IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ryan Moving and Storage and Vanliner Insurance Company, Petitioners	:	
v.	:	No. 2395 C.D. 2009
	:	Submitted: June 25, 2010
Workers' Compensation Appeal Board (Robosky), Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: December 29, 2010

Ryan Moving and Storage (Employer) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) denying its petition to suspend the benefits of Robert Robosky (Claimant) and granting Claimant's penalty petition and petition to amend the description of the work injury. In doing so, the Board affirmed the findings of a Workers' Compensation Judge (WCJ): (1) that Claimant's work-related injuries were not fully described in the Notice of Compensation Payable (NCP); (2) that Employer violated the Workers' Compensation Act (Act);[1] and (3) that Employer failed to show that

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§1-1041.4, 2501-2708.

work was made available to Claimant. We reverse the Board's decision to grant Claimant's penalty petition but affirm the Board in all other respects.

Background

Claimant worked for Employer as a truck driver and mover when, on May 23, 2003, he sustained a torn rotator cuff while moving a 600 pound voting machine. By notice of temporary compensation payable (NTCP) on June 24, 2003, Employer accepted liability for the rotator cuff injury and began paying Claimant medical and disability benefits. The NTCP later converted to an NCP. Other than a brief return to work,[2] Claimant has continued on total disability and medical compensation. In 2006, when Employer stopped making payment for certain prescriptions and medical treatment, litigation ensued.

First, on November 29, 2006, Claimant filed a penalty petition, asserting that Employer had violated the Act by unilaterally ceasing to pay Claimant's medical bills. Next, on May 10, 2007, Employer filed a petition to modify or suspend benefits, asserting that Claimant had refused to accept employment that he was capable of doing notwithstanding his physical limitations. Third, on May 23, 2007, Claimant filed a review petition for the purpose of amending the NCP to include a cervical herniated disc as part of the original work injury.

The WCJ combined the three petitions for purposes of the hearing. The evidence was presented by deposition and by live testimony.

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[2] Claimant testified that he worked a total of 56 hours, spread out over a period of months, for Employer in 2005. Employer had him updating truck logs and picking up cigarette butts with "a stick with a nail in it." Reproduced Record at 338a. Employer eventually told Claimant it had no more light duty work available.

Claimant testified that in July 2003 Dr. Robert Waltrip did surgery to repair Claimant's torn left rotator cuff. The surgery was unsuccessful. Dr. Brian Jewell attempted a second surgical repair in December 2003, which also failed. Believing that Claimant's persistent neck pain might not be caused solely by the shoulder injury, Dr. Jewell referred Claimant to Dr. Gerald Werries for magnetic resonance imaging (MRI) and electromyography (EMG) nerve conduction studies. Dr. Werries issued a report that Claimant's C5-6 disc was herniated. Dr. Jewell referred Claimant to two pain management physicians, Dr. Frank Kunkel, who prescribed Oxycontin, and Dr. Edward Heres, who administered trigger point injections to Claimant's shoulder.

In July 2006, Claimant began to treat with Dr. Edward James. According to Claimant, Dr. James continued Claimant's prescription for Oxycontin and added prescriptions for Xanax, Soma and Neurontin while also pursuing injection therapy for management of Claimant's neck and shoulder pain. Claimant testified that in 2006, Employer suddenly refused to pay for Dr. James' treatment and his prescribed medications.

Claimant also testified about his meetings with Teri Soyster, a vocational rehabilitation specialist hired by Employer to locate employment opportunities for Claimant. Soyster arranged a job interview on November 15, 2006, with Dennis Moriarty, the owner of Youghiogheny Valley Specialty Services, which provides plain clothes security services to retail stores. At the interview, Moriarty described the job responsibilities, and Claimant expressed reservations. Moriarty suggested that Claimant consult his physician and in December 2006, Claimant attended a second interview with Moriarty. When

Claimant showed Moriarty the list of narcotic medications he was taking, Moriarty stated: "I couldn't put you out there if I wanted to." Claimant Deposition at 48; Reproduced Record at 352a (R.R. ___). Claimant testified that Moriarty did not offer him a position or put him on a work schedule.

Claimant then offered the testimony of Dr. Edward James, who is board certified in family medicine. Dr. James explained that he began treating Claimant on July 14, 2006, and he opined that the medications he prescribed were substantially related to Claimant's shoulder injury. Dr. James further opined that Claimant's cervical disc herniation was caused by Claimant's original work incident.

Dr. James testified that Claimant is not able to perform the plain clothes security job at Youghiogheny because his narcotics medications limit his ability to drive. Dr. James stated that he has never seen a patient who takes 20 milligrams of Oxycontin who was able to work. Dr. James opined that Claimant will never be able to maintain "any other substantial gainful employment." James Deposition at 15; R.R. 137a. He stated that he also considered Claimant's "age of 57, level of education, training and work experience" in making that determination. *Id.*

In response, Employer submitted the medical deposition of Jack Smith, M.D., who is board certified in orthopedic surgery. Dr. Smith performed two medical examinations of Claimant, one in November 2005 and one in June 2007. Dr. Smith did not question Claimant's complaints of pain, and he opined that Claimant's prescriptions for Xanax, Soma, Neurontin and Oxycontin were reasonable for the treatment of Claimant's shoulder injury alone, without

considering the neck injury. He explained that "a mixed cocktail" of medications to provide "multi-modal pain control" is a reasonable approach. Smith Deposition at 34; R.R. 435a. Dr. Smith attributed Claimant's neck pain to degenerative changes in his neck unrelated to his work injury.

Dr. Smith concluded that Claimant has reached maximum medical improvement and is able to do sedentary or light work, so long as he does not extend his left arm. Dr. Smith reviewed the job description sent by Teri Soyster for "Security Guard 1 (plain clothes security)," and approved the position as falling within Claimant's work restrictions. R.R. 576a. Dr. Smith stated that Claimant could drive about 30-60 minutes two times daily.

Employer also presented testimony of David Heick, the claims adjuster for Employer's workers' compensation carrier, Van Liner Insurance Company. Heick explained that he began denying Claimant's medical bills in 2006 because Dr. James' medical reports stated that he was treating Claimant for multiple conditions. Those conditions included not only the accepted shoulder injury but also acute cervical radiculopathy; hypertension; anxiety; depression; and lower back pain. Dr. James' invoices lacked the reference codes he needed to determine which treatment was for the accepted work injury. Heick's disapproval notice stated that the invoices were refused because they did not relate to the accepted work injury. Heick explained that Dr. James' bills "bundled" the charges for treating all of Claimant's maladies onto one invoice. Dr. James did not contact Heick after receiving the disapproval notice.

Employer also submitted the deposition testimony of Teri Soyster, case manager with Associates in Rehabilitation, a company that places workers

who cannot return to their prior positions. Soyster testified that she met with Claimant in September 2006 for a vocational interview. Soyster stated that Claimant did everything that she asked him to do for job placement.

Finally, Dennis Moriarty testified on behalf of Employer. He explained that his company provides plain-clothes security to retailers. Moriarty testified that the plain-clothes security job would require the employee to drive between stores during the work day. He described the job duties as walking around a store looking for suspicious activities among shoppers. The security personnel do not physically apprehend shoplifters but, rather, confront them as discreetly as possible.

Moriarty interviewed Claimant in November 2006 and offered him the plain clothes security position. He suggested that Claimant discuss the offer with his attorney or doctor because Claimant appeared hesitant; thus, his interview record showed that Claimant was not being considered for the position. When Moriarty met with Claimant the following month, he again offered the security position to Claimant, despite Claimant's list of medications. Claimant did not respond to the job offer but, rather, shook his hand and left the interview. Accordingly, Moriarty did not put Claimant on a schedule.

The WCJ found Claimant credible and convincing, noting that Employers' witnesses corroborated Claimant in important areas. The WCJ credited Dr. James' testimony, and he rejected Dr. Smith's testimony to the extent that it was inconsistent with that of Dr. James. He specifically rejected Dr. Smith's testimony that Claimant could drive safely for 30-60 minutes twice a day as well as the testimony of Soyster and Moriarty. Specifically, the WCJ found that Claimant

was not capable of performing the security position and that the job had not been offered to Claimant. Finally, the WCJ rejected Heick's explanation for rejecting Dr. James' medical invoices, noting that Heick should have requested Dr. James to "unbundle" the bills.

The WCJ held that Employer violated the Act by unilaterally stopping payment for Dr. James' treatment and prescriptions and, thus, imposed a 50 percent penalty with respect to all of Dr. James' unpaid bills. The WCJ further held that Employer failed to prove that work had been made available to Claimant within his limitations or that a job had ever been offered to Claimant. Finally, the WCJ held that the NCP should be amended to include a neck injury.

Employer appealed to the Board, which affirmed. Employer now petitions for this Court's review.

On appeal,[3] Employer argues that the Board erred in four respects. First, it contends that the Board erred in holding that Employer violated the Act when it refused to make payment on medical invoices that were not clearly related to Claimant's work injury. Second, Employer asserts that the Board erred in finding that Claimant had not been offered a job he was capable of performing. Third, Employer asserts that the Board erred in relying on hearsay medical evidence as the basis for amending Claimant's NCP. Fourth, Employer asserts that the WCJ did not issue a reasoned decision.

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[3] Our scope of review is limited to determining whether there has been a violation of constitutional rights, an error of law or whether necessary findings of fact are supported by substantial evidence of record. *Tri-Union Express v. Workers' Compensation Appeal Board (Hickle)*, 703 A.2d 558, 561 (Pa. Cmwlth. 1997).

Penalty Petition

We begin with Employer's challenge to the Board's imposition of penalties. The Board found that Employer violated the Act by failing to pay invoices for Dr. James' prescriptions and medical treatment.

Section 435(d) of the Act[4] authorizes a WCJ to impose penalties for violations of the Act; their imposition and amount are matters committed to the WCJ's discretion. The claimant bears the burden of proving a violation of the Act occurred. *Gumm v. Workers' Compensation Appeal Board (Steel)*, 942 A.2d 222, 232 (Pa. Cmwlth. 2008). Once the claimant makes a *prima facie* case that a violation of the Act has occurred, the burden then shifts to the employer to prove it did not violate the Act. *Id.*

Claimant asserted that Employer violated Section 306(f.1)(1) of the Act, which obligates an employer to pay for a claimant's medical treatment related to his work-related injury. 77 P.S. §531(1)(i).[5] Section 306(f.1)(5) of the Act also

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[4] Section 435(d), added by the Act of February 8, 1972, P.L. 25, states, in relevant part, as follows:

> The department, the board, or any court which may hear any proceedings brought under this act shall have the power to impose penalties as provided herein for violations of the provisions of this act or such rules and regulations or rule of procedure:
>
> (i) Employers and insurers may be penalized a sum not exceeding ten per centum of the amount awarded and interest accrued and payable: Provided, however, That such penalty may be increased to fifty per centum in cases of unreasonable or excessive delays. Such penalty shall be payable to the same persons to whom the compensation is payable.

77 P.S. §991(d).

[5] Section 306(f.1)(1)(i) states, in relevant part:

> The employer shall provide payment in accordance with this section for reasonable surgical and medical services, services rendered by physicians or other

(Footnote continued on the next page . . .)

directs that "providers shall submit bills and records in accordance with the provisions of this section." 77 P.S. §531(5).[6] The Medical Cost Containment Regulation requires providers to submit requests for payment of medical bills on either the HCFA Form 1500 or the UB92 Form. 34 Pa. Code §127.201.[7] Employers are not required to pay for the treatment billed until the bill is submitted on one of those forms. 34 Pa. Code §127.202.[8] In addition, Section 127.203 of the Medical Cost Containment Regulation requires providers to submit medical reports on appropriate forms explaining their treatment, and insurers are not obligated to pay for treatment until they receive such a report. 34 Pa. Code §127.203.[9]

(continued . . .)

> health care providers, including an additional opinion when invasive surgery may be necessary, medicines and supplies, as and when needed.

77 P.S. §531(1)(i).

[6] Section 306(f.1)(5) states:

> The employer or insurer shall make payment and providers shall submit bills and records in accordance with the provisions of this section. All payments to providers for treatment provided pursuant to this act shall be made within thirty (30) days of receipt of such bills and records unless the employer or insurer disputes the reasonableness or necessity of the treatment provided pursuant to paragraph (6) [(relating to opinions from peer review)].

77 P.S. §531(5).

[7] Section 127.201 provides, in relevant part:

> Requests for payment of medical bills shall be made either on the HCFA Form 1500 or the UB92 Form (HCFA Form 1450), or any successor forms, required by HCFA for submission of Medicare claims.

34 Pa. Code §127.201(a).

[8] Section 127.202 provides, in relevant part, as follows:

> Until a provider submits bills on one of the forms specified in §127.201 (relating to medical bills-standard forms) insurers are not required to pay for the treatment billed.

34 Pa. Code §127.202(a).

[9] Section 127.203 states, in relevant part, as follows:

(Footnote continued on the next page . . .)

In support of his penalty petition, Claimant testified that Employer had consistently paid his medical bills when it suddenly stopped in 2006. According to Heick, Employer could not discern from Dr. James' invoices, which lacked reference codes, whether a particular treatment or medication was for the accepted work injury or for Claimant's other physical and psychological maladies being treated by Dr. James. Accordingly, Employer returned each unpaid invoice to Dr. James. The Board concluded that Employer violated the Act by not paying these invoices because it was Employer's burden to ask Dr. James to resubmit the invoices in an "unbundled" format. The Board erred.

To prove a violation of the Act, it is the claimant's burden to place the unpaid medical invoices into the record to show that they were submitted in a form that enabled the employer to discern that the treatment in question was for the claimant's work-related injury. *Sims v. Workers' Compensation Appeal Board (School District of Philadelphia)*, 928 A.2d 363 (Pa. Cmwlth. 2007), *petition for allowance of appeal denied*, 596 Pa. 749, 946 A.2d 690 (2008). In that case, we held that claimant did not meet her burden of proving that a medical invoice for

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(continued . . .)

> (a) Providers who treat injured employees are required to submit periodic medical reports to the employer, commencing 10 days after treatment begins and at least once a month thereafter as long as treatment continues. If the employer is covered by an insurer, the provider shall submit the report to the insurer.
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> * * *
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> (d) If a provider does not submit the required medical reports on the prescribed form, the insurer is not obligated to pay for the treatment covered by the report until the required report is received by the insurer.

34 Pa. Code §127.203(a), (d).

orthopedic shoes was related to her work injury where she failed to submit the invoice on the proper form and without the required provider's report. Until these items are submitted, employer has no duty to pay under the Medical Cost Containment Regulation.

Here, Claimant submitted into evidence an exhibit prepared by Dr. James that listed his unpaid invoices. This exhibit identifies and categorizes the unpaid invoices by "office visit," "injection," or "physical therapy." James Deposition, Exhibit 4, R.R. 258a. This exhibit is not a copy of the invoice sent to Employer but, rather, a summary of information that appeared on those invoices. Claimant also submitted a list of unpaid medications from the Giant Eagle Pharmacy.[10]

An employer has no obligation to pay a provider invoice until it is submitted on the proper form and supported by a periodic medical report. 34 Pa. Code §§127.201, 127.202, 127.203. Claimant presented no evidence that Dr. James submitted the required invoices and reports on the proper form. Without this evidence, Claimant did not make a *prima facie* case that a violation of the Act occurred.

Because Claimant did not meet his initial burden of proving a violation, the burden never shifted to Employer. The WCJ and the Board erroneously placed the burden on Employer to ask Dr. James to "unbundle" his bills. Employers have no such responsibility. *Sims*, 928 A.2d at 366. Accordingly, we reverse the grant of the penalty petition.

[10] It is unclear whether this list was admitted into evidence.

Petition to Suspend or Modify Compensation

Next, we address Employer's assertion that Claimant refused in bad faith to accept a valid job offer. Employer argues that Claimant sabotaged Moriarty's job offer by providing him with a list of medications he was taking. Employer further argues that Claimant was able to perform the work made available to him because he could drive safely while taking the narcotics. Claimant counters that Employer is asking this Court to reweigh the evidence and change the WCJ's credibility determinations, which cannot be done by an appellate court.

In *Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.)*, 516 Pa. 240, 252, 532 A.2d 374, 380 (1987), our Supreme Court set forth the four-pronged process by which an employer may obtain a modification or suspension of a claimant's benefits when suitable employment has been made available to the claimant. First, an employer who seeks to modify a claimant's benefits on the basis that he has recovered must produce medical evidence of a change in his condition. *Id.* The employer must then produce evidence of a referral to an available job for which the claimant has been medically cleared. *Id.* Third, the claimant must then demonstrate that he has in good faith followed through on the job referral. *Id.* Finally, if the referral fails to result in a job, then claimant's benefits should continue. *Id.*

In this case, Employer sought to prove that it had referred Claimant to an available security job within his physical limitations. Dr. Smith reviewed the job description for "Security Guard 1 (plain clothes security)," and approved the position as falling within Claimant's work restrictions. However, the WCJ rejected

Dr. Smith's testimony and, instead, credited Dr. James' testimony that Claimant could not do the duties of a plain clothes security officer because of the narcotic medication he takes on a daily basis. The WCJ is the sole arbiter of credibility and the weight to be assigned the evidence, and this Court may not disturb those credibility findings. *Newhouse v. Workers' Compensation Appeal Board (PJ Dick/Trumbull Corp.)*, 803 A.2d 828, 832-833 (Pa. Cmwlth. 2002). As the WCJ rejected Employer's medical evidence, Employer failed to prove that work within his physical limitations was made available to Claimant. As such, the burden never shifted to Claimant to follow up on the referral and, therefore, his good or bad faith in that regard is irrelevant.

In short, the Board did not err in denying Employer's petition to suspend or modify Claimant's benefits.

Claimant's Review Petition

Next, we address Employer's contention that the Board erred in amending the NCP. Employer reasons that the WCJ's factual finding that Claimant's cervical herniation was work-related was based upon hearsay medical evidence, which is not substantial evidence.

In his decision, the WCJ found that

> as early as February or March of 2004, Dr. Gerald Werries suggested that the neck might be a component of his shoulder pain.

WCJ Decision, Finding of Fact No. 3 (FOF ___). The WCJ also found that

> Dr. James' opinion that the [C]laimant's neck was injured on the date of the work injury is supported by the medical evidence; specifically, the March 13, 2004 radiology report and

> March 31, 2004 report of Dr. Werries that indicate a disc "protrusion" and "herniation" at C5-6.

WCJ Decision, FOF 14. Employer challenges both of these findings as based upon hearsay evidence. It argues that Claimant should have presented Dr. Werries, not testimony about what Dr. Werries stated.

Medical experts may express an opinion based, in part, on the reports of others that are not in evidence, so long as it is a report on which the expert customarily relies in the practice of his profession. *Pistella v. Workmen's Compensation Appeal Board (Samson Buick Body Shop)*, 633 A.2d 230, 233 (Pa. Cmwlth. 1993). Dr. James' reliance on Dr. Werries' radiology reports falls within this rule. Dr. James explained that as a family physician, he routinely relies upon radiology reports to make diagnoses and provide treatment.

Dr. James opined that Claimant's cervical disc herniation resulted from the traumatic work injury, not from degenerative disc disease. Dr. Werries' reports established the existence of the herniation but did not opine as to its origin. The WCJ found that Dr. James based his opinion on knowledge he obtained as Claimant's treating physician, and that Dr. Werries' reports simply corroborated Dr. James' opinion.

Dr. James was entitled to rely on Dr. Werries' radiology reports because he customarily relies upon such reports in his profession. Accordingly, Dr. James' testimony was not hearsay evidence, and the Board did not err in amending Claimant's NCP.

Reasoned Decision

Finally, we consider Employer's contention that the WCJ did not issue a reasoned decision. Employer contends that the WCJ did not explain his

credibility determination as is necessary for appellate review. *Daniels v. Workers' Compensation Appeals Board (TriState Transport)*, 574 Pa. 61, 828 A.2d 1043 (2003).

In *Daniels*, the Supreme Court offered examples of "countless objective factors" that could guide the WCJ's resolution of conflicting expert testimony. They include whether the witnesses' opinions were based on erroneous factual assumptions; whether there was less interaction or less timely interaction by the expert with the subject; whether the expert betrayed bias or interest; whether the expert was unqualified or less qualified than the opposing expert; or whether the expert was impeached by inconsistencies or contradictions in his testimony or report. *Id.* at 78, 828 A.2d at 1053. Employer argues that the WCJ did not produce a reasoned decision because he failed to address these factors. The Board rejected this contention, noting that in

> Findings of Fact 9 through 14, the [WCJ] made credibility determinations based upon the evidence presented. We were able to conduct an effective judicial review. No error of law was committed.

Board Adjudication at 9. We agree with the Board.

In Finding of Fact No. 14, the WCJ stated that he found Dr. James' testimony to be credible because as Claimant's treating physician, he had examined Claimant many times and was "intimately familiar with [Claimant's] condition." WCJ Decision at 6. The WCJ based his credibility determination squarely on one of the *Daniels* criteria for evaluating deposition testimony, *i.e.*, the extent of Dr. James' familiarity with Claimant given the years of treatment. Thus,

the finding is sufficient to conduct adequate appellate review, and the Board did not err in concluding that the WCJ's decision was well reasoned.

Conclusion

For the foregoing reasons, we affirm the order of the Board granting Claimant's review petition and denying Employer's petition to suspend or modify benefits. We reverse the order of the Board granting Claimant's penalty petition.

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MARY HANNAH LEAVITT, Judge

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v.	:	No. 2395 C.D. 2009
Workers' Compensation Appeal Board (Robosky), Respondent	:	

O R D E R

AND NOW, this 29th day of December, 2010, the order of the Workers' Compensation Appeal Board dated November 4, 2009, in the above-captioned matter is hereby AFFIRMED in part and REVERSED in part in accordance with the foregoing opinion.

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MARY HANNAH LEAVITT, Judge