IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Susan E. Shaffer, Petitioner | : | |
| v. | : | No. 1843 C.D. 2009 |
| Workers' Compensation Appeal Board (F.D. Muncy d/b/a McDonald's Restaurant/Lackawanna Casualty Co.), Respondents | : | Submitted: January 15, 2010 |

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

*OPINION NOT REPORTED*

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: March 25, 2010

Susan E. Shaffer (Claimant) petitions for review of the September 9, 2009, order of the Workers' Compensation Appeal Board (Board), which affirmed the decision of the workers' compensation judge (WCJ) denying Claimant's claim petition and review/reinstatement petition. For the reasons that follow, we vacate and remand.

On July 14, 2006, Claimant suffered a right ankle fracture in the scope and course of her employment with F. D. Muncy d/b/a McDonald's Restaurant (Employer). Employer accepted liability for Claimant's injury by filing an Agreement for Compensation, which described the injury as "limited to right ankle—fracture." (WCJ's Finding of Fact No. 5.) Claimant sought medical

treatment and, on March 8, 2007, she underwent surgery to repair her right ankle. Claimant's benefits were suspended, effective May 27, 2007, when she returned to work with restrictions but no loss of earnings.

On November 3, 2007, Claimant fell on the front porch of her home while getting ready to leave for work. As a result of the fall, Claimant sustained a left foot fracture, a right knee injury, and a right ankle injury. She subsequently underwent arthroscopic knee surgery and reconstruction of her right ankle.

Thereafter, Claimant filed a claim petition alleging that she sustained work-related injuries to her left foot and right knee and a re-injury of her right ankle ligaments when she fell on November 3, 2007. Claimant averred that she slipped and fell "when [her] previously injured right ankle … gave way causing [her] to fall and sustain new injuries…." (Reproduced Record (R.R.) at 1a.) Claimant also filed a petition to review/reinstate compensation, alleging that she suffered a worsening of her condition as of November 3, 2007, and that the description of her injury was incorrect. Claimant averred that she "sustained either a new injury on 11/03/07 or a reinjury secondary to the previously acknowledged right ankle injury … resulting in new injuries to the left ankle and foot, right knee, and reinjury to the right ankle/foot."[1] (R.R. at 4a, 6a.) The petitions were assigned to the WCJ for hearings.

In support of her petitions, Claimant testified to the circumstances of her fall:

> I was scheduled to work---I believe that it was 7:00 to 4:00 that day. I was on my way out the door at 6:30 in

[1] Claimant's counsel filed both a claim petition and a review/reinstatement petition in order to protect Claimant's rights regardless of whether the WCJ determined she sustained a new injury or, in the alternative, experienced an outgrowth of the original work injury. (R.R. at 22a.)

> the morning. I had just locked my door, turned to take a—to go down my first step and I wasn't even thinking and I stepped with the ankle that had the surgery. The next thing I knew it went---I was tryin' to catch myself, fell down the steps and slid across the porch.

(R.R. at 47a.) Claimant denied that a defect in her home caused the fall.

Claimant testified that prior to her fall on November 3, 2007, her right ankle was unstable and had given way at work on two prior occasions. (R.R. at 49a.) She stated that she had not fully recovered from her 2006 work injury and continued to have symptoms of swelling and pain. (R.R. at 47a-48a.)

Claimant also presented the deposition testimony of her treating physician, Brian Batman, M.D., who is a board certified orthopedic surgeon. Dr. Batman first treated Claimant on February 20, 2007; he performed surgery on her right ankle in March 2007, and provided ongoing treatment thereafter. Dr. Batman evaluated Claimant again on November 6, 2007, and diagnosed Claimant as suffering from a left foot fracture, a flare up of a degenerative condition in her right knee, and a recurrent instability of her right ankle. At that time, Dr. Batman determined that his prior surgical repair of Claimant's right ankle had completely failed. (R.R. at 158a–59a.)

In addition, Dr. Batman stated that, during an August 21, 2007, examination, Claimant reported that she had experienced inversion episodes, which involved Claimant's ankles turning inward. He diagnosed Claimant as experiencing recurrent instability of her right ankle, and he stated that it looked like Claimant experienced that condition at the time of her November 3, 2007, fall. (R.R. at 156a–58a.)

Dr. Batman testified concerning the relationship between Claimant's fall at home on November 3, 2007, and her July 2006 work injury as follows:

> It is my opinion that the injury on November 3rd, 2007, likely would not have occurred except for the original work-related injury of July 14 of 2006. Had she not had that original injury and subsequent surgery, she would probably not have sustained the subsequent injuries that were the direct result of her ankle giving way.

(R.R. at 175a.) Dr. Batman also opined that Claimant's knee problems were related to her fall, which itself was caused by the work injury and ankle instability.

> …My assumption---my working assumption is that had she not had the original ankle injury at work, which then caused the subsequent ankle instability, she probably wouldn't have had the episode where her ankle gave out on her, causing her to fall down the steps and injure her knee. So I think they are all related.
>
> Q. Including the left foot fracture and the left ankle instability?[2]
>
> A. Yes. For the same reasons.

(R.R. at 165a.)

With regard to the ankle inversions/instability episodes reported by Claimant in August 2007, Dr. Batman testified that Claimant never told him whether the inversions occurred at work or at home, and he stated that, if the inversions did not occur at work, he would classify them as new injuries. (R.R. at 189a-90a.) Dr. Batman did testify on cross-examination that the lack of this information was why he made reference to a working assumption:

[2] While the record shows that Claimant has problems with her left ankle, Dr. Batman testified that he could not with any degree of medical certainty relate those problems to the November 3, 2007, fall. (R.R. at 180a.)

> Q. So if this woman sustained two inversions in excess of five months after your surgery and you didn't question her as to where or when they occurred and she didn't volunteer that information to you, how do you draw a conclusion that they relate back, to a reasonable degree of medical certainty, which is the only conclusion I care about? Is it fair to say that you can't?
>
> A. It's fair to say that it would certainly be a bit of a stretch without that information.
>
> Q. That's why when you gave testimony on direct examination, and again on my cross, you talked about a working assumption; correct?
>
> A. Correct.

(R.R. at 191a.) Dr. Batman did not explain why the location of the reported inversion incidents was relevant to determining the ultimate cause of those occurrences.

Nevertheless, on re-direct examination, Dr. Batman provided a firm opinion regarding causation:

> Q. What happened when she fell at home on November the 3rd of 2007, in your opinion, to a reasonable degree of medical certainty? Was that or was that not yet another inversion episode?
>
> A. …I think that it turned into an inversion episode. I think she had a problem—her ankle was unstable. She has a problem with proprioception, which is a medical term for the body's ability to recognize position sense….
>
> …I think that was … also part of her injury and part of the reason that caused her ankle to give out and twist and cause her to fall down the steps.

> Q. That related back to her initial injury and the initial surgery.
>
> A. Yes.
>
> Q … That being said, to a reasonable degree of medical certainty, have the conditions that occurred that you have addressed surgically and clinically post the November 3rd, 2007 fall at work, are they related to that initial injury.
>
> A. Yes.

(R.R. at 192a-94a).

After reviewing the evidence, the WCJ accepted as credible Claimant's testimony that: (1) Claimant had not fully recovered from the effects of her 2006 work injury by November of 2007, (2) Claimant fell on her front porch on November 3, 2007, and (3) Claimant's resulting knee and ankle pain limited her ability to work. (WCJ's Finding of Fact No. 71.) However, the WCJ found that Claimant's testimony did not establish an obvious causal connection to the fall and her prior work injury and, therefore, unequivocal medical testimony was required. The WCJ concluded that the opinions of Dr. Batman were equivocal and, therefore, insufficient as a matter of law to establish a causal connection between the acknowledged 2006 work injury and Claimant's November 3, 2007, fall. The WCJ reasoned as follows:

> (1) When expressing his opinion as to causal relationship on direct examination, Dr. Batman only characterized the causal connection as 'likely' or 'probable,' assuming certain facts;
>
> (2) The facts Dr. Batman assumed appear to be that the Claimant's ankle inverted and/or gave way when

> Claimant put weight on her right foot on 11/03/07. However: (a) Dr. Batman conceded that two incidents of instability, ankle giving away, noted by him in August 2007, could not be causally related to the work injury. He made this admission in correspondence to the carrier and later, at time of deposition [3]; (b) Claimant did not specifically state that on 11/03/07 her right ankle inverted under her weight;
>
> (3) The doctor's 'working assumption' that Claimant fell due to right ankle instability on 11/03/07 only begs the question of causal connection. See Williams v. WCAB (Hahnemann Univ. Hosp.), 834 A.2d 679 (Pa. Cmwlth. 2003).

(WCJ's Conclusion of Law No. 7.) Because the WCJ determined that the testimony was not competent, he made no finding concerning the credibility of Dr. Batman's testimony.

Accordingly, the WCJ denied Claimant's claim petition and review/reinstatement petition. Claimant appealed to the Board, which affirmed the WCJ's decision. Claimant now appeals to this Court. [4]

Claimant challenges the WCJ's determination that she failed to carry her burden to establish a causal relationship between her acknowledged work injury and the fall she subsequently experienced. Claimant argues that the WCJ

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[3] (Correspondence to Lackawanna Insurance Group, 10/09/07, Deposition Exhibit 2, R.R. at 209a.) Dr. Batman also indicated in this correspondence, which pertains to his August 21, 2007, examination notes, that Claimant's ankle surgery was a success. However, Dr. Batman testified in his deposition that, approximately two and one-half months after the August 2007 examination, he determined that the surgery had failed.

[4] Our scope of review is limited to determining whether the findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Meadow Lakes Apartments v. Workers' Compensation Appeal Board (Spencer), 894 A.2d 214 (Pa. Cmwlth. 2006).

erred by requiring her to present unequivocal medical evidence to support her petitions and by concluding that the opinions of Dr. Batman were equivocal.[5]

In a claim petition proceeding, a claimant bears the burden to prove a causal relationship between the injury and his or her employment. Coyne v. Workers' Compensation Appeal Board (Villanova Univ. & PMA Group), 942 A.2d 939 (Pa. Cmwlth.), appeal denied, 599 Pa. 683, 960 A.2d 457 (2008). As explained in Calcara v. Workers' Compensation Appeal Board (St. Joseph Hospital), 706 A.2d 1286 (Pa. Cmwlth. 1998), a claimant's burden of production regarding causation depends on whether the causal relationship between the claimant's injury and employment is obvious:

> An obvious injury is one 'which immediately manifests itself while Claimant is in the act of doing the kind of heavy work which can cause such an injury.' A classic example would be the laborer who grabs his back in pain after lifting his shovel full with wet concrete. In such a case, the causal connection is so clear that a lay person can see the connection. Under those circumstances, the claimant's testimony is sufficient to connect the injury to the claimant's employment, and additional medical testimony is not required. Conversely, where there is no obvious causal connection between the disability and a work-related injury, unequivocal medical testimony is required to establish that causal connection.

Id. at 1289 (citations omitted). Lay testimony is probative on the issue of causation only when the cause and effect are so immediate, direct and natural to common experience as to obviate any need for an expert medical opinion. Budd

[5] For sake of clarity, we depart from the order of the arguments set forth in Claimant's brief.

Trailer Co., Inc. v. Workmen's Compensation Appeal Board (Behney), 524 A.2d 525 (Pa. Cmwlth. 1987).

Here, Claimant testified only that the November 3rd fall occurred when she exited the door of her home, stepped with the ankle that she had injured almost sixteen months earlier, and then suddenly fell on the front porch. Under these circumstances, the alleged relationship between the events of July 14, 2006, and November 3, 2007, is not so clear, direct, immediate, and natural to common experience that a lay person could perceive the connection. Therefore, the WCJ correctly required Claimant to demonstrate causation by unequivocal medical testimony.

Claimant argues that the opinion of Charles Harvey, M.D., as set forth in the report of his independent medical examination, constitutes sufficient evidence to establish a causal connection between the July 14, 2006, work injury and the accident of November 3, 2007. However, the record reveals that Employer did not introduce Dr. Harvey's report into evidence. Rather, the medical report was attached to Exhibit C-3, which Claimant introduced solely to demonstrate that Employer's contest was unreasonable and not for the medical opinions contained therein. (R.R. 73a-74a.) Accordingly, Claimant cannot rely upon Dr. Harvey's opinion to prove causation.

Claimant also contends that the WCJ erred by finding Dr. Batman's opinion to be equivocal. Claimant argues that Dr. Batman's use of the words "probably" and "likely" did not render his opinions equivocal and that the WCJ erred by determining the competency of Dr. Batman's opinion based on a few words taken out of context. We agree.

Where medical testimony is necessary to establish causation, the medical witness must testify not that the injury or condition might have or possibly came from the assigned cause but that, in his professional opinion, the result in question did come from the assigned cause. Lewis v. Workmen's Compensation Appeal Board, 508 Pa. 360, 498 A.2d 800 (1985). Medical evidence that is less than positive or that is based upon possibilities or assumptions may not constitute legally competent evidence for the purpose of establishing the causal relationship. Id.; Moyer v. Workers' Compensation Appeal Board (Pocono Mountain School District), 976 A.2d 597 (Pa. Cmwlth. 2009). Whether medical testimony is unequivocal is a question of law and, therefore, subject to this Court's review. Terek v. Workmen's Compensation Appeal Board (Somerset Welding & Steel, Inc.), 542 Pa. 453, 668 A.2d 131 (1995).

It is well settled that the testimony of a medical witness must be reviewed in its entirety and that the final decision on its certainty should not rest on a few words taken out of context. City of Wilkes-Barre v. Workmen's Compensation Appeal Board, 420 A.2d 795 (Pa. Cmwlth. 1980). A medical witness's use of words such as "probably," "likely," and "somewhat" will not render an opinion equivocal so long as the testimony, read in its entirety, is unequivocal. Deitrich v. Workmen's Compensation Appeal Board (Shamokin Cycle Shop), 584 A.2d 372 (Pa. Cmwlth. 1990); Wells/Richard Manufacturing Co. v. Workmen's Compensation Appeal Board (Gross), 450 A.2d 766 (Pa. Cmwlth. 1982). The law does not require every utterance which escapes the lips of a medical witness on a medical subject to be certain, positive, and without reservation or exception. Philadelphia College of Osteopathic Medicine v. Workmen's Compensation Appeal Board (Lucas), 465 A.2d 132 (Pa. Cmwlth.

1983). Instead, it is sufficient that a medical expert, after providing a foundation, testify that in his or her professional opinion or that he or she believes or that he or she thinks certain facts exist. Id. Such testimony, if accepted by the fact finder, will support an award, even if the medical witness admits to uncertainty, reservation, doubt or lack of information with respect to medical and scientific details; so long as the witness does not recant the opinion or belief first expressed. Id.

When viewed as a whole, Dr. Batman's testimony reflects his opinion within a reasonable degree of medical certainty that the fall and the injuries Claimant sustained on November 3, 2007, are related to Claimant's July 14, 2006, work injury. (R.R. at 175a; 192a–94a.) Although Dr. Batman did use the words "probably," "assumption," and "working assumption," he did so when referring to the probability that Claimant would experience a falling episode and be injured. (R.R. at 165a, 175a.) Dr. Batman did not undercut the certainty of his opinion by recognizing that Claimant's work injury created the potential for her to be injured by a fall.[6]

Moreover, in a workers' compensation proceeding, answers given during cross-examination do not, as a matter of law, destroy the effectiveness of the previous opinions expressed by a physician. Hannigan v. Workmen's Compensation Appeal Board (Asplundh Tree Expert Co.), 616 A.2d 764 (Pa. Cmwlth. 1992), appeal denied, 535 Pa. 670, 634 A.2d 1118 (1993). Rather, such statements go to the weight, not the competency, of the expert's opinion. Corcoran v. Workers' Compensation Appeal Board (Capital Cities/Times Leader), 725 A.2d

[6] This case is unlike Lewis and Bisesi v. Workmen's Compensation Appeal Board, 433 A.2d 592 (Pa. Cmwlth. 1981), where experts made the assumption that, because of temporal proximity, an injury was caused by a recent event.

868 (Pa. Cmwlth. 1999). In addition, the fact that a physician does not know all of the details of the mechanics of an injury is a matter that goes to the weight of the expert's testimony, rather than its competency. DeGraw v. Workers' Compensation Appeal Board (Redner's Warehouse Markets, Inc.), 926 A.2d 997 (Pa. Cmwlth. 2007).

In this case, Dr. Batman did not recant his opinion during cross-examination or concede that his testimony was less than certain. Also, Dr. Batman subsequently provided a firm opinion regarding causation on redirect examination. (R.R. at 192a-94a). Hence, after reviewing Dr. Batman's testimony in its entirety, we conclude that his testimony on cross-examination did not render his opinion equivocal and that the WCJ committed an error of law in determining otherwise. Corcoran; DeGraw.

Finally, Claimant contends that the WCJ erred by not correcting the description of the work injury in the 2006 Agreement for Compensation ("limited to right ankle—fracture") to include right ankle ligament injuries that required reconstructive surgery. Claimant indicated in her review/reinstatement petition that the description of the injury is incorrect, and the record confirms that the issue of amending the Agreement for Compensation to include Claimant's status post-surgery was before the WCJ.[7] (R.R. at 23a.) Although this issue is distinct from the injury and causation questions stemming from Claimant's fall, the WCJ failed

[7] At the first hearing in this matter, Employer's counsel informed the WCJ he could not imagine his client "having any problem stipulating to an amendment … to include the status post surgery with hardware." (R.R. at 23a.) However, Employer retreats from that position in this appeal. (Employer's Brief, pgs. 19-20.)

to address Claimant's request to amend the description of the injury and instead denied the review/reinstatement petition in its entirety.[8]

Accordingly, we vacate the Board's order and remand this matter to the Board with instructions to remand this case to the WCJ for a new decision that addresses the credibility of Dr. Batman's testimony and sets forth additional findings with regard to the merits of Claimant's claim and review/reinstatement petitions based on the existing record and consistent with the foregoing opinion.

PATRICIA A. McCULLOUGH, Judge

[8] We note that the right ankle ligament injury and the right ankle fracture acknowledged in the Agreement for Compensation are closely related and involve the same body part. It appears that both injuries would be encompassed by the description of the injury in the Agreement for Compensation. See City of Philadelphia v. Workers' Compensation Appeal Board (Fluek), 898 A.2d 15 (Pa. Cmwlth. 2006) (a claimant should not bear the burden of establishing the causal connection between the work injury and a subsequently alleged injury or condition where the injuries are closely related, i.e., involve the same body part or system or a sequalae), appeal denied, 590 Pa. 662, 911 A.2d 937 (2006); Rissi v. Workers' Compensation Appeal Board (Tony DePaul & Son), 808 A.2d 274 (Pa. Cmwlth. 2002) (where the notice of compensation payable described the work injury as carbon monoxide poisoning, to terminate benefits, employer also had to prove that the claimant recovered from a related organic brain injury), appeal denied, 573 Pa. 687, 823 A.2d 146 (2003).

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**ORDER**

AND NOW, this 25th day of March, 2010, the order of the Workers' Compensation Appeal Board (Board), dated September 9, 2009, is hereby VACATED and the case is REMANDED to the Board, for further remand to the WCJ, for a new decision based on the existing record.

Jurisdiction relinquished.

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PATRICIA A. McCULLOUGH, Judge