IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Merlino Greenhouses, LLC, Petitioner v. Workers' Compensation Appeal Board (Gardner), Respondent	: : : : : : : :	 No. 930 C.D. 2009 Submitted: September 25, 2009

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: February 26, 2010

Merlino Greenhouses, LLC. (Employer) petitions for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of a Workers' Compensation Judge (WCJ) denying its Termination and Suspension Petitions. We vacate the Board's order and remand.

Bernard Gardner (Claimant) sustained an injury in the course and scope of his employment on July 7, 2006. Employer acknowledged this injury in a Notice of Compensation Payable (NCP) describing it as a low back strain. Employer subsequently filed a Termination Petition alleging Claimant fully recovered from his work-related injury as of December 15, 2006. Employer also filed a Suspension Petition alleging Claimant was offered a specific job that he was physically capable of performing that he refused in bad faith.

Employer presented the testimony of William H. Spellman, M.D., board certified orthopedic surgeon, who saw Claimant on December 15, 2006. He opined Claimant's low back strain had resolved and that Claimant needed no work restrictions.

Claimant presented the testimony of Albert D. Janerich, M.D., board certified in physical medicine, who first saw him on August 22, 2006. Dr. Janerich diagnosed Claimant's work-related injuries as musculoligamentous strain with resultant chronic pain, myofascitis/ inflammation of the muscle, and radiculopathy. He opined the lamina of the vertebral body at L5 was fractured in two areas resulting in spondylolisthesis of L5 with respect to S1 spondylolysis. Dr. Janerich agreed that there was underlying degenerative arthritis in Claimant's back. It did not become symptomatic, however, until the work injury warranting a finding of an aggravation.

Dr. Janerich advised Claimant against work. He explained Claimant should avoid bending or twisting at the waist. He should not lift, carry, or push loads greater than twenty pounds. Claimant cannot sit for more than thirty minutes at a time. Dr. Janerich did not believe Claimant was fully recovered from his work injury, nor could he return to work as a general laborer or truck driver. Dr. Janerich conceded Claimant had recovered from the musculoligamentous strain.

In a decision dated June 10, 2008, the WCJ denied Employer's Termination and Suspension Petitions. The WCJ found Employer "failed to meet its burden of proving that the Claimant fully and completely recovered from his work injury." Reproduced Record (R.R.) at 260a. He further found Employer failed to establish Claimant was physically capable of performing

a job that was offered to him. In rendering his determinations, the WCJ credited Claimant who testified on his own behalf. He further credited Dr. Janerich's testimony over that of Dr. Spellman. The Board affirmed. This appeal followed.[1]

Employer argues on appeal that the WCJ erred in denying its Termination Petition based on the opinions of Dr. Janerich. Employer emphasizes that Dr. Janerich agreed Claimant was fully recovered from his lumbar strain, the injury accepted in the NCP, and that he believed Claimant continued to be disabled as a result of conditions that were not accepted in that document. Employer acknowledges that a WCJ may amend an NCP to include additional injuries. It contends, however, that the WCJ failed to adhere to proper procedure to amend the injury description in this instance. Furthermore, Employer suggests the additional injuries testified to by Dr. Janerich arose after the work injury of July 7, 2006, that the NCP was not materially incorrect, and that it was incumbent on Claimant to file a Review Petition to expand the NCP.

In a termination proceeding, the burden of proof is on the employer to establish that the claimant has fully recovered from his work-related injury. 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,

[1] 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. Gentex Corp. v. Workers' Compensation Appeal Board (Morack), 975 A.2d 1214 (Pa. Cmwlth. 2009).

can return to work without restrictions, and that there are no objective medical findings that either substantiate the employee's claims of pain or connect them to the work injury. Id., 550 Pa. at 327, 705 A.2d at 1293. The employer's burden is a considerable one and it never shifts to the claimant because disability is presumed to continue until proved otherwise. Marks v. Workers' Compensation Appeal Board (Dana Corp.), 898 A.2d 689 (Pa. Cmwlth. 2006).

In City of Philadelphia v. Workers' Compensation Appeal Board (Smith), 860 A.2d 215 (Pa. Cmwlth. 2004)(Smith I), a case similar to the one before us, the employer accepted liability for a "low back strain" and thereafter sought a termination of benefits. Relying on the claimant's expert testimony, the WCJ denied the employer's petition and redefined the claimant's injury to include post-traumatic lumbar radiculopathy and two herniated discs at L5-S1. The Board affirmed but this Court reversed. We held that the testimony of the claimant's experts concerning conditions that were not accepted by the employer in the NCP was irrelevant to the question of whether the claimant had recovered from the acknowledged work injury. We added that before the claimant's herniated discs and lumbar radiculopathy could be found compensable, it was incumbent on the claimant to file a review petition to amend the NCP or file a claim petition and establish a causal connection to his employment. This Court indicated that the WCJ "gloss[ed] over the difference between a muscle strain and a herniated disc with attendant radiculopathy." Smith, 860 A.2d at 223. Further, we indicated, "[a] lower back strain is not the same as disc herniation and lumbar radiculopathy." Id.

Following this Court's decision in Smith I, this Court issued its opinion in Cinram Mfg., Inc. v. Workers' Compensation Appeal Board (Hill), 932 A.2d 346 (Pa. Cmwlth. 2009). There, the employer issued an NCP acknowledging a "lumbar strain/sprain." The WCJ denied the employer's termination petition and amended the NCP, concluding that the claimant proved that his work injury included a herniated disc. The employer argued on appeal that the WCJ erred in amending the NCP when the claimant had not filed a review petition, and that the claimant's doctor's testimony was incompetent because he failed to acknowledge that the work injury was limited to a lumbar strain/sprain.

This Court noted that under Section 413(a) of the Pennsylvania Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §771, a WCJ is empowered to amend the description of the claimant's work injury, even in the absence of a review or claim petition, if it is proved that the NCP is materially incorrect.[2] We explained that an NCP is materially incorrect if the accepted injury fails to include all of the injuries that the claimant suffered in the work incident. Because the record contained evidence to support the finding that the claimant sustained a

---

[2] Section 413(a) of the Act provides:

> A workers' compensation judge may, at any time, review and modify or set aside a notice of compensation payable and an original or supplemental agreement or upon petition filed by either party with the department, or in the course of the proceedings under any petition pending before such workers' compensation judge, if it be proved that such notice of compensation payable or agreement was in any material respect incorrect.

77 P.S. §771.

herniated lumbar disc as a result of his work injury, we held that the WCJ did not err in expanding the description of the work injury and denying the employer's termination petition. This is so even though the Employer only accepted a lumbar strain and sprain.

In City of Phila. v. Workers' Compensation Appeal Board (Smith), 946 A.2d 130 (2008)(Smith II), this Court reviewed the subsequent rulings of the workers' compensation authorities following our previous remand. The WCJ had again denied the employer's termination petition based on the credible evidence presented by the claimant. He found that the claimant established the NCP was materially incorrect at the time it was issued. He amended the NCP that accepted only a lower back strain to include post traumatic lumbar radiculopathy and two herniated discs at L5-S1. The Board affirmed.

We rejected the employer's arguments that the claimant was required to file a review petition in order to change the injury description to include anything other than a back strain. We further rejected its contention that the WCJ erred in considering injuries other than those recognized in the NCP in denying the termination petition. We noted that, consistent with Hill, the claimant proved through credible testimony that he sustained herniated discs and lumbar radiculopathy as a result of the initial work incident. Consequently, we affirmed the Board's opinion.

The Supreme Court, in Cinram Mfg., Inc. v. Workers' Compensation Appeal Board (Hill), __ Pa. __, 975 A.2d 577 (2009) affirmed this Court's order below. It held that a WCJ may correct an NCP to include injuries not specifically considered by the original NCP in the context of any petition, even one filed by an employer in a termination

proceeding.[3] The Supreme Court 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 or psychiatric conditions related to the original injury, i.e., consequential conditions, can only be made upon the filing of a specific petition requesting amendment. Most importantly, the Court stated that "the burden rests with claimants to establish the existence of additional compensable injuries giving rise to corrective amendments, regardless of the procedural context in which the amendments are asserted." Hill, __ Pa. at __, 975 A.2d at 582. The Court found there was substantial evidence of record to support a corrective amendment of the NCP to include an aggravation of a disc herniation causing nerve root impingement and resultant radiating pain.[4]

[3] The Supreme Court, in Hill, noted the concerns of employers that in defending against termination petitions, claimants have increasingly been presenting medical testimony concerning different body parts than those considered to be the accepted injury, thereby placing it in a position of having to prove a negative; *i.e.*, that the new injury is not causally related to the work injury, and reversing the general principle that claimant must prove all elements of a claim.

[4] In a footnote, the Supreme Court referenced a "third method of effectively amending [an NCP]." Hill, __ Pa., __, 975 A.2d at 582, fn. 9. Citing Gumro v. Workers' Compensation Appeal Board (Emerald Mines Corp.), 533 Pa. 461, 626 A.2d 94 (1993), the Court acknowledged that there are times where the burden is on the employer to establish an independent cause of disability where continuing symptoms or worsening symptoms involve the same body part as the accepted work injury. The Court, in Gumro, held that the burden was on the employer to prove that the deep venous thrombosis that was causing the current disability was not related to a work-related knee injury Nonetheless, it explained:

> The Commonwealth Court's approach of interpreting Gumro's holding somewhat narrowly seems reasonable, *particularly in light of the liberal procedures available under the statute for claimants to obtain modifications to*

In the present matter, the NCP lists Claimant's work injury as only a low back strain. Claimant's own doctor, however, conceded on cross-examination that the musculoligamentous strain had resolved. Dr. Janerich opined Claimant was not fully recovered from his work-related injury due to the ongoing problems with myofascitis, radiculopathy, spondylolisthesis, spondylolysis and an aggravation of degenerative arthritis in Claimant's back.

This matter commenced with the filing of a Termination Petition. Claimant did not file his own petition expressly seeking to amend the NCP. Smith II and the holdings of both the Supreme Court and this Court in Hill instruct that the NCP may be amended and that Claimant may successfully defend against Employer's Termination Petition if the NCP was materially incorrect at the time it was issued and Claimant is capable of establishing causation regarding the additional injuries. This is so even in the absence of a review or claim petition.

Claimant's additional injuries, as testified to by Dr. Janerich, include myofascitis, radiculopathy, spondylolisthesis, spondylolysis and an aggravation of degenerative arthritis in Claimant's back. Only a low back strain was acknowledged in the NCP that Claimant's own doctor opined was resolved. The WCJ did not reference the fact that Dr. Janerich opined

---

> *descriptions of accepted injuries, as well as the legitimate allocation to claimants of the burden to prove injuries which are not accepted by employers.* In the absence of any relevant argumentation by the parties to this appeal, although we will not dispositively resolve the matter, we decline to disturb the Commonwealth Court's approach here. (Emphasis added).

Hill, 975 A.2d at 582, fn. 9

Claimant was fully recovered from the only injury listed in the NCP. He made no finding concerning whether he was amending the Claimant's injury description to include additional injuries. He did not expressly indicate that the burden should be placed on Claimant to establish causation for the injuries testified to by Dr. Janerich as it was in Smith I, Smith II and the Hill cases. The WCJ denied Employer's Termination Petition finding only that it "failed to meet its burden of proving that the Claimant fully and completely recovered from his work injury." R.R. at 260a.

Claimant bears the burden of establishing causation regarding his myofascitis, radiculopathy, spondylolisthesis, spondylolysis and an aggravation of degenerative arthritis in his back.[5] This determination, in turn, requires a finding as to whether the WCJ is being asked to make a corrective amendment to the NCP that is permissible in a termination proceeding or whether Claimant is seeking an amendment based on consequential conditions, i.e., medical conditions arising subsequent to the issuance of the NCP which are related to the original injury that would require a petition to be filed specifically asking for such relief. The WCJ must make findings consistent with these conclusions. The WCJ's findings are insufficient in and of themselves to form the basis for his decision. A remand is appropriate when the WCJ's findings fail to resolve a necessary issue raised by the evidence or the parties. C.P. Martin Ford, Inc. v. Workers' Compensation Appeal Board (Dzubur), 767 A.2d 1164 (Pa.

---

[5] Claimant, in brief, contends that "[he] met his burden of showing that the additional compensable injuries were related to his work injury." Claimant's brief, p. 18. Nowhere in the WCJ's decision, however, is there any indication that the burden was placed on Claimant to establish causation and that he satisfied that burden.

Cmwlth. 2001). Consequently, we must vacate the order below and remand this matter to the WCJ to render findings to properly dispose of Employer's Termination Petition.[6] In the event the WCJ finds that a request for a corrective amendment is before him and that Claimant is able to meet his burden to establish causation regarding the alleged additional injuries, the WCJ should expressly state the injuries that make up Claimant's injury description.[7]

JIM FLAHERTY, Senior Judge

---

[6] Arguably, Claimant's alleged myofascitis, radiculopathy, spondylolisthesis, spondylolysis and an aggravation of degenerative arthritis in his back are part of the same body part or system as Claimant's accepted low back strain. Thus, an argument could be made that consistent with Gumro, Claimant had no burden in this litigation and Employer was required to establish an independent cause for these alleged injuries or establish full recovery from the same. As per the Supreme Court's decision in Hill, however, Gumro is to be narrowly interpreted. It should be a rare instance that a claimant would not have the burden to prove causation regarding injuries that are not accepted by the employer. We do not believe Gumro is applicable here.

[7] Employer also appeals the denial of its Suspension Petition. Because we are vacating and remanding this matter for new findings on the Termination Petition, the WCJ may make findings warranting an alteration of his disposition on Employer's Suspension Petition. Thus, the issues relating to the Suspension Petition are not yet ripe for our review.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Merlino Greenhouses, LLC, Petitioner	:	
v.	:	No. 930 C.D. 2009
Workers' Compensation Appeal Board (Gardner), Respondent	:	

O R D E R

AND NOW, this 26th day of February, 2010, the order of the Workers' Compensation Appeal Board is vacated. This matter is remanded for findings consistent with this opinion. In the event the WCJ determines he is being asked to make a corrective amendment to the NCP, but Claimant fails to establish causation regarding the additional injuries testified to by Dr. Janerich, Employer's Termination Petition should be granted based on Dr. Janerich's statement that Claimant is fully recovered from his musculoligamentous strain.

Jurisdiction relinquished.

____
JIM FLAHERTY, Senior Judge