IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Martin's Run,	:	
Petitioner	:	
	:	
v.	:	
	:	
Workers' Compensation Appeal Board (Rogers),	:	No. 1742 C.D. 2010
Respondent	:	Submitted: December 30, 2010

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI Filed: May 17, 2011

Martin's Run (Employer) appeals from an order of the Workers' Compensation Appeal Board (Board) reversing in part the decision of the Workers' Compensation Judge (WCJ) to the extent it terminated the benefits of Rebecca Rogers (Claimant) as of November 6, 2006, because Employer failed to meet its burden of demonstrating that Claimant had fully recovered from her work injury. Finding no error in the Board's decision, we affirm.

Claimant began working for employer as a certified nursing assistant (CNA) in 1999. On February 14, 2006, Claimant sustained an injury in the course and scope of her employment. On March 7, 2006, Employer accepted Claimant's

work injury pursuant to a Notice of Compensation Payable (NCP), which listed the injury as a right shoulder strain and described the injury as follows: "[Claimant] pulled light cord behind patient's bed and light popped causing shock and burn to [Claimant]'s right fingers. [Claimant] fell backwards into closet door and injured her right shoulder." (Reproduced Record (R.R.) at 3a.) Claimant was medically released and returned to light-duty on May 15, 2006, at which time her benefits were suspended, and she returned to full-duty work on July 17, 2006. However, she left work on September 11, 2006, and did not return. Claimant filed a Claim Petition on September 12, 2006, alleging an injury to her neck with pain radiating down her right shoulder, arm and hand due to the incident on February 14, 2006.[1] Employer filed a timely answer denying the allegations.

Before the WCJ, Claimant testified that during her regular shift on February 14, 2006, she entered a patient's room and reached up with her right hand to pull a light chain. When she did so, she heard a pop, there was smoke, and two of her fingers were burned. She also testified that she felt an electric shock go through her arm, was thrown back so that her shoulder hit the wall, and felt pain from her head down to her hand on her right side. Claimant was transported by ambulance to the local emergency room where she was given a tetanus shot, a prescription for Percocet and was referred to Dr. Christine Zabel. According to Claimant, Dr. Zabel examined her, sent her for x-rays and physical therapy, and referred her to Dr. Brigham.

[1] At the resulting hearing before the WCJ, Claimant's counsel agreed that Employer initially accepted Claimant's work injury by way of the NCP. Therefore, the matter was handled in the nature of a reinstatement petition rather than a claim petition.

Claimant testified that Dr. Brigham examined her, sent her for an MRI, administered cortisone injections, and continued to treat her for several months.

Claimant testified that since the time of the initial injury, she has had pain from her right hand up her arm, through her shoulder, and up to her head. She stated that her hand is numb and weak at times and that she has a constant headache. She admitted that Dr. Brigham released her to light-duty on May 15, 2006 and to full-duty on July 17, 2006, despite her pain. When her right arm and shoulder started hurting severely after her return to full-duty, Claimant allegedly informed Employer's human resources department and was told to contact a physician to make an appointment. Claimant testified that she left several messages but no one returned her call, so she left her employment on September 11, 2006, and obtained counsel. Claimant stated that she left her job because of the pain she was experiencing and she did not feel she could continue performing the full-duty work. Claimant testified that her attorney referred her to John J. Bowden, Jr., D.O. (Dr. Bowden), who prescribed Percocet for her pain, started her on physical therapy, and referred her to Dr. Avart for arthroscopic surgery.[2]

On cross-examination, Claimant admitted that no one else witnessed the February 14th incident. Claimant admitted informing Dr. Bowden that the cortisone injections helped her pain level for a period of time. Claimant stated that Dr. Zabel referred her to a cardiologist, but she did not follow through with the recommended

[2] Claimant refused to consent to this surgery because it requires a blood transfusion, which is against her religious beliefs.

stress test. Claimant admitted to receiving several written warnings from Employer regarding her conduct, including one issued three days after returning to light-duty for bringing personal issues into the work place.

Claimant also presented the deposition testimony of Dr. Bowden, who is board certified in family medicine and pain management.[3] Dr. Bowden testified that he first saw Claimant on September 13, 2006, at which time she presented with headaches and pain in her neck, right shoulder, arm and hand. According to Dr. Bowden, Claimant stated that she sustained her injury during the course of her employment as a CNA when she pulled a light cord, was "electrocuted" and fell backwards into a wall. She informed Dr. Bowden that she had undergone physical therapy, had an MRI, and received cortisone injections, which provided temporary relief. However, she stated she was not currently working due to her allegedly excessive amount of pain and resulting inability to do any lifting, pushing or pulling.

Dr. Bowden recommended that Claimant undergo nerve stimulation therapy exercises, prescribed Naprosyn and Percocet for her pain, and rendered her disabled from September 13 to November 13, 2006. He recommended an MRI of Claimant's right shoulder and cervical spine, which revealed questionable degenerative changes, but no disc herniation. He testified that in his opinion, with a reasonable degree of medical certainty, Claimant's injuries and disability were directly related to her work injury. Based upon Claimant's continuous pain and need

[3] Dr. Bowden admitted all of his legal-medical work was performed on behalf of patients versus employers or insurance carriers, and that Claimant was referred to him by her attorney.

for narcotic medications, he was of the opinion that she was disabled, could not return to her work duties as a CNA, and was not physically capable of returning to any type of employment.

On cross-examination, Dr. Bowden admitted that if Claimant's history of the work accident was not accurate and she was not in fact thrown into the wall, he might question the state of her work injury claim. Upon reviewing Claimant's MRIs, Dr. Bowden admitted that the results indicated there was no rotator cuff injury, the degenerative changes and stenosis would be pre-existing, that no actual herniations were indicated, and there were no acute findings on the reports.

Employer presented the deposition testimony of Joseph Bernstein, M.D. (Dr. Bernstein), board certified in orthopedic surgery with a background in sports medicine and shoulder surgery. Dr. Bernstein conducted a physical examination and took a medical history of Claimant in November of 2006. Claimant told Dr. Bernstein that while working for Employer, she tried to change a light bulb and received an electric shock, burned her fingers, and was thrown backwards, striking her shoulder. She also told Dr. Bernstein that she was out of work for approximately 12 weeks, returned to light-duty for 6 weeks, and then stopped working altogether because she was too symptomatic. Claimant failed to inform him that she returned to work on full-duty for approximately 2 months. Dr. Bernstein testified that the MRI conducted on March 30, 2006, was not normal in that there was clear pathology in Claimant's shoulder, but that the pathology was long-standing. He testified that the osteoarthritic changes seen on the February 20, 2006 x-rays also take awhile to develop and are long-standing conditions. Upon a physical examination of Claimant,

Dr. Bernstein noted that she had no distress, no areas of superficial tenderness, but the shoulder pain she reported upon rotation and her subjective complaints were consistent with the objective pathology evidenced on her MRIs and x-rays.

Dr. Bernstein was asked to assume that Employer accepted liability for Claimant's right shoulder strain and whether he had an opinion, to a reasonable degree of medical certainty, as to whether that was an accurate description of her work injury. Dr. Bernstein responded, "Well, it could have been at the time. It's not an accurate description of what [Claimant] has right now." (R.R. at 85a.) He testified that his impression as to Claimant's condition was that she had arthrosis of the shoulder with rotator cuff tendinosis, which he testified was not an inherently traumatic condition. However, he could not say, with a reasonable degree of medical certainty, to what he would attribute these findings. Dr. Bernstein testified that it was possible that these long-standing conditions became symptomatic by the trauma from the February 14, 2006 incident, but it was also possible that Claimant suffered another aggravation or exacerbation of her condition which did not relate to the work trauma. According to Dr. Bernstein, someone with rotator cuff tendinosis and arthrosis of the shoulder, like Claimant, may be disabled from returning to the work force without restrictions. They would be placed on light-duty with restrictions regarding lifting and raising the affected arm.

Employer also presented the trial deposition of Margaret McMullan (Ms. McMullan), Employer's former Director of Nursing and Claimant's former supervisor. Ms. McMullan testified that Claimant was frequently in trouble with the charge nurses during her shift because she could be lackadaisical at times. She also

testified that Claimant's performance reviews mentioned her extremely poor attitude and lack of motivation, and she agreed with these reviews. Given her familiarity with the room in which the injury occurred, the placement of the furniture, and the tightness of the space, Ms. McMullan testified that she did not believe Claimant could have been thrown back into the wall by the alleged electric shock as she testified to before the WCJ.

The WCJ found Claimant partially credible as she established a work-related incident on February 14, 2006, her return to light-duty and then full-duty work, and her eventual choice to leave work allegedly due to her work injury on September 11, 2006. The WCJ ascribed some credibility to the testimony of Dr. Bowden as he saw Claimant two days after she stopped working and, at that time, there was no medical evidence to rebut his findings. However, the WCJ rejected the balance of Dr. Bowden's testimony concerning the duration of Claimant's disability, noting that Dr. Bowden admitted the MRIs revealed only pre-existing degenerative changes, with no herniations, acute findings or rotator cuff injury.

The WCJ ascribed "much credibility" to Dr. Bernstein's testimony and found him more qualified than Dr. Bowden given his background and expertise. The WCJ stated:

> [Dr. Bernstein] opined that Claimant had sustained a right shoulder strain on February 14, 2006 but that her current condition of arthrosis of the right shoulder with rotator cuff tendinosis was not a traumatically induced condition. He opined that she is fully recovered from her work injury and her current complaints are not related to the work injury.

The WCJ also found the testimony of Ms. McMullan credible as to Claimant's job duties and performance, including her disciplinary problems. He found that Ms. McMullan's testimony "casts severe doubt" on Claimant's own testimony regarding the extent and severity of her injury.

Given all of this, the WCJ granted Claimant's reinstatement petition and ordered that her benefits be reinstated for the period of September 11, 2006, until November 6, 2006, with benefits terminated thereafter. Claimant appealed, and the Board found the record lacked substantial evidence to support the WCJ's finding of Claimant's full recovery from a right shoulder strain. The Board stated that Dr. Bernstein never actually acknowledged or assumed the existence of a shoulder strain. While he stated this "could have been" an accurate description of Claimant's work injury at the time, it was not an accurate description of her condition when he examined her. Instead, Dr. Bernstein diagnosed Claimant with arthrosis of the shoulder with rotator cuff tendinosis, conditions which are not part of Claimant's accepted injury. The Board did not believe this testimony supported an inference of Claimant's full recovery from a shoulder strain and that Dr. Bernstein failed to offer any testimony synonymous with a full recovery or a return to baseline. Therefore, the Board reversed the WCJ's opinion to the extent it terminated benefits as of November 6, 2006. This appeal followed.[4]

[4] Our review of a decision of the Board is limited to determining whether errors of law were made, constitutional rights were violated, and whether necessary findings of fact are supported by substantial evidence. *Ward v. Workers' Compensation Appeal Board (City of Philadelphia)*, 966 A.2d 1159 (Pa. Cmwlth. 2009). Substantial evidence is recognized as such relevant evidence as a reasonable mind may accept as adequate to support a conclusion. *To v. Workers' Compensation Appeal Board (Insaco, Inc.)*, 819 A.2d 1222, 1224 (Pa. Cmwlth. 2003).

Employer's main argument on appeal is that there was substantial evidence to support the WCJ's finding that Claimant had fully recovered from her work injury as of November 6, 2006, and that the Board erred in reversing this determination. This Court has clearly established the employer's burden of proof in a termination proceeding as follows:

> It is well established that an employer seeking to terminate workers' compensation benefits bears the burden of proving by substantial evidence either that the employee's disability has ceased, or that any current disability arises from a cause unrelated to the employee's work injury. Employer must show that any continued disability is the result of an independent cause or the lack of a causal connection between the continued disability and the original compensable injury. In either situation, this is a considerable burden because the claimant's disability is presumed to continue until demonstrated otherwise; there is no burden on the claimant to prove anything at all.

Davis v. Workers' Compensation Appeal Board (Mercy Douglas and PMA Group), 749 A.2d 1033, 1035 (Pa. Cmwlth. 2000) (quoting *Parker v. Workers' Compensation Appeal Board (Dock Terrace Nursing Home)*, 729 A.2d 102, 104-05 (Pa. Cmwlth. 1999)). While a medical expert is not required to use "magic words" in rendering an opinion that a claimant has fully recovered, this opinion must nonetheless be unequivocal, made with a reasonable degree of medical certainty, and the testimony must be reviewed in its entirety. *See Udvari v. Workmen's Compensation Appeal Board (USAir, Inc.)*, 550 Pa. 319, 327 n.3, 705 A.2d 1290, 1293 n.3 (1997); *Callahan v. Workmen's Compensation Appeal Board (Bethlehem Steel Corp.)*, 571 A.2d 1108, 1110-11 (Pa. Cmwlth. 1990).

We agree with Employer that the Board's statement that Dr. Bernstein never assumed or acknowledged Claimant's right shoulder strain is incorrect. In his deposition testimony, Dr. Bernstein was specifically told to assume that Employer had accepted liability for Claimant's right shoulder strain and was then asked whether, based upon his physical examination of Claimant and review of her medical records, this was an accurate description of her work injury. Dr. Bernstein responded, "Well, it could have been at the time. It's not an accurate description of what [Claimant] has right now." (R.R. at 85a.) It is clear from this statement that Dr. Bernstein's expert medical opinion was that Claimant was no longer suffering from a right shoulder strain. Even though Dr. Bernstein did not use the words "fully recovered," his meaning was clear and the Board erred in finding otherwise.

However, this does not end our analysis. As stated above, the employer's burden never shifts to the claimant, and the employer must show that any continued disability is not causally linked to the original compensable injury. "[W]here a claimant continues to complain of pain, the employer's burden is met when it presents unequivocal medical testimony that the claimant is fully recovered, can return to work without restrictions and that there are no objective medical findings which either substantiate the claims of pain or link them to the work injury." *Indian Creek Supply v. Workers' Compensation Appeal Board (Anderson)*, 729 A.2d 157, 161 (Pa. Cmwlth. 1999) (quoting *Murphy v. Workers' Compensation Appeal Board (Mercy Catholic Medical Center)*, 721 A.2d 1167, 1170 (Pa. Cmwlth. 1998)).

This case is very similar to that of *Jones v. Workers' Compensation Appeal Board (J.C. Penney Co.)*, 747 A.2d 430 (Pa. Cmwlth. 2000). The claimant in

Jones fell and injured her knee during the course of her employment and received benefits pursuant to an NCP. *Id.* at 430. Two years later, her employer filed a termination petition alleging she had fully recovered. *Id.* To support its petition, the employer presented the medical testimony of Dr. Bushkoff, who stated the claimant sustained a medial meniscus tear as a result of her fall. *Id.* Dr. Bushkoff testified that one of the claimant's diagnoses was not work-related because that particular condition takes a great deal of time to develop and was observed during the claimant's surgery only a month after the fall. *Id.* at 431. However, on cross-examination Dr. Bushkoff admitted that this condition could have been caused by the work injury or the injury could have aggravated the condition. *Id.* The WCJ granted the employer's termination petition and the Board affirmed. *Id.* However, this Court concluded that when viewed in its entirety, Dr. Bushkoff's testimony did not conclude to a reasonable degree of medical certainty that the claimant's condition did not result from her work-related injury and that the injury did not aggravate her condition. *Id.* at 432. Therefore, we found that the medical evidence failed to meet the employer's burden of demonstrating that the claimant's current disability was unrelated to her work injury. *Id. See also Indian Creek Supply* (holding the employer's burden went beyond proving that the claimant fully recovered from his lumbosacral strain to encompass the claimant's complaints of a herniated disc, and that employer failed to meet this burden due to the medical expert's equivocal testimony).

In the present case, Dr. Bernstein testified unequivocally that Claimant's MRIs were not normal, they showed clear pathology, and her physical examination and reports of pain were consistent with her asserted condition. Similar to the

medical expert in *Jones*, Dr. Bernstein provided a diagnosis of a long-standing degenerative condition. Also, like the medical expert in *Jones*, Dr. Bernstein admitted it was possible that these underlying conditions were aggravated by and became symptomatic due to Claimant's February 14, 2006 work injury. While the NCP in the present case lists Claimant's injury as a strain to her right shoulder, it describes the injury as follows: "[Claimant] pulled light cord behind patient's bed and light popped causing shock and burn to [Claimant]'s right fingers. [Claimant] fell backwards into closet door and injured her right shoulder." (R.R. at 3a). Employer accepted this description and we must consider whether the outlined trauma caused Claimant's current disability. Dr. Bernstein testified that he could not form an opinion, with a reasonable degree of medical certainty, as to what caused Claimant's continuing disability. Therefore, this testimony does not meet Employer's burden of demonstrating that Claimant's continuing disability and pain are not causally linked to the original compensable injury.

Finally, Dr. Bernstein testified that Claimant could return to work only on light-duty with restrictions regarding lifting and raising her right arm. This falls short of meeting Employer's burden that Claimant may return to work without restrictions.

For all of the above reasons, we agree with the Board's overall conclusion that Employer failed to meet its burden of proving entitlement to a termination of Claimant's benefits. Accordingly, the order of the Board is affirmed.

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DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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	:	
Workers' Compensation Appeal Board (Rogers),	:	
Respondent	:	No. 1742 C.D. 2010

O R D E R

AND NOW, this 17th day of May, 2011, the order of the Workers' Compensation Appeal Board at No. A08-0262, is affirmed.

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DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Martin's Run,	:	
Petitioner	:	
	:	
v.	:	No. 1742 C.D. 2010
	:	SUBMITTED: December 30, 2010
Workers' Compensation Appeal Board (Rogers),	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

CONCURRING OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED: May 17, 2011**

I agree with the result reached by the majority.[1] Nonetheless I write separately to explain my understanding of the standard applicable to the burden of proof regarding the work-relatedness of claimant's other complaints, which is more complex than the majority suggests. Simply stated, an employer does not have the burden to negate the work-relatedness of any and all complaints contributing to a claimant's current disability. Rather, as this court has explained:

> [I]n the course of defending against a termination petition, when a claimant alleges a new and distinct physical injury or psychiatric condition not contemplated

[1] I also agree with its conclusion that the credited testimony of Dr. Bernstein was sufficient to support termination based solely upon the condition accepted in the NCP, a right shoulder strain, and thus that the Board erred as a matter of law in finding to the contrary.

> by the original agreement or award of compensation, the burden rests with the claimant to establish that this new injury/condition was work-related. . . . However, where the claimant's ongoing disability is related to an injury or condition which is of a very similar nature and/or affects the same body parts which have been recognized as compensable, then the burden remains with an employer to establish an independent cause for the same.

Visteon Systems v. Workers' Compensation Appeal Board (Steglik), 938 A.2d 547, 552 (Pa. Cmwlth. 2007). *See also City of Philadelphia v. Workers' Compensation Appeal Board (Fluek)*, 898 A.2d 15 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 590 Pa. 662, 911 A.2d 937 (2006).

Under this standard, I agree that aggravation of pre-existing arthrosis of the shoulder with rotator cuff tendonitis, since it affects the same body part, is sufficiently close to a shoulder strain as to place the burden on employer. However, I disagree that Dr. Bernstein's testimony was too equivocal to support a finding of full recovery from such an aggravation. Rather, the reason that termination was improper lies in the lack of critical findings of fact by the WCJ.

Although Dr. Bernstein was not able to say with any degree of certainty whether Claimant had suffered an aggravation of these pre-existing conditions at the time of her work injury,[2] his unequivocal testimony provided substantial basis for the WCJ to find full recovery from any time of injury aggravation, *depending upon the WCJ's credibility findings.* Specifically, Dr. Bernstein testified that the claimant had not told him that after a period of light duty work and before finally leaving her job, she had returned to full time of injury duties. He explained that he thus suspected that her symptoms had "returned to

[2] He expressed doubt regarding this, explaining that such conditions are not ordinarily trauma induced.

baseline" when she returned to such work. If that were the case, then he would conclude that she had recovered from any such aggravation by the time she returned to full duty, and the symptoms she experienced at the time of his later examination were not work related. He then explained:

> So the whole issue is the history really is the history she gives and its credibility. If Ms. Rogers told me that she had this condition and was not aware of it, it became symptomatic by a trauma and remained persistently symptomatic, then I would say she has an ongoing aggravation of her shoulder. If she told me that she was not symptomatic before, became symptomatic, and then I learned either from her or independently that she returned to baseline and then became symptomatic down the road, I would say she has another aggravation or exacerbation of her condition, but it doesn't relate to the work trauma.
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> * * * *
>
> Q. Doctor, do you have any way of confirming whether or not her arthrosis of the shoulder would be related – when I say arthrosis of the shoulder, I guess I'm referring to as you had found as of November 6 of '06 for that to be related, in fact, to whatever happened to her on February 14 of '06?
>
> A. No, I can't. Judge Harrison could say, I believe that Ms. Rogers was not symptomatic before this. She became symptomatic by this episode and she has remained enduringly symptomatic. And if we take that as fact, then it's related. If any of those criteria are not accepted, it's not related.

In terminating benefits, the WCJ found Dr Bernstein credible. He did not, however, make any finding whether the symptoms of arthrosis/tendonitis had remained constant or had resolved and later recurred. Instead, he found only that:

> 9. Having heard and seen Claimant testify in person and having reviewed her testimony this WCJ finds her partially credible. She does establish the happening of the accident on February 14, 2006 and her release to light duty work on May 15, 2006 and her release to full duty work on July 17, 2006. She worked full duty until September 11, 2006 when she chose to leave work allegedly due to her work injury.
>
> 10. It is the extent of her disability that after that date this WCJ does not find credible.

This would appear to contradict Dr. Bernstein's testimony that the arthrosis/tendonitis symptoms were in existence at the time of his exam, a finding not supported by the evidence, but leaving undecided the question of symptoms at some time between the work injury and Dr. Bernstein's exam, the period critical to Dr. Bernstein's opinion regarding recovery. Under these circumstances, I agree that there is insufficient basis to affirm the order of termination.

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BONNIE BRIGANCE LEADBETTER,
President Judge