IN THE COMMONWEALTH COURT OF PENNSYLVANIA

GE Transportation Systems and Electric Insurance Company, Petitioners	:	
v.	:	
Workers' Compensation Appeal Board (McEwen), Respondent	:	No. 635 C.D. 2011
	:	Submitted: October 7, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: October 27, 2011

GE Transportation Systems and Electric Insurance Company (Employer) petitions for review of an order of the Workers' Compensation Appeal Board (Board) affirming the decision of the Workers' Compensation Judge (WCJ) denying Employer's request for a remand due to newly discovered evidence. Finding no error in the Board's decision, we affirm.

On February 16, 2005, Employer issued a Notice of Compensation Denial (NCD) acknowledging a work-related injury to Claimant on June 15, 2004,

but denying that Claimant was disabled within the meaning of the Act.[1] Claimant then filed a Claim Petition alleging total disability resulting from an aggravation of a previous work injury in his position as a machine operator for Employer.

Before the WCJ, Claimant testified that he worked in Employer's locomotive engine facility on the laser welder machine in 1998, which involved handling parts that weighed a total of two hundred pounds up to sixty or seventy times per shift. Claimant was taken off the machine due to neck and shoulder tendinitis as well as problems with his left knee. He then worked in light-duty for seven months and was then released to full-duty. Claimant stated he returned to the laser welder machine in June 2004 for approximately two and a half weeks, after which the tendinitis returned and he experienced back, neck, and shoulder problems. Claimant bid off that job on November 2, 2004, but continued to have the same problems. From the time that the tendinitis returned, Claimant treated with several physicians who variously prescribed ibuprofen, icing of his arms at home, physical therapy and a prescription drug for inflammation to alleviate his pain. He testified that he continued to work until February 2005, when Dr. Vermeire, an orthopedic surgeon to whom he was referred, limited him to light-duty work, specifically lifting only ten pounds per arm and occasionally 25 pounds total. Claimant testified that Employer told him there was no light-duty work available and he was placed on short-term disability. He stated that he then had left arm surgery performed by Steven Kann, M.D. (Dr. Kann), an orthopedic surgeon. Even after the surgery, Claimant stated that he still had pain in his neck and left shoulder and experienced a loss of grip strength.

[1] Workers' Compensation Act, Act of June 2, 1915, P.L. 736, *as amended*, 35 P.S. §§1-1041.4, 2501-2708.

Claimant also presented the deposition testimony of Dr. Kann who first examined Claimant on July 13, 2005. Dr. Kann diagnosed Claimant with bilateral epicondylitis and opined that the injury was work-related, specifically from his work on the laser welder machine. He further noted that the duration of Claimant's exposure to the laser welder machine was irrelevant with regard to the development of the injury. Dr. Kann performed surgery on Claimant's left arm on September 26, 2005, and opined that Claimant could perform modified duty work with restrictions on repetitive gripping and grasping as well as pushing and pulling activities.

Employer presented the deposition testimony of John Tucker, M.D. (Dr. Tucker), who stated that while there could be a relationship between Claimant's work activities and the injury, based on the duration of Claimant's exposure to the laser welder machine in June 2004, the epicondylitis was not work-related. Instead, Dr. Tucker opined that a work-related injury could only be shown in this instance if Claimant had engaged in highly forceful, repetitive activities which involved using his elbows in an awkward position.[2]

[2] Deposition testimony of Employer's plant nurse, Linda Foster (Foster), Employer's business leader for power assembly and turbine components, Douglas Uzarski (Uzarski), and Employer's business leader for power part production, Mark Thomas (Thomas) was also submitted by Employer. These witnesses explained the physical demands of the job Claimant was engaged in when his injury occurred. Foster personally observed the performance of the laser welder position and documented the steps of the job. Uzarski narrated a video recording of the job and noted that some aspects of the duties were not depicted in the recording. Thomas agreed with regard to the video's incompleteness. The WCJ accepted Uzarski's testimony as credible, noting that the testimony clarified—not contradicted—Claimant's testimony, and disregarded the testimony of Foster and Thomas as not probative. (*See* Opinion and Order, dated September 12, 2006, at 2-5.)

The WCJ found Dr. Kann's opinions more persuasive than those of Dr. Tucker because Claimant's injury occurred shortly after returning the laser welder machine and his symptoms were the same as those he experienced when he previously worked on that same machine. The WCJ also found Claimant credible. The WCJ determined Claimant suffered a lateral epicondylitis, which was disabling, and awarded total disability benefits to Claimant with credit to Employer for benefits previously paid. The WCJ also found that "[E]mployer established a reasonable basis to contest the petition based on the opinions of Dr. Tucker." (*See* Opinion and Order, dated September 12, 2006, at 5.) Employer was further directed to reimburse Claimant's counsel for costs. Both parties appealed.[3] The Board affirmed the WCJ's decision but remanded the matter for further findings of fact and conclusions regarding the issue of deduction of counsel fees from reimbursements to Employer's insurance carriers.

In February 2008, Employer filed a Termination Petition alleging full recovery which was consolidated with the remanded petition. Claimant filed an answer denying the averments in the petition and noted that he uses a TENS unit for pain relief several times per day. He also stated that he still required surgery on his right elbow, but because the surgery on his left elbow was not successful, Dr. Kann did not want to operate again.

[3] Employer contended on appeal that Dr. Kann's opinion was not competent because he relied on an inadequate and untruthful job history supplied by Claimant. (Board Opinion dated October 22, 2006 at 6.) Claimant contended that the WCJ erred in finding Employer's contest of the petition reasonable, and that Employer should have been required to deduct and pay counsel
(Footnote continued on next page…)

Employer submitted the testimony of William Swartz, M.D. (Dr. Swartz). Dr. Swartz reviewed Claimant's records, took a history, and conducted a physical examination of Claimant on January 15, 2008. Based on findings of grip strength in the flexed and extended positions, Dr. Swartz opined that Claimant had fully recovered from his work injury. Employer also submitted the report of a Functional Capacity Evaluation conducted on September 17, 2009, which indicated that Claimant demonstrated the ability to function at the medium physical demand level for an eight hour workday.

Dr. Kann testified again on behalf of Claimant and opined that Claimant's lateral epicondylitis was ongoing and that Claimant had reached maximum medical improvement and would require work restrictions. He noted that Claimant could have good strength for short periods of time, but could not perform heavy activities over an extended period without becoming debilitated. Claimant also testified, stating that he had chronic nerve pain in the left elbow and biceps area as well as pain in the right elbow and some in the right biceps area.

In March 2010, finding Dr. Kann more credible and persuasive than Dr. Swartz, the WCJ denied Employer's termination petition. The WCJ also held that because Employer was self-insured, Claimant's counsel was not entitled to counsel fees for recovery of medical expenses.

(continued…)

fees from any funds reimbursed to its long-term disability insurance program and health insurance carrier. (*Id.*, at 7-8.)

Employer appealed to the Board, this time alleging that newly discovered evidence showed that Claimant had been earning money through self-employment and had not notified Employer. According to Employer, this rendered Dr. Kann's testimony incompetent because it was based on a false history, making remand necessary for reconsideration of the credibility determinations. The Board denied Employer's request for remand and affirmed the decision of the WCJ stating that even if Claimant was self-employed this would not change the outcome because whether or not Claimant's injuries were work-related was based on Dr. Kann's testimony, not Claimant's. Furthermore, Employer had not shown that the newly acquired evidence would change the outcome of the case. This appeal followed.

On appeal, Employer alleges that the Board abused its discretion in not ordering a remand because "the [C]laimant lied under oath [and] committed fraud … and has since 2004 filed both state and federal income tax returns showing self-employment." (Petitoner's Brief at 11.) As a result, Employer contends that Claimant's medical condition and capabilities could not be accurately evaluated by doctors because Claimant understated his physical abilities and was engaged in self-employment, of which he did not inform his doctors. Employer claims "[i]t is highly unlikely that Dr. Kann would feel so confident about the Claimant's sincerity after finding out that the Claimant had misled him in giving him his medical history and that he had been performing physically demanding work." (Petitioner's Brief at 12.) Because this would purportedly change the outcome, Employer contends that the Board's refusal to remand the

case to the WCJ for evaluation of the newly discovered evidence is an abuse of discretion.[4]

In his request for a rehearing, Employer simply makes a bald assertion that Claimant is self-employed, a claim which is unsupported by any factual averments. Employer fails to describe the nature of the self-employment and points to nothing in the record indicating that Claimant lied under oath. A request for remand or rehearing must provide "legally cognizable cause shown by petition or otherwise on which the Board [can base] an order granting the Employer's request." *UGI Corporation v. Workmen's Compensation Appeal Board (Wagner)*, 566 A.2d 1264, 1266 (Pa. Cmwlth. 1989). Given that there was nothing proffered other than Employer's bald assertion that Claimant was self-employed, there is no evidence which the Board could discern that a rehearing would likely result in a different outcome.

Accordingly, the Board did not abuse its discretion in denying Employer's request for a rehearing and its order is affirmed.

DAN PELLEGRINI, Judge

[4] A request for remand to the WCJ is equivalent to a petition for rehearing. *Cisco v. Workmen's Compensation Appeal Board (A&P Tea Co.)*, 488 A.2d 1194 (Pa. Cmwlth. 1985). The decision to grant or deny a rehearing is within the Board's discretion and will not be disturbed absent a clear abuse of discretion. *Paxos v. Workmen's Compensation Appeal Board (Frankford-Quaker Grocery)*, 631 A.2d 826 (Pa. Cmwlth. 1993). An abuse of discretion will not be found where the petitioner fails to show how the newly discovered evidence could change the outcome of the case. *Cisco*, 488 A.2d at 1196.

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O R D E R

AND NOW, this 27th day of October, 2011, the order of the Workers' Compensation Appeal Board, at No. A10-0507, is affirmed.

DAN PELLEGRINI, Judge