IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jo Pehala,	:	
Petitioner	:	
	:	
v.	:	No. 2330 C.D. 2010
	:	Submitted: February 18, 2010
Workers' Compensation Appeal Board	:	
(Hilton Hotels Corporation),	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: March 30, 2011

Jo Pehala (Claimant) petitions for review of a September 30, 2010, order of the Workers' Compensation Appeal Board (WCAB), which affirmed the decision of a workers' compensation judge (WCJ) denying her petition to review compensation benefits. We affirm.

The WCJ found in relevant part as follows. Claimant suffered serious injuries on February 17, 2007, when she was trapped under an awning that collapsed outside of her workplace. The awning hit her, threw her to the ground, and trapped her under ice and snow. On June 4, 2007, Hilton Hotels Corporation (Employer) filed a "First Notice of Injury," which indicated that Employer had been notified of Claimant's injuries on the day that they occurred. The report also noted that Claimant's disability began on February 18, 2007, and that she went back to work on

February 27, 2007. The injury was listed as a strain of Claimant's shoulders. (Findings of Fact, Nos. 1-2.)

On March 13, 2007, Employer filed a statement of wages, listing Claimant's average weekly wage and compensation rate. Employer never issued a notice of compensation payable, although Employer paid some wage loss and medical benefits. Almost one year later, on March 7, 2008, Employer filed a notice of compensation denial (NCD), listing Claimant's injury as "cervical and right shoulder." The NCD provided that, while an injury had occurred, Claimant was not disabled as a result. (Findings of Fact, Nos. 3-5.)

Claimant was out of work due to her work-related injuries from February 17, 2007, through February 26, 2007; from May 30, 2007, through July 31, 2007; and from January 29, 2008, through June 30, 2008. During this latter period, Claimant underwent lumbar spine surgery in the nature of a laminectomy, a foraminotomy and a microdiscectomy at the L4-5 level. These surgeries were performed by Carlos M. de Luna, M.D. (Findings of Fact, No. 6.)[1]

On September 17, 2008, Claimant filed a petition to review compensation benefits, which sought to expand the description of her injury to include low back pain and herniation at L4-5.[2] Employer filed an answer denying the

[1] The record reflects that Dr. de Luna is a board-certified neurosurgeon. (N.T., 1/22/09, at 5.)

[2] We note that Employer does not argue that Claimant failed to file a proper claim petition. Rather, Employer asserts that there is no obvious causal connection between the work incident of February 17, 2007, and Claimant's low back injury.

allegations. (Findings of Fact, No. 7.) Thereafter, Claimant testified on her own behalf, explaining that, after the work incident, she received neck treatment from Dr. John Amentler and Dr. Terence Duffy. Later, she began treating for her low back. (Findings of Fact, No. 17.) On cross-examination, Claimant acknowledged that she did not begin treating for her low back until September 2007. (Findings of Fact, No. 19.) Claimant has continued to work since July 2008. (Findings of Fact, No. 18.) Claimant also presented the deposition testimony of Dr. de Luna, who opined that Claimant's herniated discs are work-related. (Findings of Fact, No. 12.)[3]

For its part, Employer presented the deposition testimony of Thomas Allardyce, M.D., a board-certified general orthopedist, who reviewed Dr. de Luna's office records, MRI reports of Claimant's lumbar spine, Dr. Amentler's records, Dr. Duffy's records, and Claimant's physical therapy records. (Findings of Fact, No. 20.) Based on his review of the MRI report of Claimant's lumbar spine and on Dr. de Luna's operative report, Dr. Allardyce opined that Claimant's L4-5 disc herniation pre-dated her February 17, 2007, work incident. Dr. Allardyce stated that these reports indicated Claimant had severe recess stenosis and facet hypertrophy, which are found in longstanding, chronic back disease. Moreover, Dr. Allardyce testified that the work incident did not aggravate Claimant's pre-existing herniation, because, had it done so, her symptoms would have been immediate. Dr. Allardyce further opined that Claimant's lumbar surgery was not occasioned by the February 17, 2007, incident. (Findings of Fact, No. 23.)

[3] Claimant apparently had another disc herniation, (N.T., 3/26/09, at 19), which is not at issue.

` Employer also submitted the records of Dr. Amentler and Dr. Duffy. Dr. Amentler's records indicate that Claimant did not complain of low back symptoms until September 20, 2007, when Dr. Amentler noted an acute onset of right low back pain, as well as right leg pain. Claimant's low back pain had been on and off for the last three weeks. Further, Dr. Duffy's records show that Claimant did not complain to him about low back symptoms until October 15, 2007. (Findings of Fact, Nos. 24-25.)

The WCJ rejected Claimant's testimony that she had low back complaints or treatment before September 2007. (Findings of Fact, No. 11.) He also rejected Dr. de Luna's testimony that Claimant's herniated disc was work-related, noting that "Dr. de Luna had an incorrect history and an insufficient foundation for his opinion," (Findings of Fact, No. 12), and that Dr. de Luna understood "that the Claimant had immediate low-back pain and radiating symptoms immediately after the February 17, 2007, work incident." (*Id.*)

The WCJ credited

> . . . the testimony of Dr. Allardyce . . . that there is no relationship between the Claimant's work-related injury, and her subsequent development of a herniated disc at the L4-5 level. Dr. Allardyce's opinion is supported by the fact that his review of the records shows that the Claimant did not report low-back pain until September of 2007, that the operative report revealed chronic disc disease at the site of the herniation, and the Claimant had severe recessed stenosis and facet hypertrophy, which is found in longstanding, chronic back disease.

> 14. Dr. Allardyce testified that the first documented complaint of low-back pain and physical therapy records was in the therapy note of September 12, 2007, that the first documented complaint of low-back pain in Dr. Amentler's records was in the office note of September 20, 2007, and that the first documented complaint of low-back pain in Dr. Duffy's records was in the office note of October 15, 2007.
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> 15. Dr. Allardyce's testimony is detailed and well reasoned, and based upon numerous factors, including the various histories that he took, his physical examinations of the Claimant, and his review of various diagnostic studies.
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> 16. Based upon all of these factors, Your Judge accepts the competent, credible opinion of Dr. Allardyce's [sic] that the Claimant's herniated L4-5 disc is not work-related.

(Findings of Fact, Nos. 13-16.)

Deciding that Claimant did not provide sufficient medical testimony to show her L4-5 herniated disc was work-related, the WCJ concluded that Claimant's disc surgery was neither work-related nor compensable. (Conclusions of Law, No. 1.) As a result, the WCJ denied Claimant's review petition. On appeal, the WCAB affirmed. Claimant's petition for review to this court followed.[4]

On appeal here, Claimant argues that the WCAB erred in affirming the WCJ's decision because it was neither reasoned in accordance with section 422(a) of

[4] Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

the Workers' Compensation Act,[5] nor sufficiently supported by the evidence. Claimant first contends that the WCJ's decision was not reasoned because he partially accepted Dr. Allardyce's testimony over the testimony of Dr. de Luna on grounds that Dr. Allardyce physically examined and took various histories of Claimant, although Dr. Allardyce did neither. However, because Claimant has failed to raise this issue in her petition for review, and we do not consider it a subsidiary question fairly comprised by her general statement of objections, we will not consider it. *See Associated Town "N" Country Builders, Inc. v. Workmen's Compensation Appeal Board (Marabito)*, 505 A.2d 1358, 1360 (Pa. Cmwlth. 1986), *aff'd*, 515 Pa. 564, 531 A.2d 425 (1987); Pa. R.A.P. 1513(d).[6]

Next, Claimant argues that the WCJ's decision was unsupported by substantial, competent evidence. In this vein, Claimant asserts that Dr. Allardyce's opinion was inherently inconsistent, because, at one point, he stated that, if the work incident caused Claimant's pain, she would have had immediate, outrageous pain, and, at another point, he stated that disc herniations can be asymptomatic. Claimant also complains that Dr. Allardyce's opinion that her herniated disc at L4-5 was not work-related was solely based on the fact that he did not see any notations related to low back pain before September 17, 2007, in his review of her medical records, while

[5] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §834.

[6] Even so, were we to reach this question, Claimant would not prevail. While it is true that Dr. Allardyce never physically examined Claimant, the WCJ explained that Dr. Allardyce's testimony was supported by his review of Claimant's medical records, and he credited Dr. Allardyce's testimony largely on the doctor's assessment of Claimant's medical history as supported by his records review. Thus, the WCJ's incorrect statement that Dr. Allardyce physically examined Claimant would not render his decision unreasoned in contravention of section 422(a).

Dr. de Luna testified on cross-examination that Dr. Amentler indicated Claimant had pain radiating to her low back as of June 8, 2007. Claimant notes that Dr. de Luna testified symptoms of low back pain can begin days, weeks or even months after an incident like the one Claimant suffered, and Claimant herself testified that, while she was treated for neck pain immediately after the incident, once her neck pain improved, she noticed that her low back pain remained.

It is solely the WCJ's role to assess credibility and resolve conflicting evidence; however, the question of the competency of the evidence is one of law subject to our full review. *Cerro Metal Products Company v. Workers' Compensation Appeal Board (Plewa)*, 855 A.2d 932, 937 (Pa. Cmwlth. 2004). In our estimation, Claimant's arguments regarding the adequacy of the evidence upon which the WCJ relied go merely to the weight of that evidence rather than to its competency.

For instance, Dr. Allardyce's testimony that, had the work incident caused Claimant's disc herniation, she would have immediately suffered "outrageous" pain, does not automatically conflict with his statement that a traumatic incident need not aggravate an underlying disc herniation that previously has been symptom-free. (N.T., 3/26/09, at 27-28.)[7] Moreover, Dr. de Luna's testimony that Dr. Amentler's June 8, 2007, medical note included a notation stating "occasional radiation to LB" (N.T., 1/22/09, at 28), does not automatically contradict Dr.

[7] We note that Dr. Allardyce concluded, based on his records review, that Claimant had indicia of longstanding, chronic back disease. He stated in this regard: "So again, combined with the fact that she had two levels of disc herniations, means that she's had basically asymptomatic herniations for some time." (N.T., 3/26/09, at 19-20.)

Allardyce's testimony that his review of the records shows Claimant did not begin to suffer low back pain until September of that year. Dr. Allardyce testified that Claimant suffered an "acute onset of right low back pain" as reflected in Dr. Amentler's note of September 20, 2007, and also stated that Dr. Duffy did not comment on Claimant's low back pain until October 15, 2007. (N.T., 3/26/09, at 15.) Further, although Dr. de Luna testified that Claimant had low back pain right after the work incident (N.T., 1/22/09, at 24-25), Claimant acknowledged on cross-examination that she did not start treatment for her low back until September 2007. (N.T., 4/21/09, at 19.)

Boiled down to their essence, Claimant's assertions in this appeal amount to little more than an argument that the WCJ erred by crediting Employer's substantial evidence over the substantial evidence presented by Claimant. Such an argument lacks merit. Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Senior Judge

Judge McCullough did not participate in the decision in this case.

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O R D E R

AND NOW, this 30th day of March, 2011, the order of the Workers' Compensation Appeal Board, dated September 30, 2010, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Senior Judge