlou's opinion that Claimant's onset of excruciating back pain and his leg symptoms were caused by the lifting incident.

The WCJ accepted Dr. Cohen's opinion that the work injury did not cause the herniations, but he expressly rejected Dr. Cohen's opinion that Claimant did not sustain any work injury whatsoever.

[T]his Judge cannot ignore Dr. Cohen's opinion, based not only on information from Claimant and post-November 2007 diagnostics but also on Claimant's pre-November 2007 treatment for back problems, that Claimant experienced ongoing and significant back pain as late as January 2007. Accordingly, **Dr. Cohen's**

**opinion that Claimant's underlying condition of a disc herniation with radiculopathy was not caused by his November 2007 work incident is accepted as fact.** To the extent that Dr. Maghsoudlou's testimony is inconsistent with this testimony by Dr. Cohen, Dr. Maghsoudlou's testimony is not accepted as fact. (Emphasis added).

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Nevertheless, this Judge also cannot ignore Dr. Maghsoudlou's observation that "...assuming the (Claimant's) excruciating back pain started at the time of the lifting that heavy object...I believe that was the cause of (Claimant's) back pain and symptoms in the legs." And given Claimant's credible testimony regarding his November 2007 lifting incident, coupled with the fact that he did seek treatment at a local ER contemporaneous with this incident, the fact that his last treatment for any back problems was in January 2007, and the fact that he worked full-duty for Defendant/Employer from July 2007, through November 2007 without recorded incident, **this Judge finds it credible that Claimant did experience the onset of excruciating back pain contemporaneously with the November 26, 2007, lifting incident.** Accordingly, this Judge will conclude that Claimant aggravated his underlying back condition. (Emphasis added)

WCJ Decision, April 15, 2009, at 8.

The WCJ's findings are consistent and entirely reasonable based on the credited medical evidence. The WCJ did not fabricate a diagnosis. Dr. Maghsoudlou specifically testified that the lifting incident caused Claimant's back pain and symptom in the legs. The WCJ, in turn, concluded that Claimant experienced "an onset of excruciating back pain" caused by the work incident. The WCJ's conclusions were amply supported by substantial evidence, including

Dr. Maghsoudlou's testimony, Claimant's testimony, and the fact that the last treatment for his prior back problems was in January 2007.

The WCJ weighed the evidence and deduced that Claimant injured his back on November 26, 2007, when he attempted to lift the log. Although the WCJ did not believe that the actual disc herniations were caused by the lifting incident, he came to the reasonable conclusion that Claimant became symptomatic and disabled after the lifting incident and that the work injury caused Claimant's onset of pain.

Employer's argument is without merit.

## II.

Next, Employer contends that the WCJ did not render a reasoned decision because the WCJ failed to reconcile a conflict in the evidence as to the precise date of the onset of Claimant's back pain. Specifically, Dr. Maghsoudlou's medical records indicate that Claimant told him that he hurt his back on December 3, 2007, while Claimant testified that he injured his back on November 26, 2007. Employer argues that Dr. Maghsoudlou's medical records reflect the onset of symptomology on December 3, 2007, weeks after the work injury. Yet, the WCJ utilized the injury date as the date that Claimant supposedly experienced pain on November 26, 2007, to establish a work injury.

Section 422(a) of the Workers' Compensation Act<sup>2</sup>, 77 P.S. §834, provides that the WCJ shall file a "reasoned decision, containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decision so that all can determine why and how a particular result was reached." A decision is reasoned if it allows for adequate review by the Board without further elucidation. Daniels v. Workers' Compensation Appeal Board (Tristate Transport), 828 A.2d 1043 (Pa. Cmwlth. 2003).

Here, the WCJ specifically addressed the inaccuracy in Dr. Maghsoudlou's medical records when he noted that "Claimant was insistent that he informed the doctor the date of his injury was November 26, 2007, as opposed to any date in December." WCJ Decision, April 15, 2009, at 7. Clearly, the WCJ perceived the error to be of no consequence. Moreover, there was nothing whatsoever in the record to suggest that Claimant had injured himself on December 3, 2007, while he was out on disability from the November 27, 2007, lifting accident. The WCJ clearly rejected Employer's attempt during the cross-examination of Dr. Maghsoudlou to exploit the discrepancy and credited Claimant's account as to the date of the onset of his pain.

Each finding by the WCJ was supported in the record and verified by this Court, which had no difficulty at all in determining why and how the WCJ reached his result. Daniels.

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<sup>2</sup> Act of June 2, 1915, P.L. 736, *as amended*.



Finally, Employer makes much of the fact that the emergency room medical records did not mention the fact Claimant was injured “at work.” Again, there was ample evidence to support that Claimant was injured at work, as opposed to some other time. Claimant testified that when he tried to lift the log onto the splitter he hunched over in pain and his co-workers told him to rest. Later that night, his parents took him to the emergency room. Having heard and observed Claimant, the WCJ specifically found “Claimant’s testimony that he suffered back pain as a result of lifting a log on November 26, 2007, credible.” WCJ Decision, April 15, 2009, at 7. The absence of any mention of a work injury in the emergency room medical records did not negate the WCJ’s findings or require the WCJ to disbelieve Claimant given the myriad of possible explanations for the omission.

Because this Court finds Employer’s appeal to be wholly without merit, the Board is affirmed.

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BERNARD L. McGINLEY, Judge

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**ORDER**

AND NOW, this 27th day of January, 2011, the order of the Workers' Compensation Appeal Board in the above-captioned case is hereby affirmed.

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BERNARD L. MCGINLEY, Judge