IN THE COMMONWEALTH COURT OF PENNSYLVANIA

UPMC Presbyterian Shadyside PU and UPMC Work Partners Claims Management, Petitioners	:	
v.	:	
Workers' Compensation Appeal Board (Ross), Respondent	:	No. 1259 C.D. 2008
	:	Submitted: October 3, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: December 18, 2008

UPMC Presbyterian Shadyside PU and UPMC Work Partners Claims Management (Employer) petition for review from the order of the Workers' Compensation Appeal Board (Board) that affirmed the grant of the Workers' Compensation Judge (WCJ) of Cynthia Ross' (Claimant) claim petition following the Board's remand.

On May 6, 2004, Claimant petitioned for benefits and alleged that she suffered a work-related injury on April 9, 2004, in the nature of a "L4-5 [d]isc [h]erniation [w]hile lifting [a] patient." Claim Petition, May 6, 2004, at 1. Employer denied all allegations. Defendant's Answer to Claim Petition, June 7, 2004, at 1.

At a hearing, Claimant testified that as a LPN (Licensed Practical Nurse) "I was considered still on orientation; so I was assigned a mentor; but nonetheless, there was a five patient assignment load to each nurse on that floor [a]nd it was to administer medications, do IVs and just do their care that they needed." Notes of Testimony (N.T.), June 22, 2004, at 9; Reproduced Record (R.R.) at 54. On April 9, 2004, Claimant was asked by the Nurse Manager to help her reposition a patient. N.T. at 11; R.R. at 56. "I went into the room to assist her to reposition this patient that was down at the end of the bed in a fetal position. She used the remote to try to bring the bed up to our waist level as you're supposed to do. The bed collapsed to the floor . . . [a]t the time the bed collapsed, I was leaning against the guardrail which it pulled me and jerked me." N.T. at 11-12; R.R. at 56-57. Claimant continued that "[w]e could not get the bed back up to waist level; so we repositioned ourselves and continued to reposition him in the bed." N.T. at 12; R.R. at 57. "When we rolled the sheet underneath him [the patient] as you would do usually to try to pull this man back up . . . slide him back up to the top of the bed is when I felt something very sore on the one side [of her back]." N.T. at 13; R.R. at 58. "It wasn't that painful at that very moment . . . [w]hat it did over the course of the next day is it just developed into . . . pain that I just could not tolerate." N.T. at 14; R.R. at 59.

Claimant stated that she was due to report back to work on April 14th at 7:00 A.M. N.T. at 16-17; R.R. at 61. Claimant called the Nurse Manager [Cathy Hamill] and "I told her my back was hurting . . . [a]nd I asked her what she wanted me to do . . . [a]nd she wanted me to go to Work Partners and get checked." N.T. at 17; R.R. at 62. "I called Work Partners and they told me to go

to Concentra." N.T. at 17; R.R. at 62. After a MRI, Claimant was sent to Dr. Daniel Wecht, a neurosurgeon and then to Dr. Robert Love Baker, II (Dr. Baker). Dr. Baker prescribed physical therapy. Claimant stated that she was unable to return to her pre-injury job. N.T. at 22; R.R. 67.

Claimant also presented the medical deposition of Dr. Baker, board-certified in neurosurgery. On May 13, 2004, Dr. Baker first examined Claimant, took a history, and reviewed medical records. Dr. Baker found that the "main abnormality was that she had some weakness on the muscles that bring the ankle up on the left, they're called the dorsiflexors, it's the extensor pollicis longus." Deposition of Dr. Robert Love Baker, II (Dr. Baker Deposition), August 3, 2004, at 11.[1] "She does describe mostly a radiculopathy, which is a radiating pain from the back down into that leg, and it's actually bilateral." Dr. Baker Deposition at 11. Dr. Baker placed Claimant on a muscle relaxant, an anti-inflammatory, and an anti-depressant. Dr. Baker Deposition at 12. Dr. Baker again examined Claimant on June 3rd and diagnosed her with "[h]eriated nucleus pulposus L4-5 left with mild spinal stenosis at that level and a lumbar strain injury." Dr. Baker Deposition at 15. Dr. Baker opined that the "herniation was probably caused by the lifting and the bed falling incident April 9th 2004, and because there was a pre-existent stenosis that caused her to have more symptoms than she normally would have had had she not had that." Dr. Baker Deposition at 16. Dr. Baker concluded that "all of her current symptoms are an aggravation of a pre-existent problem with an acute onset of a herniated disc subsequent to the injury on April 9th, 2004." Dr. Baker

[1] Dr. Baker's Deposition does not appear in the Reproduced Record.

Deposition at 16. Dr. Baker opined that Claimant could return to work but only with medical restrictions. Dr. Baker Deposition at 16.

Employer presented the medical deposition of James E. Wilberger, M.D. (Dr. Wilberger), board-certified in neurosurgery. On August 13, 2004, Dr. Wilberger examined Claimant at which time she "was complaining of back pain, pain in her left knee and pain in her left shin [which] she attributed . . . to a couple of incidents that she said occurred on April 9, 2004." Deposition of Dr. Wilberger (Dr. Wilberger Deposition), March 10, 2004, at 6; R.R. at 94. Dr. Wilberger examined Claimant, took a history, and reviewed medical records. Claimant "showed no evidence of any difficulty walking in and out of the office but when I did individual muscle strength testing she exerted less than normal or optimal effort particularly when I was testing the left leg." Dr. Wilberger Deposition at 12; R.R. at 99. Dr. Wilberger stated that "there was no structural explanation on the radiographic studies done to that point in time, specifically the MRI scan, to explain the symptoms." Dr. Wilberger Deposition at 17; R.R. at 104. "I felt that more information was needed in order to develop any reasonable opinions . . . with respect to whether anything significant was going on, whether it required additional treatment and what it meant in the context of her being able to function." Dr. Wilberger Deposition at 17; R.R. at 104. Dr. Wilberger opined that "I could find no reason why she [Claimant] could not resume some level of activity based on light duty types of restrictions." Dr. Wilberger Deposition at 17; R.R. at 104.

The WCJ made the following relevant findings of fact and conclusions of law:

1. The undersigned Judge received a Notice of Assignment dated March 27, 2007 the Bureau of Workers' Compensation concerning a Remanded Claim Petition.

2. The Workers' Compensation Appeal Board Reversed and Remanded a Decision by the undersigned Judge . . . concerning a Claim Petition filed by the claimant . . . . The Appeal Board directed the . . . Judge to render a new Decision and Order granting the Claimant's Claim Petition and to award the claimant benefits for her work-related lumbo sacral strain or sprain . . . .

3. The defendants [Employer and Insurer] did not file any additional evidence of record on the Remanded matter.

4. This Judge incorporates by reference the Findings of Fact set forth in his prior Decision from Numbers 1 through 14 as fully as if they were set forth herein at length.

5. This Judge further finds that the testimony of the claimant was generally straightforward, credible and convincing concerning her work history as a licensed practical nurse and her description of the events of April 9, 2004, as well as her understanding of the history of her medical treatment. (emphasis added).

6. This Judge also finds that her testimony was consistent with the testimony of James E. Wilberger, M.D., who had opined that she sustained a lumbo-sacral sprain/strain on April 9, 2004. (emphasis added).

7. This Judge also incorporates by reference as fully as set forth herein at length his prior Findings of Fact # 16 and 17.

Conclusions of Law

1. The testimony of Dr. James E. Wilberger was competent, unequivocal, and within a reasonable degree of medical certainty. (emphasis added).

. . . .

> 3. The claimant met her burden of proof that she sustained an injury which arose in the course of her employment on April 9, 2004 in the nature of a lumbo-sacral sprain/strain, and she was only released to limited work with lifting a maximum of 10-20 pounds, and she was also limited in twisting and allowed the ability to change positions frequently. (emphasis added).
>
> 4. The claimant met her burden of proof that she sustained disability from her regular job as a licensed practical nurse, as a result of the events of April 9, 2004. (emphasis added).

WCJ's Decision, July 3, 2007, Findings of Fact (F.F.) Nos. 1-7 and Conclusions of Law Nos. 1, and 3-4 at 1-2.

The Board affirmed and concluded that "Claimant met her burden of proving that she sustained an injury in the course of her employment on April 9, 2004, in the nature of a lumbosacral sprain/stain." Opinion of the Board, June 9, 2008, at 3.

I. Whether Claimant's Injury Occurred Outside Of The Scope Of Her Employment?

Initially, Employer contends[2] that Claimant violated a positive work order to refrain from any lifting activities as an LPN. Specifically, Employer asserts Claimant testified that she was aware of Employer's order that the lifting and the moving of patients was not part of her regular duties but was assigned to other designated employees.

[2] 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).

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). Whether an employee is in the course of his or her employment at the time of injury is a question of law which must be based on findings of fact. Roman v. Workmen's Compensation Appeal Board (Department of Environmental Resources), 616 A.2d 128, 130 (Pa. Cmwlth. 1992).

In Camino v. Workers' Compensation Appeal Board (City Mission and MCRA, Inc.), 796 A.2d 412 (Pa. Cmwlth. 2002),[3] this Court stated:

> Based on Dickey [v. Pittsburgh and Lake Erie R.R. Co., 297 Pa. 146 A. 543 (1929)] and several other cases that followed it, we noted that a three-prong test sets forth the criteria for denying benefits to a worker injured as a result of disobeying an employer's order: '(1) the injury was in fact, caused by the violation of the order or rule . . . ; (2) the employee actually knew of the order or rule. . . ; and (3) the order or rule implicated an activity not connected with the employee's work duties . . . .' Nevin Trucking v. Workmen's Compensation Appeal Board (Murdock), 667 A.2d [262], 268 [(Pa. Cmwlth. 1995)] (citations omitted). In Nevin Trucking, we determined that the claimant was not eligible for benefits for an injury arising from his violation of a known order from

[3] In Camino, Dennis Camino (Camino) had injured "his back while mopping near a commode at City Mission during his regular working hours." Id. at 414. However, Camino was told that "he had no other duties than to wash, dry, fold, and put away sheets . . . he was not to go into the showers or to wash the showers or mop the rest rooms, that the areas where there were showers and rest rooms were out-of-bounds to him . . . ." Id. at 415. The WCJ concluded that Camino was not injured while in the scope of his employment and denied benefits. The WCAB affirmed. On appeal, this Court determined the WCJ erred in concluding that Camino was not injured while in the scope of his employment and vacated the WCAB's decision and remanded for a determination of Camino's disability.

his employer not to change the tire because 'the changing of tires was not part of the claimant's work duties nor connected thereto because performing repairs on such instrumentality was expressly prohibited by employer.' Id. at 270.

. . . .

It must be remembered that these cases [Nevin Trucking and Johnson v. Workers' Compensation Appeal Board (Union Camp Corp.), 749 A.2d 1048 (Pa. Cmwlth. 2000)] are the very rare exception to the broad general principle that all injuries sustained by an employee arising in the course of his or her employment and causally related thereto are compensable under Section 301(c)(1) of the Workers' Compensation Act (Act)[4] . . . . Generally, a claimant suffers an injury arising in the course of his employment when the claimant (1) is injured while actually engaged in furtherance of the employer's business or affairs, or (2) is injured on the employer's premises (even though not engaged in the employer's business or affairs) if the nature of claimant's employment requires his or her presence on the premises. Hemmler v. Workmen's Compensation Appeal Board (Clarks Summit State Hospital), 595 A.2d 395 [(Pa. Cmwlth. 1990)]. The phrase 'actually engaged in the furtherance of the business or affairs of the employer' is given a liberal construction. Id.

. . . [W]e note that, pursuant to Dickey, in order to be ineligible for benefits, the employee must not only have been injured while in violation of an order, but must have been engaged at the time of the injury in an activity so disconnected with his or her regular duties as to be considered, with respect to the employer, nothing more than a 'stranger' or 'trespasser.' Not only must the injury arise out of the employee's engagement with 'instrumentalities, places, or things about or on which the employee has no duty to perform,' but also with matters with which the employee's 'employment does not connect him' or her. Dickey, 297 Pa. at 175, 146 A. at 544. (emphasis added).

[4] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 411(1).

Camino, 796 A.2d at 417-18.

In the present controversy, Employer failed to introduce into evidence a written policy or order that LPN's were prohibited from lifting a patient while in the course of their employment. In fact, Employer's position concerning the existence of such a policy or order was based on Claimant's testimony that "[t]hey really did not promote for the nurses to do that lifting . . . they had Patient Care Assistants to do that." N.T. at 9; R.R. at 54. However, Claimant testified that she was frequently asked to help lift or reposition patients:

> Q: Would you on occasion be required to help lift patients?
>
> A: Well, I was asked by the Patient Care Assistants to help because they were shorthanded; and I would not say no. I helped them. (emphasis added).
>
> Q: Now, you're talking about the night of the injury?
>
> A: Yeah.
>
> . . . .
>
> Q: What type of care would you provide to the patients?
>
> A: Dispense their medications, do assessments, do admissions, do discharges, do the paperwork. And certainly if I was in the room and someone was falling, I wouldn't run out to get a Nurse's Aide. I'd have to help them. (emphasis added).
>
> . . . .
>
> Q: Now you said that last incident, what do you mean by that?
>
> A: Well, all night long I was helping the Patient Care Assistants reposition patients . . . . (emphasis added).

N.T. at 9-11; R.R. at 54-56.

Here, like in Camino, the activity of repositioning and lifting of patients cannot be considered so "disconnected" to the regular duties of a LPN that Claimant was nothing more than a "stranger' or "trespasser" when she suffered her work injury. The Board properly concluded that Claimant was injured while in the scope of her employment.

II. Whether Claimant Established A Disability?

Employer next contends that Claimant was not disabled and could return to her pre-injury job. Essentially, Employer asserts that Claimant's work duties included administering medications, IVs and patient's assessments with no lifting requirement, and as such, there were no medical restrictions that prevented her from returning to her pre-injury job.

"Not only must the claimant in a claim petition establish that the claimant sustained a work related injury but also that such injury resulted in a disability . . . i.e., a loss of earnings or a loss of earning power." School District of Philadelphia v. Workers' Compensation Appeal Board (Lanier), 727 A.2d 1171, 1172 (Pa. Cmwlth. 1999). 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. Hilton Hotel Corporation v. Workmen's Compensation Appeal Board (Totin), 518 A.2d 1316 (Pa. Cmwlth. 1986).

Here, the Board determined that Claimant established a disability:

> After careful review of the record, we conclude that the WCJ did not err in finding that Claimant was disabled as

> a result of her work injury on April 9, 2004. Here, Claimant had the burden of proving that she sustained an injury which disabled her from her pre-injury job. Claimant was able to meet this burden because the WCJ accepted the testimony of Dr. Wilberger [Employer's expert] that Claimant sustained a lumbosacral strain/sprain on August 9, 2004 and that she should not lift more than twenty pounds. Consequently, the medical evidence establishes that the requirements of claimant's job exceeded her physical restrictions, and she is entitled to disability benefits unless Defendant [Employer] demonstrates that employment is available within her restrictions.

Board Opinion, June 9, 2008, at 8-9.

Employer maintains that because lifting was not part of her assigned duties as an LPN she was not disabled. This argument is without merit.

> Employer asked Dr. Wilberger on direct examination:
>
> Q: Based on your examination of her and review of the records, do you have an opinion within a reasonable degree of medical certainty as to what her present work status is? When I say present, meaning as of the date of your examination in regards to her ability to either return to full duty or light duty work?
>
> A: <u>It was my opinion that at that point in time I could find no reason why she could not resume some level of activity based on light duty types of restrictions</u>. (emphasis added).
>
> Q: <u>What would they be generally when you say light duty restrictions? Lifting, pulling? Ten pounds</u>? (emphasis added).
>
> A: <u>I usually put it at 20 pounds</u>. (emphasis added).

> Q: You feel she would have no problem lifting or carrying that weight for a substantial period of time?
> A: I would put the lifting-for a sustained period of time-to ten pounds, and for occasional periods of time, to 20 and above 20 pounds, never.
>
> Q: She could work–with those light duty restrictions she could work an eight-hour day? (emphasis added).
>
> A: That would have been my opinion. Yes, sir. (emphasis added).

Dr. Wilberger Deposition at 17-18; R.R. at 104-05.

> On cross-examination, Dr. Wilberger was asked:
>
> Q: In a nursing position for an LPN they're-I assume they would be required to be on their feet most of the day?
>
> A: I think that's a reasonable assumption. Yes, sir.
>
> Q: Certainly, an LPN position would require far more than a 20-pound lifting capacity; is that right?
>
> A: In their regular job, obviously. Yes, sir.

Dr. Wilberger Deposition at 24-25; R.R. at 111-12.

Dr. Wilberger's testimony contains two glaring observations. First, Employer never queried either by hypothetical or follow up whether his opinion would change without the lifting requirement. Second, Employer never objected to Dr. Wilberger's testimony concerning the duties of an LPN, including the lifting requirements of that position. In any event, Claimant credibly testified that she was previously asked to lift patients by the nursing staff and Patient Care

Assistants, those assigned to lift patients, and that she would personally assist a patient who was about to fall.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

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v.	:	
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O R D E R

AND NOW, this 18th day of December, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge