IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Daniel Kruper, Petitioner	:	
v.	:	No. 598 C.D. 2009
	:	Submitted: August 21, 2009
Workers' Compensation Appeal Board (Roadway Express, Inc.), Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: May 11, 2010**

Daniel Kruper (Claimant) petitions for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed as modified an order of a Workers' Compensation Judge (WCJ) expanding the description of Claimant's work injury.[1] The WCJ expanded Claimant's work injury, recognized as a torn meniscus, to include various other left knee conditions. The WCJ also expanded the injury description to include injury to the left hip and degenerative and arthritic conditions of the left hip, the neck and the low back.

Roadway Express, Inc. (Employer) appealed to the Board, which affirmed the WCJ's expansion of the work injury to include only the left knee

[1] This matter is before us on Claimant's application for reargument after the decision and order of this Court filed October 15, 2009. The Court granted reconsideration and withdrew the opinion and order of October 15, 2009.

conditions. In this appeal, Claimant asserts treatment notes and a billing statement from his chiropractor, identifying the left hip, neck and low back conditions as work-related, constitute substantial evidence supporting the WCJ's order. Alternatively, Claimant maintains the Board should have remanded this matter to the WCJ for further findings. For the following reasons, we affirm the Board's order as modified.

On October 23, 2003, Claimant suffered an injury while working as a maintenance mechanic for Employer. Employer issued a notice of compensation payable (NCP) describing the work injury as a torn meniscus.

During reinstatement and termination proceedings,[2] Claimant filed a review petition alleging an incorrect description of the work injury. Of note, the review petition did not identify the additional injuries sought to be added to the NCP.

Claimant testified on October 22, 2003, he fell off a five foot ladder while at work. When falling, Claimant's left knee hyper-extended and caused him to fall onto his left hip. In July 2004 and April 2005, Claimant underwent surgery

[2] In May 2005, Claimant filed a reinstatement petition seeking total and partial disability benefits for specific days he either missed work or left work early due to his knee injury. Thereafter, Employer filed an October 2005 termination petition alleging Claimant's work disability ceased and any current disability is due to pre-existing degenerative disease. While the petitions were pending before the WCJ, Claimant filed the current review petition. In consolidated proceedings, the WCJ concluded Claimant met his burden of proving entitlement to total and partial disability payments for the dates alleged in the reinstatement petition. The WCJ also determined Employer failed to prove Claimant completely recovered from the work injury. Neither party appeals those portions of the WCJ's decision.

to his left knee. He performs modified work for Employer. Claimant did not testify to other injuries allegedly resulting from his fall.

Claimant also presented the deposition testimony of Dr. Scott Lynch, a board-certified orthopedic surgeon (Claimant's surgeon). Surgeon began treating Claimant in March 2005, performed the April 2005 left knee surgery, and temporarily relieved Claimant's left hip pain by way of injection. Claimant's surgeon diagnosed osteoarthritis exacerbated by the fall at work with traumatic chondrosis of the lateral femoral condyle of the left knee. Claimant's surgeon opined Claimant has not fully recovered from his work injury but may work with permanent squatting and kneeling restrictions.

Claimant also submitted into evidence two packets of documents. Employer did not object to either exhibit for purposes of the review petition. The first exhibit, Claimant's Exhibit 5, contains the medical expenses, corresponding treatment notes, and May 2006 x-ray report of Claimant's chiropractor, Dr. Richard Seldow. Therein, Claimant's chiropractor diagnosed chronic lumbar sprain/strain with degenerative disc disease, degenerative joint disease of the left hip, and cervical arthritis, all related to the October 2003 fall at work. The second exhibit, Claimant's Exhibit 6, is a billing department statement identifying those medical expenses for which the doctor has not received payment.

Relevantly, the WCJ summarized Claimant's evidence as follows:

> 13. [Claimant's surgeon] diagnosed … Claimant with <u>osteoarthritis which was exacerbated by the fall at work</u> and traumatic chondrosis of the lateral femoral condyle

> of his left knee. Claimant still complains of pain[.] [Claimant's surgeon] concluded that … Claimant has not fully recovered from his work injuries and that he could not return to his pre-injury position as a maintenance mechanic without restrictions. [Claimant's surgeon] opined that … Claimant could perform the duties of this position as long as his squatting and kneeling are limited to less than two hours per day.
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> 14. Claimant submitted a series of unpaid medical bills [of] [Claimant's chiropractor] that totaled $1,840.00.

WCJ Op., 7/11/07, at 5 (emphasis added). The WCJ did not summarize Claimant's chiropractor's treatment notes and billing statement found in Exhibits 5 and 6.

Thereafter, the WCJ found:

> [Claimant] has met the burden of proof required to show that the [NCP] shall be amended to include exacerbation of osteoarthritis with traumatic chondrosis of the lateral femoral condyle of the left knee, left hip injury, chronic lumber sprain/strain with degenerative disc disease and degenerative joint disease of the left hip, back and cervical region.

Id. at 7; Finding of Fact (F.F.) No. 5 (emphasis added). Based on the above, the WCJ granted Claimant's review petition and amended the injury description to include all the additional injuries identified in the above finding. Importantly, the WCJ made no findings relative to Claimant's chiropractic exhibits.

Employer appealed to the Board, which affirmed the WCJ's decision as modified. The WCJ, according to the Board, credited only the testimony of Claimant's surgeon. To that end, Claimant's surgeon testified Claimant sustained a work-related exacerbation of osteoarthritis with traumatic chondrosis of the

lateral femoral condyle of the left knee. The Board found no other credited evidence supporting the degenerative conditions of the hip, neck and back listed by the WCJ. In June 2008, the Board affirmed expansion of the work injury to include work-related exacerbation of osteoarthritis with traumatic chondrosis of the lateral femoral condyle of the left knee. Neither party appealed.

Claimant filed a petition for reconsideration, and the Board granted rehearing. In a substantially similar decision, the Board rejected Claimant's reconsideration argument that the WCJ "must have found" his chiropractor's opinions credible. The Board noted the cover letter to Claimant's Exhibit 5 requested the unpaid bills, with corresponding medical records, be paid in conformity with the Workers' Compensation Act (Act).[3] See Bd. Op., 03/09/09, at 4. Further, the WCJ did not explicitly find the chiropractic records credible. Id. at 5. Accordingly, a unanimous Board affirmed as modified the WCJ's order and denied Claimant's petition for reconsideration.

On appeal, Claimant asserts error in the Board's modification of the WCJ order expanding the description of the work injury. In particular, Claimant maintains, although the WCJ did not expressly discuss his chiropractor's records, it is obvious the WCJ found the records and the opinions contained therein credible. Claimant's chiropractor found Claimant's 2003 fall at work caused the additional degenerative injuries. The chiropractor's records, admitted without objection, are sufficient evidence to support the WCJ's expansion of the work injury.

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

Initially, we must identify the order under review. As noted above, neither party appealed the Board's June 2008 order affirming as modified the WCJ's decision. Because Claimant failed to appeal the Board's June 2008 order and only sought reconsideration, Employer argues our review is limited to determining whether the Board abused its discretion in denying reconsideration. We disagree.

It is axiomatic that the filing of a motion for reconsideration, as here, does not extend the 30-day period for an appeal of the original order. Payne v. Workers' Comp. Appeal Bd. (Elwyn, Inc.), 928 A.2d 377 (Pa. Cmwlth. 2007); Muehleisen v. State Civ. Serv. Comm'n, 443 A.2d 867 (Pa. Cmwlth. 1982). See also Pa. R.A.P. 1701, Note ("[t]he better procedure under this rule will be for a party seeking reconsideration to file an application for reconsideration below and a notice of appeal, etc").

However, Claimant sought reconsideration of the Board's order in July 2008. Section 426 of the Act, 77 P.S. §871,[4] authorizes the Board, upon petition and cause shown, to grant a rehearing of any petition within 18 months after the Board has ruled.[5] The Board expressly granted rehearing by order of

[4] Added by the Act of June 26, 1919, P.L. 642.

[5] The Board's decision denying or granting rehearing is a matter of discretion, and will not be disturbed on appeal absent an abuse of that discretion. Matticks v. Workers' Comp. Appeal Bd. (Thomas J. O'Hora Co., Inc.), 872 A.2d 196 (Pa. Cmwlth. 2005). Rehearing is not permitted solely for the purpose of strengthening weak proofs already presented or providing cumulative testimony. Paxos v. Workmen's Comp. Appeal Bd. (Frankford-Quaker Grocery), 631 A.2d 826 (Pa. Cmwlth. 1993). Rehearing should be granted only where newly discovered evidence can be produced, where a party has not been given an opportunity to present its case, or

(Footnote continued on next page…)

August 28, 2008. Certified Record (C.R.) at Item 18. Rehearing is the functional equivalent of reconsideration. 20A G. Ronald Darlington et al., West's Pennsylvania Appellate Practice, §5102:3 (2008-2009 ed.). Because the Board granted Claimant's reconsideration request and subsequently rendered a new order in March 2009 affirming as modified the WCJ's order, a merits review is appropriate.[6]

On the merits, Claimant filed a review petition to add additional injuries to the NCP. As such, Claimant bears the burden of proving additional compensable injuries. Cinram Mfg, Inc. v. Workers' Comp. Appeal Bd. (Hill),

(continued…)

where the Board misapplied the law in light of subsequent court decisions. Moats v. Workmen's Comp. Appeal Bd. (Emerald Mines Corp.), 588 A.2d 116 (Pa. Cmwlth. 1991). In addition, "[a] rehearing petition may not be used as a vehicle for testing the merits of an unappealed decision." Young v. Workmen's Comp. Appeal Bd. (Britt & Pirie, Inc.), 456 A.2d 1150, 1152 (Pa. Cmwlth. 1983) (emphasis added).

Employer does not challenge the propriety of the Board's order granting rehearing. Therefore, we need not decide whether Claimant alleged sufficient cause for rehearing. Nevertheless, we disapprove of the Board's failure to explain why it granted rehearing. See Vista Int'l Hotel v. Workers' Comp. Appeal Bd. (Daniels), 560 Pa. 12, 742 A.2d 649 (1999) (where Board grants rehearing in the interests of justice, it must state its reasons for doing so).

[6] Our review is therefore limited to determining whether the necessary findings of fact were supported by substantial evidence, whether constitutional rights were violated, or whether errors of law were committed. Lahr Mech. & State Workers' Ins. Fund. v. Workers' Comp. Appeal Bd. (Floyd), 933 A.2d 1095 (Pa. Cmwlth. 2007). Had the Board not granted Claimant a rehearing, our review would be limited to determining whether the Board abused its discretion in denying rehearing inasmuch as Claimant did not appeal the Board's June 2008 order. Payne v. Workers' Comp. Appeal Bd. (Elwyn, Inc.), 928 A.2d 377 (Pa. Cmwlth. 2007). Cf. Douglas v. Workmen's Comp. Appeal Bd. (Bethlehem Mine Co.), 377 A.2d 1300 (Pa. Cmwlth. 1977) (claimant who did not appeal Board decision could not argue underlying merits of decision by appealing denial of rehearing).

601 Pa. 524, 975 A.2d 577 (2009).

Where there is no obvious causal connection between the disability and the work incident, a claimant is required to produce unequivocal medical evidence establishing that causal connection. Zander v. Workmen's Comp. Appeal Bd. (Warrington Equip. Co.), 449 A.2d 784 (Pa. Cmwlth. 1982). In this appeal, Claimant essentially argues he satisfied this burden by admission of his chiropractor's reports and billing statement.

At the outset, we disagree with the Board that the record lacks competent medical evidence supporting expansion of the NCP to include injuries to Claimant's left hip.

Claimant testified he sustained injury to his left hip when he fell from the ladder in October 2003. Notes of Testimony (N.T), 06/14/05, at 8. In addition, Claimant's surgeon testified Claimant's complaints of left hip pain correlated to the October 2003 fall. Dep. of Scott Alan Lynch, M.D., 09/13/06, at 14-15. Injections temporarily relieved Claimant's left hip pain. Id. at 15. Finally, all medical experts opined Claimant suffers degenerative joint disease of the left hip.[7]

Based on his examinations and treatment, Claimant's surgeon diagnosed "osteoarthritis … exacerbated by the fall at work with a traumatic chondrosis of the lateral femoral condyle of [the] left knee." Id. at 19 (emphasis

[7] Degenerative joint disease is synonymous with osteoarthritis. Stedman's Medical Dictionary 1282 (27th Ed. 2000).

added). In light of Claimant's surgeon's broad testimony regarding involvement of the left hip in the work injury, it is not clear whether the above diagnosis of exacerbation of the osteoarthritis was limited strictly to the left knee or whether it also included the left hip.

We review all evidence in a light most favorable to the party who prevailed before the fact finder. WAWA v. Workers' Comp. Appeal Bd. (Seltzer), 951 A.2d 405 (Pa. Cmwlth. 2008); 3D Trucking Co., Inc. v. Workers' Comp. Appeal Bd. (Fine & Anthony Holdings Int'l), 921 A.2d 1281 (Pa. Cmwlth. 2007). Doing so, we conclude the WCJ could resolve ambiguity in the evidence in favor of Claimant. Thus, the WCJ could find Claimant's surgeon's diagnosis included a left hip injury in the nature of exacerbation of osteoarthritis of the left hip, for which treatment was rendered. Accordingly, the record contains competent medical evidence to support the WCJ's expansion of the NCP to include exacerbation of osteoarthritis of the left hip.

Nevertheless, we agree with the Board that the facts as found by the WCJ do not support expansion of the NCP to include cervical and lumbar injuries.

Here, as clarified in Claimant's application for reargument and Employer's answer to that application, through his review petition Claimant sought less than 52 weeks of benefits. Since Claimant sought less than 52 weeks of benefits, Claimant could submit a health care provider's report regarding the cause and extent of disability. See Section 422(c) of the Act, 77 P.S. §835[8]; City of

[8] Section 422(c) was added by the Act of June 26, 1919, P.L. 642.

Harrisburg v. Workers' Comp. Appeal Bd. (Palmer), 877 A.2d 555 (Pa. Cmwlth. 2005).

> Section 422(c) of the Act provides, in pertinent part:
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> > Where any claim for compensation at issue before a [WCJ] involves fifty-two weeks or less of disability either the employe or the employer may submit a certificate by any health care provider as to the history, examination, treatment, diagnosis, cause of the condition and extent of disability, if any, and sworn reports by other witnesses as to any other facts and such statements shall be admissible as evidence of medical and surgical or other matters therein stated and findings of fact may be based upon such certificates or such reports.

77 P.S. §835. Further, this Court previously noted:

> > Reliance on a chiropractor's report is appropriate where, as here, disability of 52 weeks or less is at issue. 77 P.S. §835; CPV Mfg., Inc. v. Workers' Comp. Appeal Bd. (McGovern), 805 A.2d 653 (Pa. Cmwlth. 2002). Also, medical office notes are admissible under the statutory provision. Westinghouse Elec. Corp./CBS v. Workers' Comp. Appeal Bd. (Simon), 821 A.2d 1279 (Pa. Cmwlth. 2003), appeal denied, 574 Pa. 768, 832 A.2d. 437 (2003).
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> > Considering the language of the Act and the cases decided thereunder, a report is competent evidence where disability of 52 weeks or less is at issue. Whether the content of the report sufficiently addresses matters at issue and whether the report is persuasive are questions relating to credibility and to weight rather than to admissibility. We note that the statute permits a health provider certificate containing information which shall be admissible as evidence "of medical or surgical matters therein stated …." We specifically reject [the] [e]mployer's argument that a report must contain information on all topics mentioned in the statute before

> it is competent evidence; rather, the document must originate from a health provider and must address the matters at issue.

Budd Co. v. Workers' Comp. Appeal Bd. (Kan), 858 A.2d 170, 180 (Pa. Cmwlth. 2004) (emphasis added).

Here, although Claimant submitted his chiropractor's treatment records and x-ray report, the WCJ did not base his decision to expand the work injury on the chiropractor's records. Further, we do not accept Claimant's assumption that the WCJ implicitly credited his chiropractor's treatment notes in order to expand the NCP. Unlike other treatment notes offered into evidence, the WCJ did not summarize Claimant's chiropractic evidence. See WCJ Op., 07/11/07, at 3-4. He also did not make any findings relative to the diagnoses or opinions contained in the treatment notes. The sole reference to the chiropractic records pertains to the amount of unpaid medical expenses. F.F. No. 14. Thus, the only credited medical evidence supporting expansion of the injury is found in Claimant's surgeon's diagnosis as set forth above. While the WCJ is not required to make findings relative to every piece of evidence, he is required to make those findings necessary to support his decision. Section 422 of the Act, 77 P.S. §834 ("[a]ll parties to an adjudicatory proceeding are entitled to a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole …."); Solomon v. Workers' Comp. Appeal Bd. (City of Phila.), 821 A.2d 215 (Pa. Cmwlth. 2003) (the WCJ has sole discretion to find facts, and if those facts are grounded in competent evidence, they may not be disturbed on appeal). Here, the WCJ made no findings supporting expansion of the work injury based on Claimant's chiropractor's records.

In rejecting Claimant's argument that the WCJ's decision to expand the NCP was based on Claimant's chiropractor's treatment records, the Board explained:

> Claimant argues that the [WCJ] "must have" found the opinions of his chiropractor credible. He notes that the Claimant submitted the records of [his chiropractor] specifically for the purposes of the [r]eview [p]etition. However, the cover letter for Claimant's Exhibit 5 specifies that the exhibit consists of unpaid bills with corresponding medical records. Claimant asks "that these bills are paid in conformity with the Act." Claimant's Exhibit 6 is a billing statement containing HCFA forms. There is no indication whatsoever that these exhibits were submitted for the purposes of their medical/chiropractic opinions. Thus, the records were made a part of the record, but the [WCJ] did not explicitly find these records credible. While the WCJ could have found these records credible for the opinions expressed therein, we are constrained to rely on what the [WCJ] did, not what he "must have" done. Claimant's express intention with the submission of these bills was to see that his chiropractor was paid.

Bd. Op., 3/9/09 at 4-5 (emphasis added). Upon review, we discern no error in the Board's analysis.

More specifically, as indicated by the Board, Exhibit C-5 consists of a series of medical bills and accompanying treatment notes from Claimant's chiropractor. The cover letter to the exhibit indicates Claimant's counsel submitted these unpaid medical bills and corresponding treatment records to Employer's insurer for payment. R.R. at 187a. While the treatment notes reference cervical and lumbar injuries caused by a "fall injury," the notes do not clearly connect these injuries to the work incident. R.R. at 191a-97a. The last two

pages of the 14-page Exhibit C-5 consist of a "history" and "examination" accompanying an x-ray report, the last paragraph of which includes Claimant's chiropractor's opinion that Claimant's injuries are "directly attributable to his work-related accident." R.R. at 200a. However, as stated by the Board, there is no indication Claimant sought to rely on this opinion in support of his review petition when he submitted Exhibit C-5 to the WCJ at hearing. R.R. at 183a-84a. Indeed, at hearing, Claimant's counsel did not reference any diagnosis or opinion contained within this exhibit when he presented it to the WCJ. Id. Additionally, as the Board observed, Exhibit C-6 consists only of billing department statements and HCFA forms, which do not contain any opinions or diagnoses by Claimant's chiropractor. R.R. at 201a-223a.

Because Claimant did not direct the WCJ's attention to any opinion or diagnosis contained within the nearly 40 pages of treatment notes and billing statements that comprise Exhibits C-5 and C-6, it is not surprising the WCJ made no findings regarding any diagnosis or opinion contained in these documents. In addition, we decline Claimant's invitation to remand this matter for findings relating to these documents. To that end, Claimant could have relied on the opinions and diagnoses contained in his chiropractor's treatment records and x-ray report when he proceeded before the WCJ, but chose not to do so. Under these circumstances, a remand would merely provide Claimant a second bite at the apple and, therefore, is not appropriate.

Based on the foregoing, we affirm the Board's order as modified.

ROBERT SIMPSON, Judge

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v.	:	No. 598 C.D. 2009
Workers' Compensation Appeal Board (Roadway Express, Inc.), Respondent	:	

O R D E R

AND NOW, this 11th day of May, 2010, the order of the Workers' Compensation Appeal Board is **AFFIRMED** as modified. The injury description of the Notice of Compensation Payable is expanded to include a torn meniscus, exacerbation of osteoarthritis of the left knee with traumatic chondrosis of the lateral femoral condyle, and exacerbation of the osteoarthritis of the left hip.

ROBERT SIMPSON, Judge