IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Dykes, Petitioner

v.

Workers' Compensation Appeal Board (Highway Materials), Respondent

No. 780 C.D. 2011
Submitted: September 9, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: October 19, 2011

Joseph Dykes (Claimant) petitions this Court for review of the March 31, 2011 order of the Workers' Compensation Appeal Board (Board) affirming the decision of the Workers' Compensation Judge (WCJ) denying Claimant's Claim Petition. Claimant presents four issues for this Court's review: (1) whether the Board erred in affirming the WCJ's decision where the WCJ relied on after-acquired evidence, (2) whether the Board erred in affirming the WCJ's decision where the WCJ relied on hearsay evidence, (3) whether there was substantial evidence to support the WCJ's decision, and (4) whether Claimant's choice of medical providers was limited to the list of providers designated by Highway Materials (Employer). For reasons that follow, we affirm in part and reverse in part the Board's order.

On June 23, 2007, Claimant sustained a work-related injury. On July 2, 2007, Highway Materials (Employer) issued a Notice of Compensation Denial

(NCD) asserting that although an injury occurred, Claimant was not disabled as defined by the Workers' Compensation Act (Act).[1] On July 2, 2007, Employer also issued a Notice of Ability to Return to Work asserting that Claimant had been released to return to modified duty effective June 26, 2007. On July 27, 2007, Claimant filed a Claim Petition alleging an injury to his low back, neck and knees. Also on that date, Claimant filed a Penalty Petition alleging Employer violated the Act by failing to timely issue compensation documents. On April 30, 2009, the WCJ denied and dismissed Claimant's Claim and Penalty Petitions. Claimant appealed to the Board. On March 31, 2011, the Board affirmed the WCJ's order. Claimant appealed to this Court.[2]

Claimant first argues that the Board erred in affirming the WCJ's decision where the WCJ relied on after-acquired medical evidence to conclude that Claimant was able to perform alternate work previously offered by Employer. Specifically, Claimant contends that the WCJ relied on an independent medical examination (IME) which took place on April 4, 2008, wherein Employer's medical expert, John P. Nolan, Jr., M.D., (Dr. Nolan) had concluded that Claimant was fully recovered at that time.

Initially we recognize that

> [i]n 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. The claimant must establish that [his] injury was sustained during the course and scope of employment and is causally related thereto. The claimant is also required to establish the length of [his] disability. That burden never shifts to the employer.

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[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§ 1-1041.4; 2501-2708.

[2] This Court's review is limited to determining whether an error of law was committed, whether the findings of fact are supported by substantial evidence and whether there was a violation of constitutional rights. *Sysco Food Servs. of Phila. v. Workers' Comp. Appeal Bd. (Sebastiano)*, 940 A.2d 1270 (Pa. Cmwlth. 2008).

Coyne v. Workers' Comp. Appeal Bd. (Villanova Univ.), 942 A.2d 939, 945 (Pa. Cmwlth. 2008) (citations and footnote omitted). We also acknowledge that:

> after-acquired medical opinions issued after long periods of uncontradicted proofs do not, as a matter of law provide a reasonable basis for contesting a claim. To reasonably contest that an injury is not work-related, an employer must have in its possession at the time the decision to contest is made or shortly thereafter medical evidence supporting that position. To allow after-acquired medical opinions to justify an employer's contest would allow the decision to deny compensation to be based not on what a medical opinion is, but on the hope that some kind of medical evidence can be elicited prior to hearing.

Yeagle v. Workmen's Comp. Appeal Bd. (Stone Container Corp.), 630 A.2d 558, 560 (Pa. Cmwlth. 1993) (citation and footnote omitted).

Here, the NCD was based on Business Health Services' physician, J.J. Nicholson, D.O., (Dr. Nicholson) releasing Claimant to return to work on June 26, 2007. Hence, there was no long period of uncontradicted proof that there was a compensable injury.[3] As Claimant had the burden of proving a compensable injury, the testimony of Dr. Nolan to rebut said proof was clearly permissible. Accordingly, the Board did not err in affirming the decision of the WCJ wherein the WCJ considered the testimony of Dr. Nolan.

Claimant next argues that the Board erred in affirming the WCJ's decision where the WCJ relied on hearsay evidence to prove that Employer offered Claimant suitable alternative work. Specifically, Claimant contends that Dr. Nicholson's written restrictions were inadmissible to prove that Employer offered suitable alternative work.

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[3] This Court notes that the issue of whether Employer had a reasonable basis to contest the claim was not raised by Claimant.

As established above, Employer did not have the burden of proof. Notwithstanding, in addition to Dr. Nicholson's report, Stacy Durkin, Employer's Claim Manager, testified that she advised Claimant about the modified position available. Moreover, Claimant himself testified he was made aware of the position.[4] Thus, it does not follow that the WCJ relied upon the written restrictions to prove that a position was offered. Accordingly, the Board did not err in affirming the WCJ's conclusion that Employer offered Claimant suitable alternative work.

Claimant next argues that the WCJ's decision was not supported by substantial evidence. Specifically, Claimant contends that Employer failed to prove by substantial evidence that it provided suitable available work and it provided adequate notice to Claimant regarding suitable available work.

"Substantial evidence is such relevant evidence a reasonable mind might accept as adequate to support a conclusion. In performing a substantial evidence analysis, we must view the evidence, and every reasonable inference deducible from the evidence, in a light most favorable to the prevailing party." *WAWA v. Workers' Comp. Appeal Bd. (Seltzer)*, 951 A.2d 405, 407 n.4 (Pa. Cmwlth. 2008) (citation omitted).

As established above, it was not Employer's burden to prove whether suitable alternative work was available or whether Claimant was advised of said work. Claimant had the burden of proving his right to compensation. Here, the WCJ found that he had not met his burden. Specifically, the WCJ found "[C]laimant lacking in credibility on too many points to be persuaded by his testimony." Reproduced Record (R.R.) at 6. Claimant's description of how the accident happened was improbable. In addition, the record shows that he did not want to see a

[4] Notably, Claimant added that he was told he was to wait for a phone call which he never received; however, the WCJ found this testimony not credible.

doctor after the incident and continued to finish his task. Moreover, the record further indicates that he did not provide an adequate medical history to any of his doctors; he recently had a car accident which produced the same complaints; and he had no complaints about his right knee from June 23, 2007 until July 16, 2007. Clearly, the above is relevant evidence that a reasonable mind might accept as adequate to support the conclusion that Claimant did not incur a compensable work injury on June 23, 2007. Accordingly, the WCJ's decision was supported by substantial evidence.

Finally, Claimant argues that his choice of medical providers was not limited to Employer's list of designated providers because: 1) after the injury, Employer presented Claimant with an unsigned Acknowledgement of Rights form which Claimant then did not sign; and 2) Employer's list of providers did not comply with the Act in that it did not contain the requisite number of physicians.

Regarding the unsigned Acknowledgement of Rights, Claimant's attorney acknowledged that Claimant signed it at the time of hire and specifically stated at the hearing before the WCJ on December 3, 2007: "we're not disputing that." R.R. at 80a. However, regarding the number of physicians required for Employer's designation, Section 306(f.1)(1)(i) of the Act, 77 P.S. § 531(1)(i) specifically provides:

> Provided an employer establishes *a list of at least six designated health care providers, no more than four of whom may be a coordinated care organization and no fewer than three of whom shall be physicians*, the employe shall be required to visit one of the physicians or other health care providers so designated and shall continue to visit the same or another designated physician or health care provider for a period of ninety (90) days from the date of the first visit . . . .

(Emphasis added). The list provided by Employer contains the following providers: (1) Mercy Suburban Hospital, (2) Business Health Services, (3) Concentra Medical Center, (4) Norristown Orthopaedics, (5) Veronica Collings, D.C., (6) Drexel Neurosurgery Associates, and (7) Ophthalmology Associates. *See* R.R. at 447a. As there are not at least three physicians listed on Employer's list of providers, Claimant was not limited to visiting only the listed health care providers. Accordingly, Employer is required to pay for all medical care rendered by any physician between June 23 and September 21, 2007, relative to Claimant's work-injury, and for medical expenses due to a contusion of the back only from September 22, 2007 to April 4, 2008.[5]

For all of the above reasons, we affirm in part and reverse in part the Board's order.

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JOHNNY J. BUTLER, Judge

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[5] This Act violation was not raised in Claimant's Penalty Petition, thus the ruling on this issue does not affect the denial of Claimant's Penalty Petition.

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ORDER

AND NOW, this 19th day of October, 2011, the portion of the March 31, 2011 order of the Workers' Compensation Appeal Board affirming the denial of Joseph Dykes' claim and penalty petitions is affirmed, and the portion of the order ordering Highway Materials to pay only for medical expenses pertaining to treatment by the designated providers is reversed. Highway Materials is ordered to pay for medical expenses rendered by any physician between June 23 and September 21, 2007, relative to Dykes' work-injury, and for medical expenses due to a contusion to the back only from September 22, 2007 to April 4, 2008.

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JOHNNY J. BUTLER, Judge