IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dina Alvarez,	:	
	:	
Petitioner	:	
	:	
	:	
v.	:	No. 645 C.D. 2010
	:	Submitted: July 16, 2010
Workers' Compensation Appeal Board (Moyer Packing Company),	:	
	:	
Respondent	:	
	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: August 19, 2010

Dina Alvarez (Claimant) petitions for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed, as modified, the decision of a Workers' Compensation Judge (WCJ) that denied her Claim Petition and granted a Termination Petition filed by Moyer Packing Company (Employer). We affirm.

On June 22, 2005, Claimant sustained an injury in the course and scope of her employment. Employer issued a Notice of Compensation Payable (NCP) describing the injury as a "strain" resulting from repetitive motion affecting Claimant's "[r]ight side of neck to right hand."

Reproduced Record (R.R.), at 1a. This NCP was a "medical only" NCP and no wage loss benefits were payable. The Bureau Claim Number (BCN) assigned for Claimant's work injury was 2824693.

Claimant subsequently filed a Claim Petition alleging total disability beginning September 26, 2007 due to an April 1, 2006 work injury. A new BCN was assigned to Claimant's Petition. At hearing, Claimant apprised the WCJ of the proper date of injury and the original BCN. She proposed to amend the injury date in her Claim Petition to June 22, 2005. The WCJ directed Claimant to refile her Claim Petition under the active BCN for her June 22, 2005 work injury. Claimant filed a second Claim Petition similarly alleging total disability from September 26, 2007 and ongoing. She attributed her current disability, however, to her June 22, 2005 work injury. Claimant alleged injuries in the nature of "right neck, right shoulder, right hand and arm, upper back pain, as well as upper back pain." R.R. at 7a. Employer filed a Termination Petition alleging Claimant fully recovered from her June 22, 2005 work injury as of March 3, 2008.[1]

Claimant testified that she was working for Employer on June 22, 2005 in a position requiring her to push boxes of meat weighing thirty to sixty pounds. Claimant explained that at that time, she was experiencing pain in her neck, back, and right arm. She indicated her symptoms progressed over time although she did not miss work. Claimant left her employment on September 26, 2007. She agreed that on that day, she was

[1] The WCJ incorporated the record developed under the first Claim Petition into the record on the second Claim Petition.

reprimanded two times for not being in the proper work area. Claimant added she was sent "home" by her supervisor, Marino Alevo. R.R. at 26a.

Claimant goes to physical therapy for right shoulder, arm, and back pain. During Claimant's examination, the following dialogue took place regarding a motor vehicle accident (MVA) Claimant was involved in en route to physical therapy:

> Q. Have you had any car accidents since you stopped working?
>
> A. I haven't had any injuries for this arm.
>
> Q. How about for the other arm or left shoulder?
>
> A. For this shoulder? They did hit me, they hit my bumper and it was hurting me for a couple of days. I did go to the hospital but it's fine.

R.R. at 28a.

Claimant presented the testimony of Anthony O'Dell, D.C., licensed chiropractor, who first examined Claimant for her June 22, 2005 injury on October 8, 2007. Dr. O'Dell indicated that Claimant provided a description of her work duties involving moving boxes of significant weight. According to Dr. O'Dell, Claimant has a cervical sprain/strain with incumbent radiating symptoms attributable to her June 2005 work injury. He would like to rule out disc herniation and cervical joint dysfunction. She is not fully recovered, nor is she able to work without restrictions. He restricted Claimant to modified duty with no overhead lifting and a push/pull limit of ten pounds. Dr. O'Dell agreed Claimant was injured in a MVA on

the way to one of his therapy sessions. He stated Claimant may have sustained a mild whiplash injury as a result of this accident that may have increased her muscle spasm. He is not treating her left upper extremity.

Employer presented the testimony of Daniel Murphy, human resources manager, who stated Claimant resigned her position on September 26, 2007. According to Mr. Murphy, he had a conversation with Claimant and Mr. Alevo on that day. Claimant informed him that she did not want to perform the job she was assigned to do as it was not her normal job. Mr. Murphy stated she was trained for the assigned job, it was within Claimant's pay grade, and she did not have any medical restrictions precluding her from working the position. He thought the matter was resolved. Claimant did not return to her assigned position after this conversation, however, but rather went home. She did not return. Mr. Murphy explained company payroll was advised Claimant resigned her position. He added that had Claimant not resigned her position, the job would have remained open and available to her.

On cross-examination, Mr. Murphy stated that Claimant was asked on September 26, 2007 to hang cattle stomach on hooks. She was needed to cover for an absent worker. Per Mr. Murphy, Claimant had done this position in the past.

Employer presented the testimony of Robert W. Mauthe, M.D., board certified in physical medicine, who performed an independent medical examination (IME) of Claimant on March 3, 2008. Based on his review of relevant medical records, he determined Claimant's complaints have been

primarily in the neck and right side. Claimant complained to him at the time of her examination of cramping in the right hand. During the examination, Dr. Mauthe observed no atrophy. He found no evidence of a cervical sprain or strain. Indeed, he found no evidence of objective impairment involving the neck or either upper extremity. Dr. Mauthe acknowledged Claimant's work injury as established in the NCP. R.R. at 113a, 118a. He opined that she was fully recovered from this injury, she did not require any work restrictions, and was capable of performing her pre-injury duties with Employer.

Dr. Mauthe denied that Claimant ever mentioned a MVA wherein she sustained injury. He did review an emergency room record indicating Claimant complained of pain in the mid-cervical spine into the left trapezius muscle.

In a decision circulated September 30, 2008, the WCJ found Claimant incredible based on his personal observations of her at hearing. The WCJ further rejected the testimony of Claimant's medical witness noting that he did not examine Claimant until two years after her work injury. According to the WCJ, Dr. O'Dell failed to advance any basis for his belief that Claimant was unable to work for Employer. Per the fact-finder, Dr. O'Dell was only familiar with Claimant's work duties involving moving boxes weighing more than thirty pounds. He demonstrated no awareness that there may have been different duties assigned on September 26, 2007. Conversely, the WCJ found Employer's lay witness, Mr. Murphy, who also testified live before the WCJ, credible. He credited Dr. Mauthe's testimony

specifically noting the thoroughness of his examination and the detailed explanation for Dr. Mauthe's findings.[2]

The WCJ denied Claimant's Claim Petition. The WCJ found Claimant sustained a "cervical strain" on June 22, 2005 while working for Employer relying on the contents of the NCP. R.R. at 140a. He determined that Claimant was able to continue working her regular duties for Employer up until September 26, 2007. The WCJ found Claimant refused to perform the job she was assigned that day and that she never advised Employer that she was unable to do the job as a result of her previously accepted work injury. Per the WCJ, Claimant voluntarily quit her employment. According to the fact-finder, had Claimant not voluntarily ended her employment relationship with Employer, work would have continued to be available to her.

The WCJ also granted Employer's Termination Petition. He found Claimant fully recovered from her work-related injury as of March 3, 2008. In so finding, the WCJ indicated that Employer was liable for Claimant's reasonable and necessary medical expenses through that date.

On appeal, the Board found that Employer should be liable for Claimant's reasonable and necessary medical expenses through the date of the WCJ's September 30, 2008 Decision, not the date of Dr. Mauthe's IME.

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[2] A WCJ is free to accept or reject, in whole or in part, the testimony of any witness. Greenwich Collieries v. Workmen's Compensation Appeal Board (Buck), 664 A.2d 703 (Pa. Cmwlth. 1995). Credibility determinations are not reviewable by this Court. Campbell v. Workers' Compensation Appeal Board (Pittsburgh Post Gazette), 954 A.2d 726 (Pa. Cmwlth. 2008).

The Board affirmed the WCJ's decision in all other respects. This appeal followed.[3]

Claimant argues on appeal that the WCJ erred in denying her Claim Petition and by failing to award her wage loss benefits as of September 27, 2007. She further asserts that the WCJ's determination that Employer met its burden of proving she was fully recovered from her work-related injury is not supported by substantial, competent evidence. According to Claimant, the WCJ erroneously limited her work injury to a neck strain ignoring the previously accepted right arm strain. Claimant further states the WCJ erred in not addressing the injuries she sustained en route to physical therapy necessitated by her work injury in determining whether Employer satisfied its burden of proof. Claimant also contends that there is no evidence of record to support the WCJ's conclusion that she voluntarily quit her position with Employer. At minimum, Claimant suggests a remand is warranted.

In addressing Claimant's arguments, this Court is mindful that we must first address Claimant's claims to additional injuries not recognized in the NCP. It is only when these arguments are disposed of that we can properly address whether Employer satisfied its burden of proof in the

[3] Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated. DeGraw v. Workers' Compensation Appeal Board (Redner's Warehouse Mkts., Inc.), 926 A.2d 997 (Pa. Cmwlth. 2007). On appeal, the prevailing party below is entitled to all inferences that can be reasonably drawn from the evidence. Krumins Roofing & Siding Co. v. Workmen's Compensation Appeal Board (Libby), 575 A.2d 656 (Pa. Cmwlth. 1990).

Termination Petition. We must know what all of Claimant's work injuries are prior to determining whether Employer established full recovery from these injuries.

We first address Claimant's claim related to her alleged injuries sustained en route to physical therapy. Claimant filed a Claim Petition in this case wherein she alleged only an injury occurring on June 22, 2005. Claimant's Claim Petition had to be refiled after Claimant testified in this matter as her original filing contained an incorrect BCN. Although Claimant did offer some testimony concerning the accident at hearing and she explained she sustained some degree of injury, the Claim Petition she filed thereafter remained essentially unchanged from her first Petition. It is bereft of any reference to a MVA occurring subsequent to the injury date while en route to physical therapy.

The Supreme Court, in Cinram Mfg., Inc. v. Workers' Compensation Appeal Board (Hill), 601 Pa. 524, 975 A.2d 577 (2009), held that a WCJ may amend an NCP to include injuries not referenced in the original NCP. It ruled that corrective amendments, those that involve an inaccuracy in identifying the existing injury in the NCP, may be made in any proceeding before a WCJ. Amendments based on subsequently arising medical conditions related to the original injury; *i.e.*, consequential conditions, can only be made upon the filing of a specific petition requesting amendment. Hill, 601 Pa. at 531, 975 A.2d at 581. An injury incurred seeking treatment for a work-related injury is compensable. Berro v. Workmen's Compensation Appeal Board (Terminex Int'l, Inc.), 645 A.2d

342 (Pa. Cmwlth. 1994). When a WCJ fails to make findings on a crucial issue, remand is warranted in order for the WCJ to render such findings. City of Phila. v. Workers' Compensation Appeal Board (Doherty), 716 A.2d 704 (Pa. Cmwlth. 1998).

Claimant, in her brief, asserts she sustained a neck and left shoulder injury en route to physical therapy for her June 22, 2005 work injury. These injuries may be compensable pursuant to Berro. These injuries, however, sustained in a MVA while treating for her original work injury, are unquestionably "consequential conditions" as that term is defined in Hill. Claimant must file a petition specifically seeking relief for these injuries. Id. Claimant filed no such Petition. Claimant's Petition never mentions the MVA. Further, she makes no mention of a left shoulder injury. Claimant's own testimony briefly references the MVA and indicates Claimant was "fine" as a result. R.R. at 28a. Claimant's medical witness added that while Claimant was involved in an accident en route to therapy, she sustained only mild injury that merely served to aggravate her pre-existing muscle spasm. Based on this information, it does not appear a claim for injury sustained during Claimant's MVA was before the WCJ. Cinram Mfg. As the issues concerning the MVA were not before the WCJ, remand is not necessary pursuant to Doherty.[4]

[4] Even if Claimant included a claim for injuries resulting from her MVA in her Claim Petition, we would be hard pressed to find the WCJ's decision to grant Employer's Termination Petition in jeopardy. We reiterate that Claimant testified she was currently "fine" in terms of the injuries she may have sustained while travelling to a physical therapy appointment. R.R. at 28a. When a claimant's own evidence concedes full recovery of a particular injury, termination is proper even if the employer's expert failed

In regard to the Claim Petition, we note Claimant is not necessarily concerned with the injury description, but rather with the fact that the WCJ found she was not entitled to wage loss benefits as of September 26, 2007. In a claim petition, the burden of establishing a right to compensation and of proving all necessary elements to support an award rests with the claimant. Inglis House v. Workmen's Compensation Appeal Board (Reedy), 535 Pa. 135, 634 A.2d 592 (1993). The claimant must establish the length of her disability attributable to her work injury. Coyne v. Workers' Compensation Appeal Board (Villanova Univ.), 942 A.2d 939 (Pa. Cmwlth. 2008). Disability is synonymous with a loss of earning power.[5] Ruth Family Med. Ctr. v. Workers' Compensation Appeal Board (Steinhouse), 718 A.2d 397 (Pa. Cmwlth. 1998). When a claimant voluntarily quits her job for reasons unrelated to her work injury, she is not entitled to indemnity benefits. Campbell v. Workers' Compensation Appeal Board (Foamex), 707 A.2d 1188 (Pa. Cmwlth. 1998). In a voluntary quit

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to address that injury. Stancell v. Workers' Compensation Appeal Board (LKI Group, LLC), 992 A.2d 221 (Pa. Cmwlth. 2010).

[5] Inasmuch as Employer previously accepted Claimant's June 22, 2005 work injury in an NCP and immediately suspended Claimant's benefits due to her continued ability to work, it seems that the more appropriate filing for the relief sought would be a reinstatement petition. A claimant seeking a reinstatement of suspended benefits has the burden of proving that the disability which gave rise to her original claim continues and that, through no fault of her own, her earning power is once again adversely affected by her disability. Pieper v. Workmen's Compensation Appeal Board (Ametek-Thermox Instruments Div.), 526 Pa. 25, 584 A.2d 301 (1990). Whether she proceeded on a claim petition or a reinstatement petition is ultimately immaterial. In either case, Claimant would have to show her work injury is what is causing her loss of earnings. Coyne; Pieper.

situation, the claimant must establish she left her employment due to her injury. Beattie v. Workers' Compensation Appeal Board (Liberty Mut. Ins. Co.), 713 A.2d 187 (Pa. Cmwlth. 1998).

Claimant had the burden in the instant proceeding to establish her earnings loss was attributable to her work injury. Inglis House; Coyne. The WCJ determined that Claimant voluntarily quit her employment on September 26, 2007. He found that she was able to work for Employer for two plus years following her initial work injury without missing time as a result of her impairment. He found that Claimant refused to perform the job she was assigned on that day, that she did not inform Employer that she was physically unable to perform her job that day, and that she voluntarily quit her employment. Based on these findings, Claimant was not entitled to wage loss benefits as of September 27, 2007.[6] Campbell; Beattie.[7]

Claimant nonetheless takes issue with the WCJ's conclusion that she voluntarily resigned from her position. She contends she was sent home by another employee, that that employee was never called to testify, and that she never filled out any paperwork indicating she resigned. Claimant's argument is flawed. Claimant's testimony was rejected in its

[6] Claimant asserts the job hanging cattle stomachs on hooks was beyond her restrictions. Those restrictions were imposed by Dr. O'Dell whose testimony was rejected by the WCJ. His testimony was rejected, in part, because he demonstrated little to no knowledge of the job Claimant was asked to do on September 26, 2007.

[7] Claimant challenges the WCJ's finding that she worked her regular duties for Employer from July 22, 2005 through September 27, 2007. We find support for this finding in the record.

entirety. The WCJ, on the other hand credited the testimony of Mr. Murphy. Employer's witness indicated that he was involved in a three way conversation with Mr. Alevo and Claimant concerning a dispute over Claimant's assigned position. Per Mr. Murphy, the dispute was resolved without punishment and Claimant was to return to her assigned position. Rather than return to her position, however, per the credible testimony of Mr. Murphy, Claimant left the premises and never returned. Employer prevailed below and is entitled to all reasonable inferences that can be drawn from the evidence. Libby. The WCJ adopted Mr. Murphy's conclusion that Claimant resigned her position. This is a reasonable inference from the credible evidence of record.[8] It is acknowledged that Claimant did not fill out any paperwork indicating she resigned. As pointed out by Mr. Murphy, however, this task was rendered impossible by Claimant's failure to return to Employer's premises.

[8] Claimant urges this Court to remand this matter as Mr. Alevo was never called to rebut her claim that this individual sent her home. She states an inference must be drawn that this man's testimony would have been unfavorable to Employer as he was in Employer's control. The missing witness rule provides that where evidence would properly be part of a case is within the control of the party whose interest it would be naturally to produce it, and without satisfactory explanation it fails to do so, an unfavorable inference may be drawn. Marriott Corp. v. Workers' Compensation Appeal Board (Knechtel), 837 A.2d 623 (Pa. Cmwlth. 2003). The missing witness rule is inapplicable, however, when the witness in question is equally available to both sides of the litigation. Id. at 631. While Mr. Alevo was Employer's employee, there is no basis for this Court to conclude he was not equally available to testify on Claimant's behalf. As Mr. Alevo was equally available to both sides of the litigation, Claimant is not afforded any relief under the missing witness rule. Knechtel. This Court adds that even if Mr. Alevo did send Claimant home for the day, a question arises as to why Claimant did not return to work on her next scheduled workday.

We further reject Claimant's argument that the WCJ erroneously granted Employer's Termination Petition. We find the WCJ's determination on this issue to be supported by substantial, competent evidence.

In a termination proceeding, the burden of proof is on the employer to establish that the claimant's work-related injuries have ceased. Udvari v. Workmen's Compensation Appeal Board (USAir, Inc.), 550 Pa. 319, 705 A.2d 1290 (1997). The employer meets this burden when its medical expert unequivocally testifies that it is his opinion, within a reasonable degree of medical certainty, that the claimant is fully recovered**,** can return to work without restrictions, and that there are no objective medical findings which either substantiate the claims of pain or connect them to the work injury. Id. at 327, 705 A.2d at 1293. If a claimant sustained multiple work-related injuries, the defendant must present proof of full recovery for each respective injury. Central Park Lodge v. Workers' Compensation Appeal Board (Robinson), 718 A.2d 368 (Pa. Cmwlth. 1998). In evaluating whether an employer's medical expert's opinion is sufficient as a whole to terminate benefits, we have concluded that "[a]t a bare minimum, the expert must know what the accepted work-related injury was to be competent to testify that a claimant has fully recovered from a work-related injury." Elberson v. Workers' Compensation Appeal Board (Elwyn, Inc.), 936 A.2d 1195 (Pa. Cmwlth. 2007).

In the present matter, none of Claimant's evidence was credited. Instead, the WCJ credited Dr. Mauthe who opined Claimant was

fully recovered, that he saw no objective evidence of impairment, and that Claimant was capable of returning to work without restriction. This is sufficient to satisfy Employer's burden under Udvari.

We acknowledge the WCJ's statement that Claimant's injury is a "cervical strain." R.R. at 140a. Claimant's argument concerning this language appears one of semantics, not one of substance. The NCP lists one injury- a "strain." R.R. at 1a. The "body parts affected" consist of the right side of the neck to the right hand, an indication of radiating pain. Id. A reasonable argument can be made that the WCJ's interpretation of the NCP is correct. Even so, Dr. Mauthe observed Claimant's subjective complaints have been on the right side. He noted Claimant's complaints of pain in the right hand. He nonetheless found no evidence of objective impairment involving the neck or either upper extremity. Dr. Mauthe expressly acknowledged the contents of the NCP and offered an opinion of full recovery. We see no error in the WCJ's granting of Employer's Termination Petition. Robinson; Elberson.

After a review of the record, we conclude that the Board did not err in affirming the WCJ's decision, as modified. Accordingly, the order of the Board is affirmed.

JIM FLAHERTY, Senior Judge

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Workers' Compensation Appeal Board (Moyer Packing Company),	:	
	:	
Respondent	:	
	:	

ORDER

AND NOW, this 19th day of August, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

JIM FLAHERTY, Senior Judge