IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carol Ellis,	:	
Petitioner	:	
	:	
v.	:	No. 1141 C.D. 2007
	:	SUBMITTED: November 16, 2007
Workers' Compensation Appeal Board (Daimler Chrysler),	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** January 23, 2008

Petitioner, Carol Ellis (Claimant), appeals from the order of the Workers' Compensation Appeal Board (Board), which reversed the grant of benefits by the Workers' Compensation Judge (WCJ), affirmed the WCJ's decision terminating benefits, and reversed, remanded and subsequently affirmed the award of litigation costs associated exclusively with the penalty petition. Claimant contends on appeal that the Board erred because: (1) it mischaracterized the testimony of her medical expert; (2) her medical expert testified unequivocally that Claimant was not fully recovered; and (3) she is entitled to an award of litigation costs associated with both the claim petition and the penalty petition.

On October 29, 2003, Claimant filed a claim petition alleging that as of September 4, 2003, she suffered tendonitis in her right wrist as a result of

cumulative trauma from constant typing and computer usage in her position as a customer service representative at Daimler Chrysler. On June 1, 2004, Claimant filed a penalty petition alleging that Daimler Chrysler violated the Pennsylvania Workers' Compensation Act[1] (the Act) by failing to issue either a timely Notice of Compensation Payable (NCP) or Notice of Compensation Denial (NCD).

The WCJ granted the claim petition, finding that Claimant sustained a work injury to her right hand and wrist in the nature of DeQuervain's tenosynovitis, which disabled her from performing her job, beginning October 13, 2003. The WCJ terminated benefits as November 10, 2003, finding that Claimant had fully recovered from her injury on that date. The WCJ also granted the penalty petition, finding that Claimant had shown that Daimler Chrysler had violated the Act by not issuing either a NCP or NCD. In addition, the WCJ awarded Claimant a penalty of ten percent of all compensation due and payable. Both parties appealed the WCJ's decision to the Board.

The Board reversed the WCJ's grant of the claim petition, concluding that the testimony of Claimant's medical expert was equivocal. In addition, the Board affirmed the grant of the penalty petition, but vacated the award because Claimant was only successful on the penalty petition and the award was based on Claimant's unallocated costs for both the claim and penalty petitions. The Board remanded the matter for the WCJ to award litigation costs limited to the penalty petition only. On remand, the WCJ awarded $236.60 in litigation costs. Claimant again appealed the WCJ's decision to the Board. The Board affirmed the WCJ's award of limited litigation costs. Claimant now appeals to this Court.

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P. S. §§1-1041.4, 2501-2626.

Claimant first asserts that the Board erred when it determined that the testimony of her medical expert, Laurie E. Hirsh, M.D., was equivocal regarding the causal relationship between the DeQuervain's tenosynovitis and her work at Daimler Chrysler. A claimant has the burden of proving a causal connection between her alleged disability and the injury sustained at work. *Fotta v. Workmen's Comp. Appeal Bd. (U.S. Steel/USX Corp. Maple Creek Mine)*, 534 Pa. 191, 626 A.2d 1144 (1993). Where the injury is not attributable to a specific incident, the causal relationship between the injury and the employment will seldom be obvious, and in those cases, unequivocal medical testimony is required. *Workmen's Comp. Appeal Bd. v. Bethlehem Steel Corp*. 352 A.2d 571, 573 (Pa. Cmwlth. 1976).

Dr. Hirsh, a board eligible orthopedic surgeon, testified on behalf of Claimant. Dr. Hirsh diagnosed Claimant with DeQuervain's tenosynovitis. According to Dr. Hirsh, this condition is caused by swollen tendons going underneath a tight compartment and being aggravated every time the tendons travel in and out of the compartment, which occurs with thumb use. *See* Deposition of Laurie E. Hirsh, M.D. (Hirsh Dep.) at 31. During her deposition, Dr. Hirsh testified regarding causality on direct examination, cross examination and re-direct examination. On direct examination, Dr. Hirsh testified that Claimant's work at Daimler Chrylser could cause her to become symptomatic. Dr. Hirsh's testimony, in pertinent part, was as follows:

> Q: Okay. Doctor, claimant became symptomatic, according to her testimony, while keying with her job at Daimler Chrysler. Do you have an opinion as to whether or not that type of activity could cause the symptomatology the claimant had?
> A: It could. I do. It could.

. . . .

Q: Doctor, do you have an opinion as to what caused claimant's condition that you described and treated?
A: I do.
Q: And what is that opinion?
A: The repetitive motion of her, of her thumb and wrist.
Q: While doing what?
A: Patient stated that her symptoms were exacerbated while at work.

See Hirsh Dep. at 17-18.

However, on cross-examination Dr. Hirsh seemingly recanted her prior testimony. Dr. Hirsh testified as follows:

Q: You agree, Doctor, that the DeQuervains tenosynovitis is not caused by Miss Ellis' job at Daimler Chrysler or I guess her other job at Cooper Hospital.
A: Correct.
Q: And your opinion is that repetitive use of the right thumb, regardless of the forum, would cause symptoms when an individual such as Miss Ellis already has this underlying condition.
A: Yes.

See Hirsh Dep. at 35-36. Furthermore, admitted into evidence was a letter dated May 14, 2004 from Dr. Hirsh to Claimant's attorney which stated: "Ms. Ellis's DeQuervain's tenosynovitis and the triggering of her right index and long fingers are not directly caused by her job but are exacerbated by repetitive use." *See* Hirsh Dep. at Exhibit 1. On re-direct examination, Dr. Hirsh again testified that the "[r]epetitive motion about the thumb and wrist" caused Claimant's DeQuervain's tenosynovitis and that "the patient complained of these symptoms while keying and using the mouse." *See* Hirsh Dep. at 46.

The WCJ found the testimony of Dr. Hirsh to be credible and more persuasive than the testimony of Daimler Chrylser's medical expert, Dr. Stephen L. Cash, a board-certified orthopedic surgeon, who testified that Claimant's condition was not caused by her customer service work. The Board, however, held that the WCJ's finding that Claimant's DeQuervain's tenosynovitis was related to her employment was not supported by unequivocal medical evidence.

A claimant with a pre-existing condition, who alleges an aggravation of that pre-existing condition, is entitled to compensation if she shows (1) that the injury or aggravation arose in the course of employment, and (2) that the injury was related to that employment. *Vazquez v. Workmen's Comp. Appeal Bd. (Masonite Corp.)*, 687 A.2d 66, 69 (Pa. Cmwlth. 1996). Whether medical testimony is equivocal is a conclusion of law subject to plenary review by the court. *Continental Baking Co. v. Workers' Comp. Appeal Bd. (Hunt)*, 688 A.2d 740, 743 (Pa. Cmwlth. 1997). In determining whether testimony is equivocal, the witness' testimony must be taken as a whole and the conclusion should not rest upon a few words of testimony taken out of context. *Lewis v. Workmen's Comp. Appeal Bd.*, 498 A.2d 800, 803 (Pa. Cmwlth. 1985).

After a careful review of the record, we find that the testimony of Dr. Hirsh was not equivocal regarding causation. Dr. Hirsh, on direct and re-direct examination, testified that Claimant's work as a customer service representative caused her DeQuervain's tenosynovitis. On cross-examination, Dr. Hirsh seemingly contradicted her testimony on direct examination by agreeing that Claimant's condition was not caused by either her work at Daimler Chrysler or her work at Cooper University Hospital. However, a full review of the colloquy between Dr. Hirsh and employer's counsel reveals that Dr. Hirsh made her

statement regarding causation in the context of a discussion regarding predisposition to develop DeQuervain's tenosynovitis, the symptoms experienced by Claimant once the underlying condition manifested itself and the need for surgery to cure Claimant's condition.[2] Dr. Hirsh went on to testify that the symptoms, which Claimant later experienced in March 2004 and the surgery she underwent in April, some seven months after she ceased working for Daimler Chrysler, were not related to her work at Daimler Chrysler. *See* Hirsh Dep. at 35-37. Dr. Hirsh never stated that the original symptoms that Claimant experienced in 2003 were not related to her work at Daimler Chrysler; rather Dr. Hirsh clearly stated that the repetitive use of Claimant's right thumb while at work caused an aggravation of the underlying condition. A full reading of Dr. Hirsh's testimony in context, which the WCJ found credible, demonstrates that Claimant's work at Daimler Chrysler aggravated a preexisting condition.

Thus, because the medical evidence presented by Claimant was not equivocal, the Board erred in reversing the WCJ's award of benefits. Accordingly, we reverse the Board's order in this regard.

Claimant also contends that the WCJ and the Board erred by terminating her benefits as of November 10, 2003, despite unequivocal medical testimony that Claimant was not fully recovered. The WCJ found that Claimant was fully recovered from her work-related injury as of November 10, 2003, when Dr. Hirsh released her to return to her pre-injury position without restriction. Claimant asserts that Dr. Hirsh's statement that Claimant's condition had "all but

[2] Although Dr. Hirsh cleared Claimant to return to her pre-injury job as of November 10, 2003, Claimant never returned to work at Daimler Chrysler. Claimant underwent surgery to relieve the DeQuervain's tenosynovitis in April of 2004.

resolved" is not sufficient evidence to support a termination of benefits. The failure of a medical expert to employ the "magic words" is not fatal. Instead, the expert testimony must be reviewed in its entirety to determine whether the conclusions reached are sufficient to warrant termination of benefits. *See Udvari v. Workmen's Comp. Appeal Bd. (US Air)*, 550 Pa. 319, 327, 705 A.2d 1290, 1293 (1997); *Callahan v. Workmen's Comp. Appeal Bd. (Bethlehem Steel Corp.)*, 571 A.2d 1108 (Pa. Cmwlth. 1990) (physician need not say magic words that claimant was "fully recovered;" sufficient that physician testified to releasing claimant to work without restrictions because work-related injury was resolved).

A careful review of the record demonstrates that the WCJ's finding of full recovery is supported by substantial competent evidence. Dr. Hirsh testified that Claimant's DeQuervain's tenosynovitis was "all but resolved" and that Claimant could return to her pre-injury job without restriction. *See* Hirsh Dep. at 29. It is significant in this regard that claimant's work-related disability arose only because her work caused a flare-up of symptoms related to a non-work related medical condition. Thus, when those symptoms were so resolved as to no longer be disabling, termination was proper. *See also*, *Bethlehem Steel Corp. v. Workmen's Comp. Appeal Board (Baxter)*, 550 Pa. 658, 708 A.2d 801 (1998). In addition, Dr. Hirsh clearly testified that the reoccurrence of Claimant's symptoms in March 2004 and the resulting surgery performed in April 2004 was not caused by her work at Daimler Chrysler. *See* Hirsh Dep. at 30, 37.[3] The WCJ did not err

[3] Thus, even if under other circumstances, Dr. Hirsh's testimony would support a suspension rather than a termination of benefits, since claimant never returned to work at Daimler Chrysler and subsequent symptoms were not related to her work there, there is no practical difference in this case.

in terminating Claimant's benefits as of November 10, 2003, and the Board properly affirmed.

Finally, Claimant asserts that the WCJ and the Board erred in awarding litigation fees limited to the penalty petition. Section 440 of the Act, 77 P.S. § 996(a), provides that if a claimant is successful in whole or in part in a litigated claim, reasonable costs must be awarded. The WCJ initially awarded litigation costs for both petitions without allocating cost. As a result of its conclusion that Claimant failed to prevail on the claim petition, the Board vacated the award of litigation costs and remanded the matter to the WCJ to award costs solely related to the penalty petition. On remand, the WCJ awarded Claimant litigation costs limited to the penalty petition only.

The original award of litigation costs was not vacated by the Board because the WCJ's findings were not supported, but rather because Claimant on appeal only successfully litigated the claim petition. In general, this Court will not interfere with the WCJ's discretionary award of costs in a case, especially where the WCJ found the costs to be reasonable. *Braun Baking Co. v. Workmen's Comp. Appeal Bd. (Stevens)*, 583 A.2d 860, 864 (Pa. Cmwlth. 1990). Thus, because this Court has reversed the Board and reinstated the WCJ's grant of the claim petition, we also reverse the Board's order affirming award of litigation costs limited only to the penalty petition and remand this matter to the Board with directions to remand to the WCJ for entry of an award of litigation costs consistent with WCJ's Finding of Fact 17 in the Decision rendered February 3, 2005.

BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 23rd day of January, 2008, in accordance with the foregoing opinion, the order of Workers' Compensation Appeal Board in the above captioned matter is hereby REVERSED to the extent that the order reversed the WCJ's grant of the claim petition. Termination of benefits is AFFIRMED. To the extent that the Board awarded litigation costs limited only to the penalty petition, the order is REVERSED and the matter is REMANDED. The Board shall remand this matter to the WCJ for entry of an award consistent with the WCJ's Finding of Fact 17 in the Decision rendered February 3, 2005.

Jurisdiction relinquished.

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BONNIE BRIGANCE LEADBETTER,
President Judge