

In March of 2001, Claimant had been involved in a motor vehicle accident while on his way to the airport to fly to his native country, Egypt. Notes of Testimony (N.T.), April 13, 2005, at 7.

Upon returning to the United States, Claimant testified that he saw Dr. Stanton Bree (Dr. Bree) on April 13, 2001. N.T. at 7. Claimant alleged the automobile accident caused him to miss work for six weeks. He returned to work on April 24, 2001. N.T. at 8. Claimant did not have any recurring disability from the automobile accident and continued to work although he experienced some neck and back pain. N.T. at 15. In January of 2002, during the course of his employment, he was “bending down, like reaching up” and heard his back “crack twice.” N.T. at 8-9. Claimant further testified that he had to stop working for one hour or so until he felt a little better. N.T. at 9. He had an x-ray on February 11, 2003. N.T. at 17. Dr. Joseph Schneider (Dr. Schneider) provided chiropractic care to both his neck and back from May 8, 2003, through June 26, 2003. N.T. at 17. Claimant informed Dr. Schneider that he had been having symptoms he had attributed to the motor vehicle accident that he was involved in on March 4, 2001. N.T. at 22. The medical bills for the x-ray and chiropractic treatment were submitted to his motor vehicle insurance company. N.T. at 17-18. Claimant had a diagnostic study performed on his lumbar spine on April 25, 2003. N.T. at 20. He complained of lower back pain which was the “result of a motor vehicle accident which happened two years ago.” N.T. at 21.

On May 9, 2003, the Claimant completed a confidential patient case history, and reported lower back and left leg pain. When Claimant was questioned

regarding the cause of his complaints, he answered, “car accident” on March 4, 2001. N.T. at 19.

On May 13, 2003, Claimant complained to Dr. Bree of low back, bilateral hip, left leg and upper neck pain, which he again related to the 2001 motor vehicle accident. N.T. at 20.

On December 8, 2004, Claimant saw Dr. Haueisen at Susquehanna Valley Pain Center, and reported a three year history of back and neck pain.

Claimant presented the testimony of Everett C. Hills, M.D. (Dr. Hills), on April 11, 2008. Dr. Hills testified that Claimant related all of his symptoms to the 2001 motor vehicle accident. Deposition of Dr. Hills (Dr. Hills Deposition), April 11, 2008, at 10. In a report from Dr. Hills to Stephen Schneider (Claimant’s former attorney), dated July 16, 2006, (Hills Exhibit No. 1), Dr. Hills specifically reiterated that he was unable to provide a medical opinion that Claimant’s condition was work related. Dr. Hills Deposition at 11.

Employer presented the deposition testimony of Donald F. Leatherwood, M.D. (Dr. Leatherwood), a board-certified orthopedic surgeon. Deposition of Dr. Leatherwood (Dr. Leatherwood Deposition), July 10, 2008, at 6.¹

¹**[Employer’s Counsel (EC)]:** Doctor, if you could summarize for me the examination that you performed and just in general what you thought about those particular findings.

(Footnote continued on next page...)

The WCJ denied Claimant's claim petition after concluding that he failed to establish that he provided timely notice to Employer and failed to satisfy his burden on the claim petition:

2.) At no time during his testimony did the claimant indicate that there was a witness to his injury or at no time did the claimant indicate that he gave notice of his injury to his supervisor or any other co-worker. Pursuant to Section 311 of the Pennsylvania Workers' Compensation Act, as amended, notice of a work injury must be provided within 120 days of the injury. This Judge relies on 77 P.S. §631. This Judge also finds that an employee has the burden to provide the employer with

(continued...)

[Employer's Witness (Dr. Leatherwood)]: Well, the examination was objectively normal for both the lumbar spine, cervical spine, upper and lower extremities.

There were several subjective complaints on the part of the patient, including subjective complaints of tenderness and reduced voluntary range of motion, but they were within his control.

....

[EC]: Doctor, based on the history that you obtained from [Claimant], your physical examination, and your review of the medical records and diagnostic studies, were you able to form an opinion based upon a reasonable degree of medical certainty as to whether you believe that [Claimant] ever sustained a work injury in January of 2002?

[Dr. Leatherwood]: Based upon my history taken from the patient, the examination, and to a large extent upon my review of the medical records, it is my opinion that [Claimant] did not sustain a work injury related to his lumbar spine on January 15th of 2002.

Dr. Leatherwood Deposition at 11-16.

notice. This Judge relies on the case of Storer v. WCAB (ABB), 784 A.2d 829 (Pa. Cmwlth. 2001).

3.) This Judge, in reviewing the claimant's direct testimony, finds that the claimant never testified, or otherwise provided, that notice of a January work injury. He never proved that his [sic] was provided to an employer or anyone representing the employer. The claimant was represented by an attorney during this testimony, and never mentioned giving notice of his alleged injury to the employer. Nothing about notice was even completed on the Claim Petition. None of the claimant's medical bills were ever submitted to the employer or his worker's [sic] compensation carrier. Rather, they were submitted to the claimant's motor vehicle insurance carrier and Medicare.

4.) This Judge, in reviewing this case, finds that the first notice of any claimed January 15, 2002 work injury was the filing of the claimant's Claim Petition in January 2005, close to 3 years later. The claimant was represented by an attorney, Robert Mirin, Esquire, during this whole process. This Judge finds that this fact alone causes him to find the claimant's testimony incredible and this Judge cannot award based on the claimant's failure to provide notice of the injury as provided by the Worker's [sic] Compensation Act.

....

Workers' compensation is remedial legislation, however the claimant has the burden of proof and he must prove every element listed in his Claim Petition; this claimant has failed to do so. He has failed to give notice; he has failed to give competent and credible medical evidence and he has pinned his hopes on the testimony of Dr. Hills and this Judge finds that the testimony of Dr. Hills was incredible and not worthy of belief.

Upon reviewing this whole matter, this Judge finds that the claimant has failed to prove his case as the law requires, therefore this Judge finds the claimant's testimony was not credible. This Judge finds the claimant's testimony was not credible. This Judge finds

that the testimony of Dr. Leatherwood was credible and this Judge accepts the testimony of Dr. Leatherwood over the testimony of Dr. Hills, who was allegedly claimant's treating physician.

WCJ's Findings of Fact Nos. 2-4 and Reasoning and Analysis, January 14, 2009, at 4-7.

Claimant appealed the denial of his benefits to the Board which affirmed the decision of the WCJ:

In the instant case, the Judge found that although the Claimant testified in this matter, he never provided testimony that he gave timely notice of his work injury to Employer (Finding of Fact No. 3). Instead, the Judge found that the first notice Claimant provided of a January 15, 2002 work injury occurred with the filing of his Claim Petition in January of 2005, which was nearly three years after the alleged work injury occurred (Finding of Fact No. 4). After reviewing the record in this case, we see no error in the Judge's finding that Claimant failed to timely notify the Employer of his work injury. Since Claimant did not provide timely notice of his work injury to Employer within 120 days of that injury, Claimant's claim was barred and the Judge did not err in denying the Claim Petition.

Board's Decision, February 19, 2010, at 4.

Claimant contends² that his injury was work related and the testimony of Dr. Bree was credible.³ Claimant also contends that he provided notice to

² This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

³ This Court is foregoing the order of the Claimant's arguments.

Employer. Claimant further contends the Board erred when it concluded that he failed to satisfy his burdens of proof and persuasion.

In a claim petition the claimant bears the burden of proving all elements necessary to support an award. Innovative Spaces v. Workmen's Compensation Appeal Board (DeAngelis), 646 A.2d 51 (Pa. Cmwlth. 1994). To sustain an award, the claimant has the burden of establishing a work-related injury which resulted in disability.⁴ If the causal relationship between the claimant's work and injury is not clear, the claimant must provide unequivocal medical testimony to establish a relationship. Holy Family College v. Workmen's Compensation Appeal Board (KYCEJ), 479 A.2d 24 (Pa. Cmwlth. 1984).

Section 311 of the Pennsylvania Workers' Compensation Act (Act),⁵ 77 P.S. §834, provides that notice of a work injury must be provided within 120 days of the injury. An employee has the burden to prove the employer's receipt of notice. *See* Storer v. Workers' Compensation Appeal Board (ABB), 784 A.2d 829 (Pa. Cmwlth. 2001). Whether a claimant has complied with the notice requirements of the Act is a question of fact for the [fact finder]. *Id.*

Critically, although Claimant argues in his brief that he gave notice of the injury to his supervisor, Mr. George Getsos, a scrutiny of the record reveals the Claimant did not testify regarding notice.

⁴ For workers' compensation purposes, disability is equated with a loss of earning power. Inglis House v. Workmen's Compensation Appeal Board (Reedy), 535 Pa. 135, 634 A.2d 592 (1993).

⁵ Act of June 2, 1915, P.L. 736, *as amended*.

Since the WCJ found that Claimant failed to provide timely notice of his work injury to Employer the WCJ and the Board did not err in denying the claim petition. Accordingly, the decision of the Board is affirmed.⁶

BERNARD L. McGINLEY, Judge

⁶ Because this Court affirms the determination of the WCJ that Claimant failed to provide notice to Employer as required under the Act, this Court need not address Claimant's remaining arguments.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Ibrahim Shehata, | : | |
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| Petitioner | : | |
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| v. | : | |
| | : | |
| Workers' Compensation Appeal | : | |
| Board (Agkin Carmine's Restaurant), | : | No. 519 C.D. 2010 |
| Respondent | : | |

ORDER

AND NOW, this 11th day of January , 2011, the order of the Workers' Compensation Appeal Board is affirmed.

BERNARD L. MCGINLEY, Judge