IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jack Schonour,	:	
Petitioner	:	
	:	
v.	:	No. 528 C.D. 2011
	:	SUBMITTED: June 24, 2011
Workers' Compensation Appeal Board (Can Corporation of America, Inc. and America Casualty Co. of REA),	:	
Respondents	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED: August 5, 2011**

Claimant Jack Shonour petitions for review of the order of the Workers' Compensation Appeal Board (Board) that affirmed the denial of his claim petition seeking benefits pursuant to Section 306(c)(15) of the Workers' Compensation Act (Act),[1] 77 P.S. § 513(15), which provides compensation for, *inter alia*, the "loss of any substantial part of the first phalange of a finger . . . ." Because we agree that Claimant failed to meet his burden of proving that the injury

[1] Act of June 2, 1915, P.L. 736, *as amended.*

to his finger resulted in the loss of a substantial part of the first phalange, we affirm.

Claimant sustained a work-related injury on July 29, 2009, which resulted in the amputation of the tip of his left middle finger.[2] Employer, Can Corporation of America, Inc. accepted the injury via a notice of compensation payable and total disability benefits were paid accordingly until Claimant returned to full duty. Claimant subsequently filed a claim petition seeking benefits under, *inter alia*, Section 306(c)(15), which provides:

> The loss of any substantial part of the first phalange of a finger, or an amputation immediately below the first phalange for the purpose of providing an optimum surgical result, shall be considered loss of one-half of the finger. Any greater loss shall be considered the loss of the entire finger.

77 P.S. § 513(15).[3] The matter proceeded to a hearing before a workers' compensation judge (WCJ), where Claimant testified to the circumstances surrounding his injury and the current condition of his finger, the WCJ viewed the finger and described it for the record, and medical reports concerning the injury were admitted into evidence pursuant to Section 422(c) of the Act, 77 P.S. § 835.[4]

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[2] The mechanism of the injury itself amputated the tip of the finger; the amputation was not the result of surgery to treat the injury.

[3] "Phalanx," the singular of "phalanges" is defined by Stedman's Medical Dictionary (26th ed.) as "[o]ne of the long bones of the digits, 14 in number for each hand or foot, two for the thumb or great toe, and three each for the other four digits; designated as proximal, middle, and distal, beginning from the metacarpus." *Id.* at 1339.

[4] Section 422 was added by the Act of June 26, 1919, P.L. 642. Pursuant to Section 422(c), where, as here, the claim at issue involves fifty-two weeks or less of disability payments, the findings of fact may be based on certificates and sworn reports of health care providers. The WCJ described the appearance of Claimant's finger on the record as follows:

> Claimant is holding his left hand with his palm facing him with the back of his fingers facing me. I'm looking at the left middle finger.

(Footnote continued on next page…)

Specifically at issue was whether Claimant sustained the loss of a "substantial part" of the first phalange. In order to meet his burden, Claimant attempted to demonstrate that the injury included a loss of bone at the end of the finger.

In support of his claim, Claimant submitted various medical records and reports. Of note is the record from the emergency care unit, which stated that Claimant suffered a "traumatic amputation [of the left] third finger tip," and that, positive findings included: "ragged laceration – distal finger amputated – nail avulsed from bed entirely. X-ray shows small amount of distal phalange bone missing [with an] open [fracture]." *See* Employee's Ex. 3 to Notes of Testimony (N.T.), Hearing of November 10, 2009. In addition, a dismemberment chart was submitted, showing that the portion amputated included the area from the end of the bone to end of the finger.[5] We note that while the chart clearly depicts the loss of tissue and nail, it is not clear from the chart whether any bone loss occurred. An x-ray report from the hospital, dated July 29, 2009, was also introduced; the report states:

> There are semiopaque dressings related to the distal aspect of the middle finger which compromises detail

(continued…)

> The nail is clearly misshapen from this side and the --- if you will, the rounded part of the finger is not round on the middle finger as it is with the ring finger and index finger. Now turn your hand the other way. And when he turns palm facing me, I can observe that the middle finger slopes from the high side toward the thumb to the low side near the little finger. Again, it is not rounded but it is misshapen. . . .

Notes of Testimony (N.T.) at 13-14, Hearing of November 10, 2009, Reproduced Record (R.R.) at 28-29.

[5] The chart was included with the other records from the hospital but it is undated; although the writing is somewhat unclear, it appears that Claimant's treating physician, Nirutisai K. Graff, M.D., may have initialed the chart.

> and evaluation. There does appear to be loss of the soft tissues over the tuft region of the distal third finger and the possibility of some loss of bone from the tuft must be considered but the overlying dressings make this determination difficult. . . . The joints are preserved.
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> IMPRESSION: Distal soft tissue and bone injury relative to the middle finger as discussed above. Overlying dressings compromise evaluation but the possibility of the loss of a small amount of bone from the tuft region of the distal phalanx cannot be excluded. Recommend clinical correlation and follow-up.

Id. Claimant's documentation also included the medical report of Dr. Maxwell Stepanuk, Jr., an orthopedic surgeon, who states that, he reviewed the October 6, 2009, x-ray of Claimant's left hand and that, "[t]here is evidence of bone loss at the lateral tip of the distal phalanx . . . ." *Id.*, Employee's Ex. 4.[6] Dr. Stepanuk notes that there is a "hypertrophic scar" at the site of the injury and "a small portion of nail embedded in the scar tissue which is painful." *Id.*

Employer introduced, inter alia, a dismemberment chart from Nirutisai K. Graff, M.D., the plastic surgeon who apparently treated Claimant following his discharge from the hospital. According to Dr. Graff's depiction, Claimant lost the portion of tissue and nail that covers the top of the bone or phalanx and extends to the end of the finger. *See* Employer's Ex. 1. As with the

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[6] In his findings, the WCJ notes that the doctor's reference to an x-ray dated October 6, 2009, may have been a typographical error:

> October 6th was the last day that Claimant did not work. No one referenced a follow-up October x-ray at either the November or December hearings. No x-ray report from that date was offered. The only x-ray of record is the one from July 29th. Dr. Stepanuk did not state that he performed one when he saw Claimant on November 20th.

WCJ's decision and order (April 21, 2010), Finding of Fact No. 8.

other dismemberment chart, we note that it is difficult to tell whether Claimant sustained any bone loss. Employer's documentary evidence also included a fax from the carrier to Dr. Graff, stating: "Please address percentage of bone loss." *Id.* Written on that fax in what is clearly different handwriting is the notation: "Pt had no bone loss." *Id.*[7] Dr. Graff's report of July 30, 2009, the day after the injury, states: "[H]e has a tip injury July 29, 2009 . . . . He has a crush injury to the left middle finger distal phalanx. The chain yanked off the nail; and nail bed." *Id.* Dr. Graff further noted in her report that, Claimant did not have any exposed bone or tendon and that he needed time off from work "to allow this soft tissue abrasion

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[7] Although Claimant's counsel did not actually object to this document, there was a fair amount of discussion on the record between counsel for both parties and the WCJ because, while the document was addressed to Dr. Graff, and Dr. Graff presumably responded to the question, there is nothing on the document that actually indicates that Dr. Graff was the person who wrote "Pt. had no bone loss." The WCJ stated:

> It is true that the handwritten notation of no bone loss is not signed. Since that appears to me to be the only issue I have to decide in this case; that is, was there sufficient bone loss to justify a half finger specific loss award, it seems to me that I have two options. One, I can give either side the opportunity to get a specific signed document from Dr. Graff, or somebody can get an x-ray, since his finger is no longer in bandages.
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> . . . .
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> [I] think Mr. Seidel's [counsel for Claimant] point that there is not a signature to that sentence creates at least some issue. I don't know what x-rays cost to take these days. I have described Claimant's finger on the record and you may very well take a position that let's assume there's that amount of bone loss based on the initial radiologist concern because of the artifact, and then say notwithstanding that it still doesn't meet the statutory definition. And that's fine and I'll decide that issue. But on the other hand, if you want a definite fact of record that there is not any bone loss then I think you need to have a signed document 'cause I do think Claimant's entitled to that.

N.T. at 26 -27, Reproduced Record (R.R) at 41-42.

avulsion to heal." *Id.* In an office note dated August 13, 2009, Dr. Graff states that Claimant is "status post crush of the left middle finger, loss of soft tissue and nail. . . . There is good granulation tissue, some evidence of epithelialization." *Id.*

In his findings, the WCJ described Claimant's injury as follows:

> When viewing the dorsal (back of the hand) fingers, the undersigned saw that the left middle fingernail was obviously misshapen. The normally rounded end of the fingertip was not round. When viewed from the palmar side, the finger was not rounded but was misshapen, with the slope toward the little finger.

WCJ's decision and order (April 21, 2010), Finding of Fact No. 5. After reviewing the medical evidence, the WCJ concluded that Claimant failed to meet his burden of demonstrating that he lost a substantial part of the first phalange of his finger and denied the petition. In doing so, the WCJ noted that:

> Dr. Stepanuk, Claimant's witness, reported only that he sustained loss of bone. He did not quantify it. The radiologist who read the x-ray was, at best, non-committal. The ER doctor reviewed a report. The operating surgeon, who is entitled to the most credit because she saw the finger "up close and personal" as she repaired it, said that he did not lose any bone. Claimant has not met his burden of meeting the dictionary or caselaw definition of "substantial."

Id., Finding of Fact No. 10. The Board affirmed and the present appeal followed.

Claimant first contends that since the medical evidence demonstrates that he sustained bone loss, he is entitled to benefits under Section 306(c). While not clearly articulated, he is essentially arguing that the loss of any bone in the distal phalange constitutes the "loss of any substantial part of the first phalange of a finger" for purposes of Section 306(c)(15) benefits. We disagree.

The plain meaning of the statutory language requires a substantial loss of the first phalange, or bony structure, in order to be entitled to compensation. When addressing whether a claimant has sustained a "substantial" loss of bone, the appellate courts have routinely looked to the common definition of "substantial," interpreting the word to mean "important," "essential," or "material;" "something worthwhile as distinguished from that without value or merely nominal." *See Farah v. Workmen's Comp. Appeal Bd. (Weaver)*, 586 A.2d 472 (Pa. Cmwlth. 1991); *Bush v. Keystone Carbon Co.*, 236 A.2d 231 (Pa. Super. 1967).

In *Lockhart Iron & Steel Co. v. Workmen's Compensation Appeal Board (White)*, 330 A.2d 586 (Pa. Cmwlth. 1975), this court concluded that an injury that resulted in one-fourth inch of bone loss from the distal phalanx constituted a loss of a "substantial part" of the first phalange, entitling the claimant to benefits under Section 306(c)(15). Similarly, in *Bush*, the loss of three-sixteenths of an inch of the phalange was held to be substantial for purposes of Section 306(c)(15).

Here, Claimant has simply failed to demonstrate that he sustained a substantial, *i.e.*, material, loss of bone. While the medical evidence was conflicting and in some cases even equivocal due to lack of certainty as to whether Claimant sustained any loss of bone, the WCJ's findings suggest that he found either that no bone loss occurred or that very little occurred. *See* Finding of Fact No. 10. There is nothing in the statutory language or case law to suggest that any loss of bone, no matter how small, is compensable; if that were the case, inclusion of the requirement that a "substantial part" be lost would be meaningless. Moreover, disregarding the WCJ's findings regarding bone loss, the evidence cannot be construed to demonstrate that Claimant lost a substantial part of his first phalange;

neither the emergency room record nor Dr. Stepanuk's report can support the conclusion that a substantial loss occurred because neither indicated the amount of loss involved. Furthermore, ignoring for the sake of argument that the dismemberment charts are arguably equivocal, at most, the charts demonstrate a miniscule amount of bone loss, not a loss of a substantial part of the first phalanx. Accordingly, we discern no error in the conclusion that Claimant failed to meet his burden of proof.

In light of our conclusion above, we need give very little discussion to Claimant's evidentiary issues. As to the first, that the WCJ erred in noting that Dr. Graff's dismemberment chart does not depict any bone loss,[8] we note that even had the WCJ found otherwise, the amount possibly depicted does not demonstrate a loss of a substantial part of the bony structure and, therefore, that evidence, however interpreted by the WCJ, was insufficient to support the Claimant's burden of proof.

Next, Claimant contends that the WCJ erred in relying on the unsigned statement that "Pt had no bone loss" to deny benefits because that document was excluded from the record. While it is unclear whether the WCJ intended to exclude the faxed document from the record due to a lack of sufficient foundation or authenticity, the WCJ's partial reliance on this evidence to conclude

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[8] The WCJ found: "On August 10th, [Dr. Graff] completed a questionnaire submitted to her by Carrier. Her copy of claimant's finger diagram shows more extensive amputation from the soft tissue areas of the fingertip, but not of bone." Finding of Fact No. 9. According to Claimant, "[a] review of the amputation diagram shows that Claimant lost more than soft tissue; he also lost bone. The [August 10] diagram reveals a thick black line running right through the tip of the bone of the middle finger. Moreover, a July 28, 2009 amputation diagram of the exact finger also designates bone loss." Claimant's appellate brief at 11 (citations to reproduced record omitted). This contention was not raised in the petition for review and, therefore, technically is waived.

that Claimant failed to meet his burden of proof does not command a different result. As we have repeatedly noted, the evidence of record simply fails to demonstrate that Claimant lost a substantial part of his first phalanx. Accordingly, the order of the Board is affirmed.

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BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 5th day of August, 2011, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby affirmed.

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BONNIE BRIGANCE LEADBETTER,
President Judge