

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Timothy Haught,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1369 C.D. 2010
	:	Submitted: October 22, 2010
Workers' Compensation Appeal	:	
Board (UGI Amerigas HVAC),	:	
	:	
Respondent	:	
	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY

FILED: December 10, 2010

Timothy Haught (Claimant) appeals from a determination of the Workers' Compensation Appeal Board (Board) affirming the decision of a Workers' Compensation Judge (WCJ) denying his Review Petition. We affirm the Board's order in part and reverse in part.

Claimant sustained an injury in the course and scope of his employment on December 20, 2007. The injury occurred when he fell off a ladder from a height of nine feet. UGI Amerigas HVAC (Employer) issued a Notice of Compensation Payable (NCP) acknowledging a "comminuted fracture left tibial plateau." Bureau Exhibit No. 1.¹ Claimant filed a Review

¹ Claimant was permitted to proceed with his appeal *in forma pauperis*, thereby excusing him from filing a reproduced record. Citation is made throughout this opinion to the certified record.

Petition on July 21, 2008 alleging that the injury description contained in the NCP is incorrect. He indicated that while the NCP properly recognized his left tibia fracture, he also sustained injury to his left knee, right shoulder, left leg, lower back, and right foot as a result of his fall at work.

Claimant testified that in December of 2007, he fell off a ladder when it slid from underneath him. He stated that as he fell down, he struck his left elbow on a fire extinguisher. He also struck a filing cabinet. According to Claimant, he landed on his right side on top of the ladder. He explained that he attempted to get up, but realized his leg was hurt. He added that he felt pain in his right shoulder. Claimant stated his left tibia problem necessitated surgery. In April of 2008, Claimant began putting weight on his left leg. Per Claimant, he first utilized crutches to get around. He suggested that using crutches caused his right shoulder to bother him. In May of 2008, he began walking with a cane that he believed caused lower back and right foot pain. Claimant agreed he did not have any problems currently with his left arm.

Claimant was involved in the following dialogue at hearing:

Q. Did you have pain in any other parts of your body other than what you've just described at [the time of the fall]?

A. In my right shoulder I had. I told them, when we had the interview, that I hurt my right shoulder.

Q. Okay. And were you having pain anywhere else at that time?

A. Not at that time. And it—*I really didn't start getting pain probably for about three months or so*

when I was allowed to get up and start moving around and I got off the happy drugs.

N.T. 8/19/08, pp. 6-7. (Emphasis added).

Later, at the same hearing, the following discussion took place:

Q. I think, were you explaining to us, when was it that you started to identify pain in some other areas of your body?

A. *Well, after I was up on crutches, my shoulder really started bothering me...* And when I started walking with the cane, that's when I started getting more pain, like in my lower back and my right foot. It's—I think it's a lot the way you walk. Have your weight shifted over to the one side.

Id. at 9-10. (Emphasis added).

Claimant presented the testimony of Norman B. Stempler, D.O., board certified orthopedic surgeon, who first saw Claimant on July 18, 2008. Dr. Stempler noted Claimant underwent an open reduction and internal fixation of the left knee. He reviewed a CT scan that showed the tibia problem did not heal properly; *i.e.*, there was a nonunion failure. According to Dr. Stempler, Claimant's current diagnosis is status post displaced fracture, lateral tibia plateau, nonunion of the fracture. There is chronic peritendinitis bursitis of the right shoulder with impingement, a lumbosacral strain and sprain, with myofascitis. These diagnoses, per Dr. Stempler, were attributable to the incident occurring December 20, 2007.

Dr. Stempler agreed that Claimant did not complain of pain in his right shoulder and back to the degree and frequency that he complained of pain in his left knee. According to Dr. Stempler, Claimant made no

complaints regarding his back at his last visit. Dr. Stempler did not know exactly how Claimant injured his shoulder on December 20, 2007. He speculated that Claimant tried to grab something during his fall that resulted in further injury.

Employer presented the testimony of John Perry, M.D., board certified in orthopedic surgery, who examined Claimant on November 19, 2008. The only area Claimant voiced complaints about to Dr. Perry was the knee. Dr. Perry diagnosed Claimant with a comminuted bicondylar tibial plateau fracture of the left knee in addition to post-traumatic arthritis. He specified that these conditions were related to Claimant's fall at work. He agreed that Claimant sustained a left forearm contusion on December 20, 2007, but opined Claimant was fully recovered from this injury. Dr. Perry did not examine Claimant's back as Claimant failed to report any complaints in this area.

Dr. Perry disagreed that Claimant had a right shoulder problem attributable to his work injury. He explained as follows:

A.... There was Dr. Stempler's notes indicating painful abduction of the shoulder and evidence of impingement, but that's not something you would get from falling off a ladder. *And also his MRI, based on the report of Dr. Schaff, doesn't show the findings of impingement.* You don't find an encroaching acromion and you don't find evidence of bursitis or tendonitis, which would be the sequela.

Q. Can you be a little more specific when you stated that impingement would not be a type of injury suffered in this fall?

A. Well, impingement simply means that you have a lack of space between the acromion, which is the non-movable bone at the top of your shoulder, and the underlying rotator cuff and bursa, which help move the humerus, the humeral head. So, the acromion breaks downward and then rubs against the bursa and you can get a chronic tendonitis, but that's an anatomic, pathologic anatomic problem, it's not related to an injury; unless you were to have something like a fracture that would move some fragments to encroach on that space. *Based on Dr. Schaaf's reading, that is not present on the MRI.*

Depo. dated 2/2/09, pp. 14-15. (Emphasis added).

By a decision circulated August 3, 2009, the WCJ denied Claimant's Review Petition. The WCJ credited Claimant's testimony. The WCJ indicated, however, that Claimant explained that the symptoms in his right shoulder, low back, and right foot began when he started using crutches months after his fall at work. This delayed onset of symptoms, per the WCJ, required Claimant to present unequivocal medical evidence to establish causation for these injuries that were purportedly consequential conditions attributable to the December 20, 2007 fall. In regard to the medical evidence, the WCJ credited Dr. Perry over Dr. Stempler. The WCJ explained that while Dr. Stempler did not know the exact mechanism of injury for Claimant's right shoulder injury, but hypothesized that it resulted from Claimant falling to the floor with his arms outstretched. He explained that Dr. Stempler did not suggest Claimant's right shoulder problem resulted from Claimant ambulating his large frame with crutches or a cane as alluded

to by Claimant in his testimony. According to the WCJ, while Claimant sustained “acute right shoulder pain... caused by striking his shoulder as part of the fall,” that pain resolved, and no new work-related injury developed months later. Dec. dated 8/3/09, p.7.

The WCJ indicated that Dr. Stempler never mentioned a foot injury in his deposition. The WCJ did not find sufficient credible testimony to establish a work-related back injury. In regard to the left knee, the WCJ determined the “NCP was not mistaken or incomplete” based on “the understanding that the agreed-upon post-traumatic arthritis is a natural progression from a fracture non-union.” Id.

Claimant appealed to the Board. The Board affirmed in an order dated June 14, 2010. This appeal followed.²

² Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated. DeGraw v. Workers’ Compensation Appeal Board (Redner’s Warehouse Mkts., Inc.), 926 A.2d 997 (Pa. Cmwlth. 2007). On appeal, the prevailing party below is entitled to all inferences that can be reasonably drawn from the evidence. Krumins Roofing & Siding Co. v. Workmen’s Compensation Appeal Board (Libby), 575 A.2d 656 (Pa. Cmwlth. 1990). A WCJ is free to accept or reject, in whole or in part, the testimony of any witness. Greenwich Collieries v. Workmen’s Compensation Appeal Board (Buck), 664 A.2d 703 (Pa. Cmwlth. 1995). His credibility determinations are not reviewable by this Court. Campbell v. Workers’ Compensation Appeal Board (Pittsburgh Post Gazette), 954 A.2d 726 (Pa. Cmwlth. 2008). It does not matter that there is other evidence of record that supports a factual finding other than that made by the WCJ. Hoffmaster v. Workers’ Compensation Appeal Board (Senco Prods. Inc.), 721 A.2d 1152 (Pa. Cmwlth. 1998). Rather, the proper inquiry is whether there is any evidence that supports the WCJ’s factual findings. Community Empowerment Ass’n v. Workers’ Compensation Appeal Board (Porch), 962 A.2d 1 (Pa. Cmwlth. 2008). When a WCJ mischaracterizes a witness’ testimony, his findings based on that testimony are not supported by substantial, competent evidence. Sewell v. Workers’ Compensation Appeal Board (City of Phila.), 772 A.2d 93 (Pa. Cmwlth. 2001).

Claimant argues on appeal that the WCJ's decision is not supported by substantial, competent evidence. He contends that the WCJ erred in failing to amend the NCP to include a left elbow contusion or post-traumatic arthritis of the left knee. We agree.

In Cinram Manufacturing, Inc. v. Workers' Compensation Appeal Board (Hill), 601 Pa. 524, 975 A.2d 577 (2009), the Supreme Court held that a WCJ may amend an NCP to include injuries not referenced in the original NCP. It ruled that corrective amendments, those that involve an inaccuracy in identifying the existing injury in the NCP, may be made in any proceeding before a WCJ. Amendments based on subsequently arising medical conditions related to the original injury, or consequential conditions, can only be made upon the filing of a specific petition; *i.e.*, a review petition. Hill, 601 Pa. at 531, 975 A.2d at 581. The claimant has the burden of proving the newly alleged injuries are causally related to his original work injury. Jeanes Hosp. v. Workers' Compensation Appeal Board (Hass), 582 Pa. 405, 872 A.2d 159 (2005). A party's burden of proof may be met where the necessary evidence is introduced by his adversary. DeGraw, 926 A.2d at 1001.

Pursuant to Hill, Claimant may attempt to amend the NCP when it does not include all of his work-related injuries. Employer's medical expert, Dr. Perry, credibly testified that Claimant sustained a left forearm contusion on December 20, 2007. Inasmuch as this injury was sustained during the original work incident, Claimant seeks a corrective amendment for this injury. Although Claimant had the burden of proof in this matter, Hass, he was able to satisfy that burden based on the credible

testimony of Employer's medical expert.³ DeGraw. We acknowledge that Dr. Perry opined Claimant was fully recovered from this injury. The fact remains that this was an injury sustained when Claimant fell off a ladder at work. While the WCJ was not precluded from finding Claimant fully recovered from this injury, the WCJ *technically* erred in not making a corrective amendment to the NCP. Denying Claimant's request to amend the NCP to include the forearm contusion may serve to frustrate Claimant's ability to obtain a reinstatement of benefits, indemnity or medical, for this injury should the need ever arise.

Dr. Perry further testified that Claimant developed post-traumatic arthritis as a result of his work injury. This is a consequential condition. Although the WCJ indicated the parties agreed that the post-traumatic arthritis was a natural progression of the lateral tibia plateau fracture, he declined to amend the NCP to include this injury. Presumably, although not stated, this determination was made in reliance on the holding in Gumro v. Workers' Compensation Appeal Board (Emerald Mines Corp.), 533 Pa. 461, 626 A.2d 94 (1993), wherein the Supreme Court acknowledged that there are times where the burden is on the employer to establish an independent cause of disability where continuing symptoms or worsening symptoms involve the *same body part* as the accepted work injury. The Court, in Gumro, held that the burden was on the employer to prove that a deep venous thrombosis that was causing the current disability was not related to an accepted work-related knee injury. Similarly, in this case, the arthritis is present in the knee that is already accepted as injured in the NCP.

³ We reiterate that Claimant's testimony was credited as well.

Therefore, the WCJ's August 3, 2009 Decision may be read to suggest the post-traumatic arthritis is already a part of the accepted work-injury.

Nonetheless, the Supreme Court, in Hill, explained:

The Commonwealth Court's approach of interpreting Gumro's holding somewhat narrowly seems reasonable, particularly in light of the liberal procedures available under the statute for claimants to obtain modifications to descriptions of accepted injuries, as well as the legitimate allocation to claimants of the burden to prove injuries which are not accepted by employers...

Hill, 601 Pa. at 534, 975 A.2d at 582, fn. 9. (Emphasis added).

Inasmuch as Dr. Perry, whom the WCJ found credible, opined that Claimant developed post-traumatic arthritis in his knee following the work injury, we can see no reason why the NCP should not be amended to include this injury. Gumro may be read to suggest that this injury was already included as part of the accepted work injury. Claimant, however, filed his Review Petition to amend his injury description. Moreover, the Court, in Hill, reiterated that Gumro is to be read narrowly and that the burden is properly allocated to claimants to establish causation regarding injuries not included in the NCP. It would be unwise to presume the applicability of Gumro in any future proceedings. As such, we believe the WCJ erred in not amending Claimant's NCP to include post-traumatic arthritis in the left knee.

Claimant further argues that the WCJ erred in failing to amend the NCP to include a right shoulder injury. He argues the WCJ erred in determining that he was required to present unequivocal medical testimony

of a causal connection between his right shoulder injury and his fall in December of 2007. Rather, he posits his credible testimony alone is sufficient to meet his burden as he experienced immediate pain in the shoulder after falling off and landing on a ladder. Per Claimant, the WCJ misapprehended his testimony to suggest that his right shoulder pain recurred once he began using crutches. Instead, he states his testimony was that his pain worsened at that time. He adds that while neither he, nor his medical expert, knew of the exact mechanism of injury that resulted in the shoulder problem, their testimony as a whole establishes a causal connection. Finally, Claimant indicates a discrepancy in the WCJ's decision inasmuch as the WCJ found Claimant sustained an acute injury resulting in shoulder pain as a result of the fall, but failed to amend the NCP.⁴

Any alleged right shoulder injury must be reviewed separate and apart from the contusion and arthritis. The reason is that Employer's medical witness did not concede to the existence of any work-related shoulder injury.

When the connection between the injury and the alleged work-related cause is not obvious, it is necessary to establish the cause by unequivocal medical evidence. Hilton Hotel Corp. v. Workmen's

⁴ Claimant fleetingly mentions in his Petition for Review that there was error below inasmuch as his NCP was not amended to include a low back injury. Claimant fails to mention any issue concerning a back injury in the "Statement of Questions Presented" or "Argument" sections of his brief. It is also noted that Claimant did not make any argument regarding his right foot complaints in either his Petition for Review or brief. Any argument that the NCP should be amended to include a back or right foot injury is waived. See Bingnear v. Workers' Compensation Appeal Board (City of Chester), 960 A.2d 890 (Pa. Cmwlth. 2008)(holding issues must be raised in a party's petition for review as well as the "Statement of Questions Involved" and "Argument" sections of one's brief in order to be properly preserved for appeal).

Compensation Appeal Board (Totin), 518 A.2d 1316 (Pa. Cmwlth. 1986). A causal connection is obvious where an individual is doing an act that requires force or strain and pain is immediately experienced at the point of force or strain. Gartner v. Workers' Compensation Appeal Board (Kmart Corp.), 796 A.2d 1056 (Pa. Cmwlth. 2002). No authority requires a workers' compensation injury to carry a professional diagnosis or descriptive tag. Meadow Lakes Apartments v. Workers' Compensation Appeal Board (Spencer), 894 A.2d 214 (Pa. Cmwlth. 2006). Pain itself, if causally related to employment, may be compensable as an injury and an NCP may be amended to include pain complaints. Id. at 217.

As previously explained, Claimant's testimony was deemed credible. This includes Claimant's complaints of pain in his right shoulder at the time he struck the ladder after his fall. As pain was felt at the time of impact from a nine foot fall, there is an obvious causal connection between the work incident and the immediate onset of pain. Gartner. This right shoulder pain that is devoid of a specific diagnosis may be added to the NCP as a corrective amendment. Spencer.

We recognize that there is a dispute in the interpretation of the testimony between the WCJ and the Claimant as to how the pain progressed, if at all, following the injury. A fair reading of the WCJ's decision is that the right shoulder pain incurred on December 20, 2007 resolved and that new symptoms of pain purportedly developed several months later once Claimant began walking with crutches. Claimant, on the other hand, urges us to find that the pain never ceased but began to progress once he started to try to move with the use of crutches.

Claimant's testimony has some ambiguity. Claimant's testimony can be read to support the version of events set forth by either the WCJ or Claimant. Claimant did, however, make references that he "started" to get pain in the right shoulder months after his fall when he began walking with crutches. This is consistent with the WCJ's determination that Claimant experienced pain on the day of injury that resolved and that he later developed new complaints of pain when he began to use crutches. Even though there is evidence of record to support findings other than that made by the WCJ, there is support in the record for the WCJ's actual findings. Hoffmaster; Porch. We do not believe that the WCJ mischaracterized Claimant's testimony or that his finding on this issue is not supported by substantial, competent evidence. Sewell. We will not usurp the WCJ's fact-finding role.

Nevertheless, we are inclined to point out that there is no credible evidence of record to support a finding of anything more than initial pain complaints regarding the right shoulder. The parties proceeded to present medical evidence. Claimant's medical expert, Dr. Stempler, opined that Claimant had chronic peritendinitis bursitis of the right shoulder with impingement. His testimony was rejected. Employer's expert disagreed that there was any right shoulder condition attributable to the December 20, 2007 fall. Although Dr. Perry offered an opinion as to whether the fall onto the ladder caused Claimant's impingement and sequela as opposed to determining whether these conditions developed once Claimant began ambulating with crutches, we cannot ignore his review of an MRI report that did not show impingement, an encroaching acromion, bursitis, or tendonitis.

Dr. Perry was found credible by the WCJ. The WCJ's credibility determinations are not reviewable by this Court. Campbell. Consequently, Claimant could not meet his burden of establishing that the NCP was incorrect and should be amended to include shoulder impingement and its sequela as required by Hass.

In conclusion, we find the WCJ erred in failing to amend the injury description contained in the NCP. The injury description that acknowledged a comminuted fracture of the left tibial plateau is amended to include post-traumatic arthritis in the left knee, a left forearm contusion, and pain complaints in the right shoulder. Based on the WCJ's findings read in conjunction with the credible evidence of record, the forearm contusion and the pain complaints in the right shoulder that resulted from the impact of Claimant's work-related fall are resolved. The NCP is not amended to include right shoulder impingement or any sequela. The Board's order that affirmed the WCJ's decision in its entirety is affirmed in part and reversed in part in accordance with this analysis.⁵

⁵ In the "Conclusion" paragraph of Claimant's brief, Claimant writes "Claimant further requests that Defendant be directed to reimburse Claimant's litigation costs and pay Claimant's counsel twenty percent attorney fees, chargeable to Claimant's award." Claimant's brief, p. 18. This is the first mention whatsoever of litigation costs and counsel fees in either the Petition for Review or brief filed by Claimant. Disregarding the fact that these issues were not properly preserved, Bingnear, Claimant further fails to address these issues with any degree of specificity to allow this Court to conduct meaningful appellate review. Pennsylvania Rule of Appellate Practice 2119(a), applicable to party's briefs, provides as follows:

- (a) General rule. The argument shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part--in distinctive type or in type distinctively displayed--the particular point treated therein,

followed by such discussion and citation of authorities as are deemed pertinent.

Pa.R.A.P. 2119(a).

Considering the fact that Claimant has succeeded only in having the NCP amended to include minor injuries that had already resolved and/or an injury that arguably was already a part of the accepted injury, it is questionable what immediate impact our partial reversal of the lower tribunal order would have on Claimant. See Bentley v. Workers' Compensation Appeal Board (Pittsburgh Bd. of Educ.), 987 A.2d 1223 (Pa. Cmwlth. 2009)(holding litigation costs were not recoverable when the Board corrected a technical error having no immediate impact on the claimant). Moreover, although Claimant has succeeded in part in the litigation, no change has been made in Claimant's disability status. Therefore, it is debatable as to the amount of attorney's fees that may be awarded to counsel irrespective of a fee agreement. Section 442 of the Pennsylvania Workers' Compensation Act, Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §998, states “[i]n cases where the efforts of claimant’s counsel produce a result favorable to the claimant but where no immediate award of compensation is made... the hearing official shall allow or award reasonable counsel fees... without regard to any per centum.”

A single statement mentioned in appellant's brief hardly constitutes the type of developed argument required by Pa.R.A.P. 2119(a) to allow for meaningful appellate review. Elteron, Inc. v. Zoning Hearing Board of the City of Aliquippa, 729 A.2d 149 (Pa. Cmwlth. 1999)(citing Nemoto v. Nemoto, 620 A.2d 1216, 1222 (Pa. Super. 1993). We will not make Claimant's arguments for him. Any issue concerning litigation costs or counsel fees is waived.

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	:	
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	:	

ORDER

AND NOW, this 10th day of December, 2010, the order of the Workers' Compensation Appeal Board (Board) is affirmed in part and reversed in part. The Board's order is reversed to the extent it failed to reverse the WCJ's determination that Claimant did not sustain his burden of proof to amend the Notice of Compensation Payable to include post-traumatic arthritis in the left knee, a left forearm contusion (resolved), and pain complaints in the right shoulder (resolved). The Notice of Compensation Payable is amended to include these injuries. The Board's opinion is affirmed in all other respects.

JIM FLAHERTY, Senior Judge