IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Ralph Dreibelbis, Jr., Petitioner | : | |
| v. | : | No. 1782 C.D. 2009 |
| Workers' Compensation Appeal Board (Taylor Northeast, Inc.), Respondent | : | |
| Taylor Northeast, Inc. and PMA Insurance Company, Petitioners | : | |
| v. | : | No. 1946 C.D. 2009 |
| | : | Submitted: December 31, 2009 |
| Workers' Compensation Appeal Board (Dreibelbis), Respondent | : | |

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: February 25, 2010

Ralph Dreibelbis, Jr. (Claimant) and his employer, Taylor Northeast, Inc. (Employer), have filed cross-petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board).[1] In this adjudication, the Board affirmed the Workers' Compensation Judge's (WCJ) denial of Claimant's petition to

[1] By order dated October 9, 2009, the cross-petitions for review were consolidated.

reinstate his workers' compensation benefits, but it reversed the WCJ's decision to terminate Claimant's benefits. For the reasons that follow, we affirm the Board, denying relief to both Claimant and Employer.

The background is as follows. On May 27, 2005, Claimant injured his right knee in the course of his employment as a forklift mechanic. Employer issued a Notice of Compensation Payable (NCP) describing Claimant's injury as a medial meniscal tear. Claimant returned to a light-duty job with no wage loss. When Claimant underwent arthroscopic surgery to treat his knee in September 2005, Employer paid disability benefits from the date of his surgery until October 10, 2005, when he returned to light-duty work. Employer then suspended his benefits.

Claimant continued to work, but on May 31, 2006, he underwent right knee replacement surgery, which caused him to be off work until September 5, 2006. Employer did not pay workers' compensation benefits during Claimant's absence and did not pay for the surgery. Claimant filed a reinstatement petition, seeking total disability benefits from May 30, 2006, through September 4, 2006, on the basis that his loss of earning power during this period was causally related to his May 2005 work injury. Employer filed an answer denying liability.

At the hearing on his reinstatement petition, Claimant testified. He explained that when he suffered the May 2005 knee injury, he treated with three different physicians, including orthopedic surgeon Stephen Longenecker, M.D., who restricted him to light-duty work, which improved his knee. However, each time he tried to return to his pre-injury job, severe pain returned. Accordingly, Dr. Longenecker performed arthroscopic surgery on Claimant's knee in September 2005. During his four-week absence for this surgery, Claimant received workers' compensation disability.

After Claimant's return to light-duty work in October 2005, his knee progressively worsened. At the suggestion of Employer's insurance carrier, Claimant returned to Dr. Longenecker, who advised Claimant that he needed a knee replacement. Employer's insurance carrier sent Claimant to Dr. John Perry, a board-certified orthopedic surgeon, for a second opinion. Claimant underwent the knee replacement surgery on May 31, 2006, which caused him to miss work for fourteen weeks. Claimant returned to work in September 2006, and he no longer has any problems with his knee.

Claimant acknowledged that he had undergone right-knee surgery in 1999. However, after the surgery he claimed to have experienced no problems until he injured his right knee in May 2005.

Claimant testified that he believed, based on his discussions with the insurance carrier, that his workers' compensation disability benefits would be reinstated during the time he was off work for his knee replacement surgery, but they were not. Because Blue Cross paid the surgical bills, Claimant had to pick up some co-pays and miscellaneous medical costs.

Claimant presented a November 30, 2006, medical report from Dr. Longenecker who began treating Claimant in June 2005. X-rays revealed advanced arthritis in the patellofemoral region of Claimant's right knee, which was confirmed visually by Dr. Longenecker during his September 2005 arthroscopic surgery on Claimant's knee. Dr. Longenecker explained that this arthroscopic surgery relieved Claimant's symptoms caused by the work injury.

Dr. Longenecker explained that Claimant's arthritis required his knee replacement surgery. However, Dr. Longenecker also opined that Claimant's knee

injury had caused a "degree of exacerbation" of his pre-existing arthritis. Reproduced Record at 28a (R.R. ___).

Employer presented the medical report of Dr. Perry, the orthopedic surgeon who examined Claimant on April 7, 2006, to provide a second opinion on knee replacement surgery. Dr. Perry found a full range of motion and no instability in the knee. Finding Claimant to suffer severe arthritic changes in the patellofemoral joint, Dr. Perry sent Claimant back to Dr. Longenecker.

Employer presented the deposition testimony of Jess H. Lonner, M.D., a board-certified orthopedic surgeon who specializes in knee surgery. Dr. Lonner reviewed Claimant's medical records and various radiographic diagnostic studies, but he did not physically examine Claimant. Dr. Lonner noted that Claimant had a history of problems with his right knee. Even before Claimant's May 2005 work injury, Dr. Norr performed arthroscopic surgery to debride loose cartilage from his knee. An MRI report from July 21, 2005, showed long-standing degenerative arthritis in all three compartments of the knee, and it was most pronounced in the patellofemoral joint. Dr. Lonner testified that Claimant's May 2005 work incident damaged Claimant's knee cartilage, which was repaired in the September 2005 surgery. Dr. Lonner pointed out that Dr. Longenecker's own records from October 28, 2005, documented that Claimant's knee symptoms had resolved, leaving only arthritic pain, which Dr. Lonner interpreted to mean that Claimant's work injury had resolved. Dr. Lonner disagreed with Dr. Longenecker's opinion that the work injury exacerbated Claimant's arthritis. He also stated that Claimant's claim that he did not suffer arthritic knee pain prior to the May 2005 work injury was not believable. Dr. Lonner opined that Claimant would have needed a total knee replacement even if he had not suffered the 2005 work injury.

The WCJ credited the opinions of Dr. Lonner and Dr. Perry over those of Dr. Longenecker.[2] The WCJ rejected Claimant's testimony that his knee was asymptomatic after his 1999 surgery or that all symptoms he experienced after October 2005 were related to his work injury. Based on these credibility determinations, the WCJ found that Claimant's May 2005 work injury had resolved by October 28, 2005, and that any complaints of pain and limitations thereafter were related to Claimant's pre-existing arthritis. The WCJ further found that there was no causal relationship between the May 2005 work injury and the May 2006 knee replacement surgery; accordingly, the WCJ denied Claimant's reinstatement petition. The WCJ terminated Claimant's benefits as of October 28, 2005, because he found, as fact, that Claimant's work injury had resolved by that date.

Claimant appealed to the Board. The Board remanded for the WCJ to address Claimant's contention that Employer should have been estopped from refusing to reinstate his benefits. Claimant's estoppel theory was based upon the contention that the insurance carrier allegedly advised Claimant that his disability benefits would be reinstated during the time he missed work for his knee replacement surgery.

On remand, the WCJ found that Employer never accepted the knee replacement surgery to be work-related. Further, Employer's medical evidence established that Claimant's knee replacement surgery was not caused by the May 2005 work injury. The WCJ rejected, as not credible, Claimant's testimony that he

[2] The WCJ has complete authority over questions of credibility, conflicting medical evidence and evidentiary weight. *Sherrod v. Workmen's Compensation Appeal Board (Thoroughgood, Inc.)*, 666 A.2d 383, 385 (Pa. Cmwlth. 1995).

was lulled into submitting to surgery by comments made by the insurance carrier's adjustor. The WCJ reaffirmed his prior decision.

Claimant again appealed, and the Board affirmed the WCJ's denial of the reinstatement petition. However, the Board reversed the WCJ's termination of Claimant's benefits for two reasons: Dr. Lonner had never examined Claimant and Employer did not actually request a termination.

Claimant and Employer then petitioned for this Court's review.[3] Claimant argues, first, that the WCJ's key findings relating to the denial of the reinstatement are not supported by substantial, competent evidence. Second, Claimant argues that the Board erred in its ruling on Claimant's estoppel theory. Employer's one issue on appeal is that the Board erred in reversing the WCJ's termination of Claimant's workers' compensation benefits.

We first address Claimant's appeal of the denial of his reinstatement petition.[4] The WCJ did so because he found that Claimant's arthritic condition, not his work injury, caused him to miss work in 2006 for his knee replacement. Claimant takes issue with three of the WCJ's findings that led to that conclusion. They are as follows:

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[3] This Court's scope and standard of review of an order of the Board is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether Board procedures were violated, whether constitutional rights were violated or an error of law was committed. *City of Philadelphia v. Workers' Compensation Appeal Board (Brown)*, 830 A.2d 649, 653 n.2 (Pa. Cmwlth. 2003). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Mrs. Smith's Frozen Foods Company v. Workmen's Compensation Appeal Board (Clouser)*, 539 A.2d 11, 14 (Pa. Cmwlth. 1988).

[4] An employee seeking a reinstatement of benefits following a suspension bears the burden of proving that: (1) through no fault of his own his earning power is again adversely affected by the work-related injury, and (2) the disability that gave rise to the original claim continues. *Pieper v. Ametek-Thermox Instruments Division*, 526 Pa. 25, 34, 584 A.2d 301, 305 (1990).

> 9. There is no Bureau document [which] acknowledged that [Employer] accepted a work related knee injury requiring surgery.
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> 10. The medical opinions of Dr. Perry and Dr. Lonner clearly establish that the [knee replacement] surgery was not related to the May 27, 2005 work injury.
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> 11. Claimant's testimony that he was lulled into submitting to surgery, based upon comments from an adjuster is found to be not credible. His testimony concerning his symptoms, history to physicians is contradictory.

WCJ remand decision, February 27, 2009, at 3; Findings of Fact 9-11. Claimant asserts that these three findings are not supported by substantial evidence.

With respect to Finding of Fact No. 9, Claimant points out that there is a Bureau document, *i.e.*, the 2005 NCP, which acknowledged Claimant's knee injury and led to the arthroscopic surgery. However, it is clear from the context that Finding of Fact No. 9 relates to the 2006 knee replacement surgery, not the 2005 arthroscopic surgery. Further, this finding is supported by Claimant's own testimony that despite his alleged conversations with the insurance carrier's adjustor, he never received anything in writing from the Bureau.

With respect to Finding of Fact No. 10, Claimant contends that Dr. Perry never opined that Claimant's knee replacement surgery was unrelated to his work injury. He also argues that Dr. Lonner's testimony is incompetent because he never examined Claimant or reviewed the diagnostic radiographic films.

It is true that Dr. Perry did not opine on whether the knee replacement surgery was related to the 2005 work injury; he merely stated that he did not know what he could do for Claimant. However, it is irrelevant because Dr. Lonner credibly testified that the knee replacement surgery was not related to the work injury. Claimant's argument regarding the scope of Dr. Lonner's study of Claimant goes to

the weight to be assigned to his testimony, not its competency. The weight to be assigned to the evidence is a matter which is entrusted solely to the WCJ. *Saville v. Workers' Compensation Appeal Board (Pathmark Stores, Inc.)*, 756 A.2d 1214, 1220 (Pa. Cmwlth. 2000).

With respect to Finding of Fact No. 11, Claimant argues that there is no evidence that Claimant had knee symptoms following his 1999 surgery and no evidence that Claimant ever stated otherwise. Claimant is wrong. Claimant's medical records showed that he complained to Dr. Christopher Mancuso of knee "twinges" prior to the 2005 work injury. R.R. 76a.

Claimant has framed his argument in terms of substantial evidence, but he is actually challenging the WCJ's credibility determinations, and the fact finder, not this Court, has complete authority over questions of credibility. *Davis v. Workers' Compensation Appeal Board (City of Philadelphia)*, 753 A.2d 905, 909 (Pa. Cmwlth. 2000). Further, Claimant had the burden of proof in his request for reinstatement. Because the WCJ rejected Claimant's evidence, as was his prerogative to do, Claimant did not meet his burden of proving that his loss of earning power was caused by his work-related injury.[5]

Nevertheless, Claimant argues that the WCJ and the Board should have reinstated his benefits based on estoppel because he was lulled into undergoing knee replacement surgery by the insurance carrier's adjustor.[6] In support, Claimant notes

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[5] Claimant also argues that Dr. Lonner's testimony is incompetent because he never accepted the fact that Claimant's 2005 work injury was a torn meniscus, as admitted by Employer in the NCP. Even if Dr. Lonner's testimony were incompetent, it is of no moment because Claimant had the burden of proof and failed to meet it. At any rate, all of the doctors in this case agreed that Claimant never had a meniscal tear. Therefore, Dr. Longenecker's medical opinion would also be incompetent, under Claimant's reasoning.

[6] Our Supreme Court has explained that:

**(Footnote continued on the next page . . .)**

that his testimony in this regard was uncontradicted. He suggests that the WCJ should have drawn an adverse inference from Employer's not calling the adjustor to testify.

We reject this argument. The WCJ is free to reject the testimony of any witness, even if it is uncontradicted. *Hoffmaster v. Workers' Compensation Appeal Board (Senco Products, Inc.)*, 721 A.2d 1152, 1156 (Pa. Cmwlth. 1998). Claimant testified live before the WCJ, and he was not believed. An adverse inference cannot be drawn against a party unless it is shown that the witness is "peculiarly within the reach and knowledge" of that party. *Bonegre v. Workers' Compensation Appeal Board (Bertolini's)*, 863 A.2d 68, 73 (Pa. Cmwlth. 2004). Claimant could have subpoenaed the insurance adjustor, but he did not do so. It was Claimant's burden of proof; Employer did not have to present any evidence.

We turn next to Employer's appeal. Employer contends that because Dr. Lonner's testimony supported a finding that Claimant fully recovered from his work injury, the WCJ was permitted to order a termination, consistent with the evidence. It was error, according to Employer, to overrule the WCJ. We disagree.

Employer is correct that the WCJ is empowered to grant relief that is warranted by the facts of the case. *Brehm v. Workers' Compensation Appeal Board (Hygienic Sanitation Company and Zurich Insurance Company)*, 782 A.2d 1077,

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**(continued . . .)**

> Equitable estoppel arises in the workers' compensation arena when an employer, "by [its] acts, representations, or admissions, or by [its] silence when [it] ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts."

*Westinghouse Electric Corporation/CBS v. Workers' Compensation Appeal Board (Korach)*, 584 Pa. 411, 422, 883 A.2d 579, 586 (2005) (quoting *In re Estate of Tallarico*, 425 Pa. 280, 288, 228 A.2d 736, 741 (1967)).

1081-1082 (Pa. Cmwlth. 2001). However, this general principle does not apply in termination cases. In *Coover v. Workmen's Compensation Appeal Board (Browning-Ferris Industries of Delaware Valley)*, 591 A.2d 347, 350 (Pa. Cmwlth. 1991), this Court held that it was error for the WCJ to terminate benefits where the employer had filed a modification petition, not a termination petition. We found it crucial that the claimant be given notice that a termination is at issue so that he has ample opportunity to prepare a defense. Likewise, we reversed a termination in *Foyle v. Workmen's Compensation Appeal Board (Liquid Carbonic I/M Corp.)*, 635 A.2d 687 (Pa. Cmwlth. 1993), where the employer's post-hearing brief requested a termination based upon the record evidence, because the claimant did not have notice that a termination was a possibility before the record closed. In *McQuilken v. Workers' Compensation Appeal Board (Prudential)*, 770 A.2d 376 (Pa. Cmwlth. 2001), we explained that benefits can be terminated without a specific request from the employer when litigating a claim petition because the duration of benefits is always an issue in a claim petition. Stated otherwise, in any proceeding where the issue of full recovery is being litigated, the WCJ can grant an unrequested termination. Otherwise, it is not permissible.

Here, the issue before the WCJ was whether Claimant's work injury, for which disability benefits had been suspended, had caused Claimant to suffer a loss of earning power. The issue of full recovery was not before the WCJ. Dr. Lonner, on whose testimony the WCJ granted the termination, did not issue an affidavit of recovery. Had Dr. Lonner done so, Claimant might have had notice that full recovery would be at issue. Employer did not file a termination petition or request a termination before the record closed, leaving Claimant without notice that a termination was a possibility. The WCJ erred in *sua sponte* granting an unrequested

termination, and the Board properly reversed it.[7] Claimant's benefits remain in suspension status, and Employer is free to pursue a termination by filing the appropriate petition.

Accordingly, we affirm the Board's order.

MARY HANNAH LEAVITT, Judge

[7] We need not address whether Dr. Lonner could render a competent opinion of full recovery without examining Claimant.

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| Taylor Northeast, Inc. and PMA Insurance Company, Petitioners | : | |
| v. | : | No. 1946 C.D. 2009 |
| Workers' Compensation Appeal Board (Dreibelbis), Respondent | : | |

**ORDER**

AND NOW, this 25th day of February, 2010, the order of the Workers' Compensation Appeal Board dated September 3, 2009, in the above-captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge