IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Daniel Gavin Fanning, Sr., Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Lower Merion School District), Respondent	:	No. 934 C.D. 2010
John Carr Electric, Inc., Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Fanning, Sr. and Lower Merion School District), Respondents	:	No. 990 C.D. 2010
	:	Submitted: December 23, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: March 17, 2011

Daniel Gavin Fanning, Sr. (Claimant) and John Carr Electric (Carr Electric) cross-appeal from the order of the Workers' Compensation Appeal Board (Board) which affirmed the Workers' Compensation Appeal Judge's (WCJ) decision to deny Claimant's Reinstatement Petition and grant his Penalty Petition.

On October 7, 1987, Claimant injured his lower back while in the course and scope of his employment with Carr Electric (1987 injury).[1] In 1995, Claimant underwent a decompression with fusion and insertion of a bone simulator. Prior to 1995, Claimant had 11 back surgeries, including an attempted fusion from L-3 to S1, a lengthy history of treatment, pain management and numerous difficulties including a products liability action that concerned pedicle screws placed in his spine, and a medical malpractice action.

Claimant remained out of work for nine years, until 1996 when he began to work full-time for Lower Merion School District (School District) as a campus aide.[2] He also performed coaching duties for basketball, football and baseball.

Although Claimant was working, the condition of his back arising out of the 1987 work injury with Carr Electric was deteriorating and significantly impacted his ability to function. In February 12, 2001, Claimant underwent a CAT scan of his lumbar spine in order to address the numbness that he had been experiencing in both of his lower extremities. On February 19, 2001, Claimant presented to his pain management specialist with a high level of pain. Claimant continued to take prescription pain medications. He had trouble getting up in the morning and spent at least one hour in the hot tub. His treating physicians suggested that he have a pump implanted in his spine in order to deliver narcotic pain medication in early 2001.

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[1] The record shows that Claimant previously injured his lower back while unloading a truck at Acme in 1982 and that he received Workers' Compensation benefits for two years.

[2] By order dated 10/2/96, the Board commuted Claimant's wage loss benefits for the 1987 injury.

On March 15, 2001, while refereeing a student/faculty basketball game, Claimant fell backwards and hurt his back. The School District accepted the work injury and described it in the Notice of Compensation Payable **as lumbar strain and sprain**. Claimant received temporary total disability benefits until September 4, 2001, when he returned to work at no wage loss. His wage loss benefits were suspended in accordance with a Supplemental Agreement and a Notice of Suspension/Modification under Section 413(c) of the Workers' Compensation Act (Act)[3], 77 P.S. §772.

Approximately five weeks later, on October 19, 2001, Claimant was working as an assistant football coach when he moved quickly to avoid contact with a player. He noticed shooting pain in his back and numbness down his legs. Claimant spent the weekend in bed and was put out of work by his physician as of **October 24, 2001**. Claimant has not worked since.

First Reinstatement Petition Against the School District

On November 19, 2001, Claimant filed a Reinstatement Petition and a Petition to Review Compensation Benefits against the School District in which he listed the date of injury as March 15, 2001, requested reinstatement of his total disability benefits **as of October 24, 2001**, and an amendment to the description of his March 2001 basketball injury.

By Decision and Order dated August 8, 2003, the WCJ denied Claimant's Reinstatement Petition because Claimant had not demonstrated a recurrence of his March 2001 basketball injury-related disability. The WCJ found

[3] Workers' Compensation Act, Act of June 2, 1915, P.L. 736, as amended.

that Claimant failed to demonstrate that his earning power was adversely affected in October 2001 because "even his own physician's testimony indicate[d] that Claimant's extensive symptoms were no worse after October [2001] than they had been in the past." WCJ Decision, August 8, 2003, at 5. Claimant's wage loss benefits from his March 2001 basketball injury with the School District remained suspended.

The WCJ granted Claimant's Review Petition which amended the description of Claimant's March 2001 basketball injury to read "exacerbation of pre-existing failed back syndrome, and scar tissue, along with lumbar strain and sprain." WCJ Decision, August 8, 2003, at 5. The WCJ found that the School District remained liable for all reasonable and necessary medical treatment associated with the March 2001 basketball injury. The WCJ also stressed that his Decision in no way relieved Carr Electric from any responsibility as a result of Claimant's 1987 injury.

Claimant appealed to the Board which affirmed.

Claimant petitioned for review. This Court affirmed the Board by Memorandum Opinion and Order dated May 12, 2005, at 2144 CD 2004.

Second Reinstatement Petition Against the School District

On October 1, 2003, Claimant filed a second Reinstatement Petition against the School District which listed the date of injury as March 15, 2001, and alleged, once again, that he was totally disabled as a consequence of his March 2001 basketball injury. Claimant also filed five Penalty Petitions against the

School District and Carr Electric and alleged that the parties stopped paying for his medical expenses in violation of the Act.

In support of his second Reinstatement Petition Claimant once again testified that he stopped working in October 2001 due to increased low back pain that developed after the football related exacerbation. He treated with a pain management specialist, Christina Herring, D.O. (Dr. Herring) for approximately 10 years. He further testified that, since his testimony in the prior Reinstatement proceeding, his condition deteriorated, although nothing specific happened since he stopped working which caused his pain to increase. There was no specific trauma or other incident which caused his increased pain. In the fall of 2003, he experienced more pain in his lower back as well as a new pain in the middle of his back. Hearing Transcript, September 27, 2005, at 23; Reproduced Record (R.R.) at 42b. In addition, he testified that he began to experience shooting pains in his legs which worsened. He reported to the emergency room at Bryn Mawr Hospital because the pain was so great that he could not sleep or get out of bed. He testified that he was recently hospitalized for 10 days in March 2005 due to pain.

With regard to his medical bills, Claimant stated that the School District's insurer stopped paying for his medical treatment in September 2001 when he signed a Supplemental Agreement. Deposition of Daniel Fanning, Sr. (Fanning Deposition), June 20, 2006, at 49; R.R. at 42a. He also stated that Carr Electric's insurer stopped paying his prescription bills and bills from Dr. Herring. As a result, he owed his pharmacist $5,000. Fanning Deposition at 66; R.R. at 47a.

Claimant presented the testimony of Dr. Herring who treated Claimant since 1994. At that time, she diagnosed Claimant with failed post-laminectomy

syndrome. Deposition of Christina Herring, M.D., September 18, 2006, (Dr. Herring Deposition), at 8; R.R. at 68b. With the exception of a brief period of time when Claimant underwent surgery to remove surgical hardware in his back, she saw Claimant every four to six weeks for over ten years. During this period, Claimant returned to work for the School District. Dr. Herring opined that the March 2001 basketball injury caused a shift in his disc which caused neuropathic pain at the L4 level right. Dr. Herring Deposition at 15; R.R. at 75b. She further opined that Claimant was totally disabled since March 15, 2001. Dr. Herring Deposition at 18; R.R. at 78b. She admitted on cross-examination that Claimant's pain had increased throughout 2000 and early 2001, prior to the March 2001 basketball injury. Dr. Herring Deposition at 31; R.R. at 91b. She also explained that Claimant's pain was always severe, but got worse due to his inability to obtain nerve blocks due to Carr Electric's and the School District's failure to pay for his medical treatment. The WCJ found Dr. Herring to be credible, with the exception of her opinion that Claimant suffered an additional injury, nerve damage at L4, as the result of the March 2001 basketball injury.

Carr Electric presented the testimony of Anthony Puglisi, M.D. (Dr. Puglisi) in opposition to the petitions. Dr. Puglisi opined that Claimant would have continued to need medication and medical supervision had the March 2001 basketball injury not occurred. The fact that Claimant's medication had to be increased after the March 2001 basketball injury led him to believe that all subsequent medical treatment, including the recent hospitalization in 2005, was related to the March 2001 basketball injury. Deposition of Anthony Puglisi, M.D., August 2, 2006, at 27; R.R. at 351b. Despite the 11 prior back surgeries after the 1987 injury, Dr. Puglisi further opined that Claimant's disability was caused by the 2001 injury. The WCJ rejected the opinion of Dr. Puglisi as "inconceivable."

The School District presented the testimony of Greg Anderson, M.D. (Dr. Anderson) who examined Claimant on March 16, 2006, and reviewed extensive medical records. Dr. Anderson opined that while Claimant suffered an exacerbation of his ongoing back problems in March 2001, this incident did not change the overall course of Claimant's care. Dr. Anderson concluded that the March 2001 basketball injury caused a limited exacerbation of Claimant's pre-existing symptoms that would be expected to resolve or "settle back down to some form of a baseline." Deposition of D. Greg Anderson, M.D. (Dr. Anderson Deposition), October 3, 2006, at 13-14; R.R. at 62a-63a. Contrary to Dr. Herring's opinion, Dr. Anderson did not believe that Claimant sustained any structural changes, including an L4 nerve injury, as a result of the March 2001 basketball injury. Dr. Anderson Deposition at 15; R.R. at 64a. He did not see any evidence of any substantial difference in his symptoms after 2001 other than they continued to increase. Dr. Anderson Deposition at 31; R.R. at 80a. Dr. Anderson believed that Claimant remained totally disabled through the time of his examination on March 16, 2006, and that his prognosis for improvement was poor. Dr. Anderson Deposition at 16; R.R. at 65a. In summary, Dr. Anderson testified "I don't believe that it makes sense to say that his complete decline is due to the [March 2001 basketball injury] because in saying that, you're saying had the incident not occurred, he wouldn't have the symptoms he has today, and I don't believe that to be true." Dr. Anderson Deposition at 33-34; R.R. at 82a-83a.

By order dated June 30, 2006, the WCJ granted the Penalty Petitions and ordered the School District and Carr Electric to share the costs of Claimant's medical treatment equally from June 27, 2006, and ongoing, and ordered a 50% penalty on all unpaid medical bills. The WCJ characterized the March 2001 basketball injury as "relatively minor" and accepted the opinion of Dr. Anderson

that Claimant's symptoms were no different than they were over the years. The WCJ denied Claimant's Reinstatement Petition because the allegations were not significantly different from the allegations of his first Reinstatement Petition. The WCJ stated:

> I find the testimony of Claimant to be credible in part, concerning the fact that both Defendants at different points of time stopped paying for medical treatment. I find the balance of his testimony, concerning reinstatement, to not be significantly different from his testimony in the prior proceeding.
> ****
> I find, as a matter of law, that the allegations in Claimant's request for reinstatement are not significantly different from the allegations in his Petition filed November 19, 2001. As a result, the Decision circulated by me on August 3, 2003, and affirmed by both the Board and the Commonwealth Court, disposed of these issues. The fact that the description of the injury was changed is of no legal consequence. Claimant has again requested Reinstatement as of October 4, 2001. This request had already been denied. As a result, his request is again denied.

WCJ Decision, June 30, 2006, Finding of Fact No. 7; Conclusion of Law No. 2. at 2, 5.

All parties appealed to the Board which remanded to the WCJ to assess the circumstances for the imposition of penalties against Carr Electric. On remand, the WCJ assessed a 50% penalty against Carr Electric.

By opinion and order dated April 16, 2010, the Board affirmed the WCJ's decision. Carr Electric and Claimant appeal to this Court. The School District has since settled with Claimant and did not appeal.

Claimant's Appeal

On appeal[4], Claimant argues that the WCJ erred when he denied his Second Reinstatement Petition. Claimant contends that there was new evidence of disability resulting from the March 2001 basketball injury. Specifically, medical witnesses for all three parties agreed that he was totally disabled. Additionally, Dr. Herring's opined that the fall on March 15, 2001, caused a shift in his disc which caused neuropathic pain at the L4 level.

A claimant seeking reinstatement from a suspension must prove that through no fault of his own, **his earning power is once again adversely affected by his disability, and that the injury which gave rise to the original claim continues**. Pieper v. Workmen's Compensation Appeal Board (Ametek-Thermox Instruments Div.), 526 Pa. 25, 584 A.2d 301 (1990) (Emphasis added). To meet this burden, a claimant seeking reinstatement from a suspension must establish that his disability has continued or that his loss of earnings has recurred. Id.

At first glance, it may appear that Claimant is entitled to a reinstatement of benefits because all three doctors agreed that he was totally disabled. However, the problem with Claimant's position is that although the three experts agreed he was totally disabled, he failed to prove the March 2001 basketball injury worsened so that he was unable to work.

[4] This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

First, the WCJ did not believe Dr. Herring's testimony regarding the shift in Claimant's disc at L4. The WCJ believed Dr. Anderson who opined that the March 15, 2001, basketball injury did not cause any structural changes in his back and there was no evidence of any substantial difference in his symptoms after 2001 other than they continued to increase. The WCJ concluded, based on Dr. Anderson's testimony, the March 15, 2001 basketball injury was not the cause of Claimant's disability. Rather, it was caused by the continued worsening of the failed back syndrome resulting from the 1987 incident.

The WCJ also found, based on Dr. Anderson's testimony, that Claimant experienced an equal amount of pain before and after the March 15, 2001, basketball injury. According to Dr. Anderson the real problem was the ongoing and worsening failed back syndrome and related problems. The mere fact that the last incident was the March 2001 basketball injury does not justify the reinstatement of wage loss benefits against the School District absent evidence that the injury, which the WCJ characterized in Finding of Fact #10 as "relatively minor," actually caused the excruciating pain which resulted in his disability. Dr. Anderson believed that it was the 1987 injury, the back surgeries, the placement of the pedicle screws, the entire failed back syndrome that steadily worsened over time which caused Claimant's excruciating pain and disability. The March 2001 basketball injury **exacerbated Claimant's symptoms**, but it did not cause any structural damage. Critically, **it did not increase the pain from the level it was before the injury**. Therefore, Dr. Anderson did not believe it was the reason he was unable to work.

The WCJ also noted that Claimant's second Reinstatement Petition made the very same allegations as his first Reinstatement Petition. After the

March 2001 basketball injury, Claimant returned to work in September of 2001. He alleged in his first Reinstatement Petition that he was unable to work as of October 2001, because the symptoms of the March 2001 basketball injury had progressed to the point where he was no longer capable of performing the work he had been performing in October 2001. This Court affirmed the WCJ's conclusion that Claimant's physical condition in October 2001 was no worse than it had been in the past.

When Claimant filed the second Reinstatement Petition, he still had not returned to work as of October 2001. Claimant's second Reinstatement Petition alleged, like the first, that he was disabled due to the March 2001 basketball injury. Claimant argues that he presented different doctors and new evidence. However, as noted, the WCJ credited Dr. Anderson that the pain Claimant experienced was the result of the failed back syndrome from the 1987 incident which continued to worsen over time. Therefore, Claimant failed to prove that he experienced wage loss as a consequence of the March 2001 basketball injury, which was necessary to succeed on his reinstatement petition.

The WCJ has complete authority over questions of credibility, conflicting medical evidence and evidentiary weight, and can accept or reject the testimony of any witness, in whole or in part. Lombardo v. Workers' Compensation Appeal Board (Topps, Inc.), 698 A.2d 1378 (Pa. Cmwlth. 1997).

After a thorough review of the record, this Court must conclude that the WCJ did not err when he denied Claimant's second Reinstatement Petition against the School District. The burden was on Claimant to show that his condition again adversely affected his earning power. Pieper. Claimant failed to

meet this burden because the WCJ rejected the testimony of Dr. Herring and Dr. Puglisi which attributed increased disability to the March 2001 basketball injury. The WCJ instead accepted the testimony of Dr. Anderson. Given the WCJ's assessment of the evidence, which is supported by the record, the WCJ did not err.

Carr Electric's Appeal

Carr Electric contends on appeal that the WCJ erred when he determined that Carr Electric and the School District were equally liable for Claimant's medical expenses.[5] Carr Electric argues that this Court's decision in South Abington Township v. Workers' Compensation Appeal Board (Becker & ITT Specialty Risk Services), 831 A.2d 175 (Pa. Cmwlth. 2003) compelled the WCJ to find the School District **totally responsible** for all medical and wage loss benefits which arise from the new injury because it was the employer at the time the aggravation.

In South Abington, the employee was working with no loss of earnings from his first injury when he suffered a second injury. Therefore, the court held that the entire loss of earning power was the result of the second injury.

The ruling in South Abington is not applicable to this controversy. There, the WCJ declared a second carrier liable for the entirety of wage loss and

[5] This Court notes that the WCJ's denial of Claimant's Second reinstatement petition and the award of medical benefits against the School District were not inconsistent because the School District's expert, Dr. Anderson, never offered the opinion that Claimant had fully recovered from the March 2001 basketball injury and because the School District never filed a Termination Petition. Further, medical benefits are payable even when there is no loss of earnings or no compensable disability. Deremer v. Workmen's Compensation Appeal Board (R.J. Glass, Inc.), 433 A.2d 926 (Pa. Cmwlth. 1981).

medical benefits incurred by the employee following the occurrence of a second work injury that aggravated the first injury. That was because the second injury, i.e., aggravation, caused the employee's entire disability.

Here, as noted, the WCJ found that the 1987 injury was the injury which caused Claimant's ongoing disability. The injury was severe, and it kept worsening to the point where Claimant could not longer work. The March 2001 basketball injury temporarily aggravated Claimant's condition, but it was not the cause of his ongoing disability. **Claimant had returned to work in September 2001, after the March 2001 basketball injury**. These facts take the case out of the purview of South Abington.

Here, there is no dispute that the Carr Electric injury was the injury that caused Claimant's ongoing disability. Carr Electric's own expert testified that Claimant would continue to need prescriptive medication even if the March 2001 basketball injury never happened. Further, the WCJ credited the testimony of Dr. Anderson that Claimant continued to suffer from the original failed back syndrome that resulted from the 1987 injury and that his present condition was a result of various injuries and was a multi-factorial process so that it was difficult to isolate any single incident and state that a single incident caused a certain percentage with any accuracy.

Based on the unique facts and Dr. Anderson's testimony, the WCJ found that it was impossible to allocate a percentage of responsibility between Carr Electric and the School District so he apportioned fifty percent responsibility for each. There was no error.

The Board is affirmed.

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BERNARD L. McGINLEY, Judge

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O R D E R

AND NOW, this 17th day of March, 2011, the Order of the Workers' Compensation Appeal Board in the above-captioned case is hereby affirmed.

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BERNARD L. McGINLEY, Judge