IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Samuel Gonzalez, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (High Concrete Structures), Respondent	:	No. 1026 C.D. 2009
	:	Submitted: August 28, 2009

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: September 23, 2009

Samuel Gonzalez (Claimant) petitions for review from the order of the Workers' Compensation Appeal Board (Board) that affirmed the Workers' Compensation Judge's (WCJ) denial of his claim petition.

Claimant worked as a construction laborer for High Concrete Structures (Employer). On July 17, 2007, Claimant lifted a cage to set up cables and allegedly felt a stretching in his stomach. The next day Claimant sought treatment at an emergency room where he was given a pain pill. Claimant sought additional treatment from his family doctor for the ball or lump he felt in his abdomen. Claimant received a restricted duty note from his physician which he presented to his supervisor on September 11, 2007. Claimant met with Sandra Miller (Miller), then Employer's workers' compensation claims coordinator. Miller sent Claimant to Industrial Health on September 11, 2007. Industrial Health confirmed Claimant's need for hernia surgery. Claimant submitted a Co-worker

FMLA [Family Medical Leave Act] Leave of Absence Request (Request). Claimant underwent surgery on October 12, 2007, and returned to work November 19, 2007. Claimant did not receive workers' compensation benefits but received short-term disability benefits of $325.00 per week from September 10, 2007, to November 16, 2007.

On approximately October 26, 2007, Claimant petitioned for benefits and alleged that he was injured on July 17, 2007, "while at work lifting." Claim Petition, October 26, 2007, at 1; Reproduced Record (R.R.) at 1a.

Before the WCJ, Claimant testified that on July 17, 2007, "I was lifting a cage to set up all the cables that we stretch out. Then I pull it up and all of a sudden I felt something right here.[1] It felt like something was stretching." Notes of Testimony, January 17, 2008, (N.T.) at 9; R.R. at 14a. Claimant continued to work for Employer but "I was struggling, because every day it felt like there was a ball underneath. When I was working and when I was walking it felt like something was coming up." N.T. at 10; R.R. at 15a. Claimant testified that he informed Miller that his condition was work-related but "I'm not sure if it was due to my English or what, but she referred me to that [Family Medical Leave] saying that what happened to me was not work related, that I should ask for Family Leave. N.T. at 12; R.R. at 17a. On cross-examination, Claimant explained that he told his supervisor, Tristian Rivera (Rivera) on July 17, 2007, that he injured himself at work. N.T. at 20; R.R. at 25a.

[1] Claimant pointed to the center of his stomach below the belt line.

Claimant reported that Miller never asked him how his injury occurred. N.T. at 25; R.R. at 30a. Claimant submitted a Co-worker FMLA Healthcare Provider Certification dated September 17, 2007, and the Request, dated September 12, 2007. The WCJ accepted the Request which indicated that Claimant's hernia injury was work-related, only to the extent that Claimant signed it and not for the accuracy of its contents because it was unclear who prepared it.

Claimant also submitted the records of St. Joseph's Hospital where he treated on July 18, 2007, notes from his family doctor, records from Industrial Health which diagnosed Claimant with a "L[eft] inguinal Hernia – pt[patient] cannot relate injury incident," Industrial Health Encounter Form, September 11, 2007, at 1; R.R. at 57a, and the records of Robert N. Greenberg, M.D., who performed the hernia surgery.

Miller testified that Claimant did not report a work-related injury when he met with her on September 11, 2007. When Claimant came to see her, he presented a doctor's note. Notes of Testimony, April 3, 2008, (N.T. 4/3/08) at 10-11; R.R. at 86a-87a. Miller testified that when asked whether he was injured at work, Claimant replied, "Sandy, I honestly don't know. . . I don't know how or where I did this." N.T. 4/3/08 at 11; R.R. at 87a.

Rivera, Claimant's supervisor in the summer of 2007, testified that Claimant never told him that he sustained a work-related injury on July 17, 2007,

and never told him at any time between July and September 2007, that he sustained a work-related injury while lifting a cage. N.T. 4/3/08 at 31; R.R. at 107a.[2]

The WCJ denied the claim petition and made the following relevant findings of fact:

> 17. I find the testimony of Claimant competent but only partially credible. I do not find credible his testimony that he told Employer that he suffered a July 17, 2007, work-related injury by lifting a cage. This testimony is not supported by the records of any providers or by Employer's witnesses. I find the testimony of Employer's witnesses, Sandra Miller and Tristian Rivera, competent and more credible on that issue. However, Claimant provided notice within 120 days, and all disability, and some treatment, occurred thereafter. I find Claimant's testimony credible as to his symptoms and his period of disability, borne out by medical records.
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> 18. I find the medical records offered competent and credible. None state a causal connection between Claimant's hernia and any work activity as a causative factor. Claimant' treating surgeon does not even mention the mechanism of injury. The emergency room and family doctor records state only that he suffered increased pain after performing work and did not relate his left inguinal hernia to any work-related mechanism of injury. Moreover, the first ultrasound on September 6th was negative; the second on October 1st was the first diagnostic confirmation. Notwithstanding Claimant's counsel's Brief argument that Employer offered no causation evidence to the contrary, Claimant's testimony does not support an 'obvious' connection between his work activities and the hernia, because I do not find that

[2] Employer also introduced one page from the July 18, 2007, emergency room visit, the September 11, 2007, notes of Industrial Health, and Employer's Report of Occupation Injury or Disease which indicated that the cause of the hernia was unknown.

> the injury occurred from that July 17th mechanism. There is no stated opinion to a reasonable degree of medical certainty of a work-related cause.
>
> 19. While Claimant had a left inguinal hernia, and the type of work activities that he performed *could have* caused or aggravated such a condition, Claimant failed to prove that this hernia occurred 'in the course of employment.' (Emphasis in original).

WCJ's Decision, September 3, 2008, Findings of Fact Nos. 17-19 at 6; R.R. at 133a. Claimant appealed to the Board, and the Board affirmed.

Claimant contends that the Board erred when it affirmed the denial of the claim petition based on the evidence offered and the obvious injury doctrine.[3]

In a claim petition, the claimant bears the burden of proving all elements necessary to support an award. Innovative Spaces v. Workmen's Compensation Appeal Board (DeAngelis), 646 A.2d 51 (Pa. Cmwlth. 1994). To sustain an award, the claimant has the burden of establishing a work-related injury which resulted in disability. If the causal relationship between the claimant's work and the injury is not clear, the claimant must provide unequivocal medical testimony to establish a relationship. Holy Family College v. Workmen's Compensation Appeal Board (KYCEJ), 479 A.2d 24 (Pa. Cmwlth. 1984).

[3] 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).

Initially, Claimant asserts that the Board erred when it affirmed the WCJ's conclusion that the Request was not authenticated and was not admitted for the accuracy of its contents. Because the form indicated that Claimant's injury was work-related, Claimant argues that the Request established that he suffered a work-related injury. Claimant asserts that the entire Request should have been admitted because it was a business record[4] of Employer and Miller confirmed that she received the Request. Claimant also asserts that because this case was heard pursuant to Section 422 of the Workers' Compensation Act (Act)[5], the medical records and reports were admissible and established a work-related hernia.

When the WCJ sustained the objection to the admission of the Request on the ground that it was not authenticated, Claimant failed to raise the

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[4] The Uniform Business Records as Evidence Act, 42 Pa.C.S. §6108(b), provides in pertinent part:

> **(b) General Rule.**—A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission.

[5] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §835. Section 422 of the Act provides in pertinent part:

> Where any claim for compensation at issue before a workers' compensation judge involves fifty-two weeks or less of disability, either the employe or the employer may submit a certificate by any health care provider as to the history, examination, treatment, diagnosis, cause of the condition and extent of disability, if any, and sworn reports by other witnesses as to any other facts and such statements shall be admissible as evidence of medical and surgical or other matters therein stated and findings of fact may be based on such certificates or such reports.

Uniform Business Records as Evidence Act argument that he raises before this Court.

In Westinghouse Electric Corporation/CBS v. Workers' Compensation Appeal Board (Simon), 821 A.2d 1279, 1284 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 574 Pa. 768, 832 A.2d 437 (2003), this Court held that because "the issue of certification or sworn testimony was never properly raised before the WCJ, it has not been properly preserved on appeal to this Court."

Similarly, in Budd Baer, Inc. v. Workers' Compensation Appeal Board (Butcher), 892 A.2d 64, 67 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 588 Pa. 784, 906 A.2d 544 (2006), this Court stated, "Issues not raised before the WCJ and the Board are deemed waived on appeal to this Court."

Here, Claimant did not raise the issue that the Request was a business record before the WCJ. Consequently, the issue was waived.

Claimant also asserts that the WCJ and Board erred because neither applied the "obvious injury rule." A claimant does not need to provide medical evidence of causation if the connection between the work incident and disability is clear. Morgan v. Workmen's Compensation Appeal Board (Giant Markets, Inc.), 483 Pa. 421, 397 A.2d 415 (1979). Claimant argues that it is clear that he developed a hernia after lifting the cage on July 17, 2007, at work. However, the WCJ did not find credible Claimant's testimony that he told his supervisor that he

sustained a work-related injury on July 17, 2007, and did not find the connection between work and disability obvious because he did not believe that Claimant suffered a work-related injury on July 17, 2007.

The WCJ further credited Miller and Rivera when they testified that Claimant never told them that he suffered a work-related injury. In Morgan, our Pennsylvania Supreme Court stated that the factfinder must determine the credibility of a witness's testimony as to whether an injury is obvious. Morgan, 483 Pa. at 424, 397 A.2d at 416. Further, the WCJ, as the ultimate finder of fact in workers' compensation cases, has exclusive province over questions of credibility and evidentiary weight, and is free to accept or reject the testimony of any witness, including a medical witness, *in whole or in part*. General Electric Co. v. Workmen's Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 529 Pa. 626, 600 A.2d 541 (1991). This Court will not disturb a WCJ's finding when those findings are supported by substantial evidence. Nevin Trucking v. Workmen's Compensation Appeal Board (Murdock), 667 A.2d 262 (Pa. Cmwlth. 1995).

Here, the WCJ did not find credible Claimant's testimony that he suffered a work-related injury on July 17, 2007. This Court will not review the WCJ's credibility determinations. The Board did not err when it affirmed the WCJ's denial of the claim petition.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

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Respondent	:	

O R D E R

AND NOW, this 23rd day of September, 2009, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge