

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

US Airways, Inc. and Sedgwick CMS, :
Petitioners :
 :
v. : No. 1062 C.D. 2009
 : Submitted: October 16, 2009
Workers' Compensation Appeal Board :
(Anderson and State Workers Insurance :
Fund), :
Respondents :

BEFORE: HONORABLE DAN PELLIGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE QUIGLEY

FILED: January 28, 2010

US Airways, Inc. (Employer) and Sedgwick CMS petition for review of the May 14, 2009 order of the Workers' Compensation Appeal Board (Board) affirming the decision of the Workers' Compensation Judge (WCJ) (1) to grant the claim petition of Leanne Riley-Anderson (Claimant) and (2) to deny Employer's petition for joinder of the State Workers Insurance Fund (SWIF) as an additional defendant. We reverse the grant of the claim petition and affirm the denial of the petition for joinder.

Claimant, a flight attendant for Employer, injured her left shoulder on December 2, 2004 while opening an emergency exit window during training.

Employer ultimately issued a notice of compensation denial, in which Employer acknowledged that Claimant sustained a left shoulder strain without loss of wages.

Claimant was treated by Dr. Scott Sheppard, an orthopedic surgeon, who signed an affidavit of recovery in February 2005 and released Claimant to return to work. Claimant returned to full-time work on April 1, 2005. However, during a flight on April 13, 2005, Claimant injured her left shoulder while pulling down a jump seat with her left arm during turbulence.

On October 11, 2005, Claimant filed a claim petition, alleging that she suffered a left shoulder tear and chronic tendonitis as a result of the December 2, 2004 injury and requesting total disability benefits as of April 13, 2005. Employer filed an answer, denying the allegations, and a petition to join SWIF on the ground that Claimant sustained a new injury on April 13, 2005 and that SWIF was its insurer at that time.¹ The petitions were assigned to a WCJ, who held hearings on the matter.

In support of her claim petition, Claimant testified that: (1) she never had any problem with her left shoulder before the 2004 injury; (2) she continued to have pain and throbbing in her left shoulder after December 2004, even after she returned to work in April 2005; (3) the April 2005 injury occurred when the plane encountered turbulence as she was pulling down a jump seat with her left arm,

¹ Where a claimant returns to work after an injury and a worsening of an ongoing medical impairment causes renewed disability, it must be determined whether the worsened condition results from a recurrence or an aggravation of the original injury. *South Abington Township v. Workers' Compensation Appeal Board (Becker and ITT Specialty Risk Services)*, 831 A.2d 175 (Pa. Cmwlth. 2003). A recurrence of a prior injury happens when the prior injury manifests itself in an intervening incident that does not contribute materially to the disability; an aggravation occurs when the intervening incident materially contributes to the disability. *Id.* The original insurer is responsible for a recurrence, but the current insurer is responsible for an aggravation. *Id.*

causing severe pain in exactly the same area as the 2004 injury; and (4) she developed no new symptoms after the 2005 injury.

Claimant also offered the December 14, 2005 medical report of Brian F. Jewell, M.D., an orthopedic surgeon who began treating Claimant in June 2005. Based on his examination of Claimant, and the history she provided him, Dr. Jewell diagnosed Claimant with bursitis, impingement and a partial rotator cuff tear and opined that Claimant's condition was causally related to the December 2004 injury.

In addition, Dr. Jewell testified by deposition that he disagreed with Dr. Sheppard that Claimant had recovered from the December 2004 injury in February 2005. Dr. Jewell pointed out that a January 2005 MRI showed a possible partial rotator cuff tear and that a July 28, 2005 MR arthrogram showed tendinosis in Claimant's left shoulder. Dr. Jewell explained that tendinosis is a condition that develops over a long period of time and, thus, could not have been caused by the April 2005 injury. Thus, Dr. Jewell reiterated his opinion that Claimant's current condition is a result of the December 2004 injury. On cross-examination, however, Dr. Jewell wavered in this opinion, conceding his confusion in trying to determine which injury was more significant in causing Claimant's current inability to work. Dr. Jewell began to think that Claimant's April 2005 injury was a substantial contributing factor in Claimant's current condition.

In opposition to Claimant's petition, Employer offered the testimony of Jon B. Tucker, M.D., a board certified orthopedic surgeon who examined Claimant on two occasions. Dr. Tucker found no objective evidence of any residual injury or dysfunction from either the December 2004 injury or the April

2005 injury. He opined that Claimant could return to work as a flight attendant with no restrictions.

Employer and SWIF offered the deposition testimony of Robert P. Durning, M.D., a board certified orthopedic surgeon who examined Claimant on one occasion. Dr. Durning found no evidence of a work-related shoulder problem, stating that Claimant was physically able to perform her flight attendant duties. When asked about the April 2005 injury, Dr. Durning testified that the motion Claimant used to pull down the jump seat is not the typical motion that would lead to a shoulder injury. Dr. Durning explained that most shoulder injuries occur with the arm at least at shoulder level, and more often with the arm overhead.

After considering the evidence, the WCJ accepted that portion of Dr. Jewell's testimony that Claimant's current condition is related to the December 2004 injury. The WCJ also accepted that portion of Dr. Durning's testimony that Claimant could not have sustained a shoulder injury in April 2005. Thus, the WCJ granted the claim petition based on a recurrence of the December 2004 injury and denied the petition for joinder of SWIF, Employer's current insurer. Employer appealed to the Board, which affirmed. Employer now petitions this court for review.²

Employer argues that the WCJ erred in accepting that portion of Dr. Jewell's testimony attributing Claimant's current condition to the December 2004 injury because Dr. Jewell recanted that opinion on cross examination, rendering it equivocal. We agree.

² Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

If a physician recants an opinion given in prior testimony based on receipt of new information concerning the Claimant's medical history, the prior testimony as to the original opinion is rendered equivocal, and a finding based on the recanted opinion will not support an award. *Moore v. Workers' Compensation Appeal Board (American Sintered Technologies, Inc.)*, 759 A.2d 945 (Pa. Cmwlth. 2000).

Here, Dr. Jewell opined on direct examination that Claimant's current condition is causally related to the December 2004 injury. However, on cross examination, Dr. Jewell was shown the records of Dr. Sheppard, which supported the affidavit of recovery that Dr. Sheppard signed in February 2005. (R.R. at 76a-78a.) Dr. Jewell then testified:

A. As I sat and talked to you this morning and looked [at] these things as we went through it, the most honest I could be is it appears to me, especially as I was able to review the record of Dr. Sheppard ... that the substantial contributing factor here would be the repeat injury of 4/13/05.

....

A. I guess what I'm saying is the bigger factor here would be the 4/13/05 injury based on [Dr. Sheppard's] physical exam findings.

....

Q. So would you agree that the cause of [Claimant's] ongoing symptoms or the primary cause is the April 13, 2005 event?

A. Based on what I've heard today and specifically looking at Dr. Sheppard's note, yes.

(R.R. at 82a-84a.)

Q. And to be sure, with regard to your testimony today, you would agree that the April 13, 2005 [event] was a new injury or an aggravation injury?

A. Yes.

(R.R. at 106a.) Based on such testimony, there is no question that Dr. Jewell recanted his opinion that Claimant's current condition is caused by the December 2004 injury. Because Dr. Jewell's testimony in that regard was equivocal, the WCJ erred in accepting it.

Because the WCJ erred in concluding that Claimant's December 2004 injury recurred and because the WCJ accepted Dr. Durning's opinion that Claimant could not have sustained a shoulder injury in April 2005, we reverse the WCAB to the extent it affirmed the WCJ's grant of the claim petition and affirm the WCJ's denial of the petition for joinder of SWIF.

KEITH B. QUIGLEY, Senior Judge

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ORDER

AND NOW, this 28th day of January, 2010, the order of the Workers' Compensation Appeal Board, dated May 14, 2009, is hereby reversed to the extent the Board affirmed the grant of the claim petition. The order is affirmed in all other respects.

KEITH B. QUIGLEY, Senior Judge