IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ann McGouldrick, Petitioner	:	
v.	:	No. 1449 C.D. 2008
	:	Submitted: October 24, 2008
Workers' Compensation Appeal Board (Synthetic Thread Company), Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: December 3, 2008

Ann McGouldrick (Claimant) petitions for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of a Workers' Compensation Judge (WCJ) denying her Review Petition and granting a Termination Petition filed by Synthetic Thread Co. (Employer). We affirm.

Claimant sustained a back injury in the course and scope of her employment on November 2, 2004 after lifting a box weighing over 100 lbs. Employer issued a Notice of Compensation Payable (NCP) acknowledging this injury and describing it as a "lower back lumbosacral strain/sprain." Reproduced Record (R.R.) at 102. Claimant received varying levels of indemnity benefits thereafter. Employer filed a Termination Petition on February 22, 2007 alleging Claimant was fully recovered from her work-related injury. Claimant subsequently filed a Review Petition alleging her injury description should be

amended to include an L5-S1 disc protrusion or an aggravation of an L5-S1 disc protrusion.

Claimant testified that she worked for Employer as a mechanic and explained that she also did stock. She stated that her job duties necessitated heavy lifting, bending, pushing, and pulling. According to Claimant, her injury occurred when she picked up a box of spools containing thirty-five spools weighing over 100 lbs. not realizing it was full. She turned to the left and put the box down because it was so heavy. She felt immediate pain in the middle of her back on the right side. She was out of work for a time but returned to light duty. Her plant later shut down and her benefits were reinstated. Claimant found alternative work as a school bus driver. She lost her permit to drive the bus, however, when she could not pass her annual physical. Claimant does not believe she is fully recovered from her work-related injury. She indicated she still has lower back pain that goes down her right leg into her foot.

Claimant presented the testimony of Scott Naftulin, D.O., board certified in osteopathic family practice, who first treated Claimant on October 17, 2005. As of his first visit, Dr. Naftulin's impression of Claimant's condition was right S-1 radicular pain, herniated disc or HNP, L5-S1 with a lumbar sprain and strain, aggravating pre-existing L5-S1 disc disease. Following a subsequent visit on January 2, 2007, Dr. Naftulin's opined that Claimant's "most likely diagnosis remained discogenic pain." R.R at 13. His impression at that time was work-related lumbar strain and sprain with "probable" internal disc disruption at L5-S1 and poor clinical response to the right L3-5 percutaneous RF neurotomy. Id. at 19.

Dr. Naftulin agreed that, at times, Claimant's straight leg raising signs have been inconsistent. He further agreed the MRIs did not reveal any annular tears.

Dr. Naftulin was questioned whether he believed Claimant was fully recovered from her November 2, 2004 work injury. He responded "[t]he diagnosis was an L-5/S-1 disc herniation or disc disruption caused or aggravated by the work injury of November 2nd, 2004, from which she had not fully recovered and remained at least partially disabled." Id. at 19-20. He believed Claimant was capable of part-time sedentary work. Dr. Naftulin agreed sprains and strains typically resolve in four to twelve weeks.

Employer presented the testimony of Charles Levine, M.D., board certified in orthopedic surgery, who first saw Claimant on October 3, 2005. He observed no calf atrophy. An EMG done in February of 1995 was normal. As of this examination, Dr. Levine felt Claimant had an episode of low back pain as a result of the work incident occurring on November 2, 2004 that had resolved. He further believed Claimant had an underlying diagnosis of degenerative lumbar disc disease unrelated to the work injury.

Dr. Levine examined Claimant a second time on January 23, 2007 whereupon Claimant had complaints of persistent pain in her buttocks, down the back of her right leg, and into her foot. He noted a May 22, 2006 MRI revealed degenerative disc disease at L5-S1, with broad based disc protrusion, and no nerve root impingement. Dr. Levine again concluded that Claimant had an episode of back pain following the 2004 incident that had resolved. In addition, he opined Claimant had non-work-related degenerative disc disease. According to Dr.

Levine, Claimant is capable of returning to work without restrictions. Dr. Levine was questioned whether the NCP that describes Claimant's work injury as a lumbosacral sprain and strain should be amended to include an L5-S1 disc herniation or an aggravation of the same. He answered in the negative suggesting these latter conditions are a part of the degenerative process, not a traumatic injury.

By a decision circulated October 9, 2007, the WCJ credited Claimant's complaints of pain. Nonetheless, she rejected Claimant's testimony to the extent it can be read that those complaints are caused by her November 2, 2004 work injury. The WCJ credited Dr. Levine's testimony that Claimant was fully recovered from her work-related injury. She further credited Dr. Levine's testimony that the 2004 incident did not cause a disc herniation or aggravate a disc herniation based on the fact that there was no evidence of an annular tear on the MRI, the negative EMG, the lack of calf atrophy, and Claimant's equivocal straight leg raise test. The WCJ rejected Dr. Naftulin's testimony that Claimant's work injury caused or aggravated a herniated disc at L5-S1 based on the credible opinion of Dr. Levine. The WCJ further stated "*I also note* that Dr. Naftulin seemed rather equivocal in his diagnosis of discogenic pain and internal disc disruption at L5-S1. In describing these conditions, he used the words "most likely diagnosis" and "possible." (Emphasis Added). R.R. at 117-118. The WCJ, however, credited Dr. Naftulin's testimony that Claimant sustained a lumbar sprain and strain. She explained that Dr. Naftulin's statement that a lumbar sprain and strain resolves in four to twelve weeks supports Dr. Levine's opinion of full recovery from the work-related injury. According to the WCJ, Dr. Naftulin's

testimony as a whole attributes Claimant's current symptoms to the disc condition, not the sprain and strain.

Based on her credibility determinations, the WCJ found that Claimant failed to establish that her injury description should be amended to include a disc herniation or an aggravation of a disc herniation. Consequently, she denied Claimant's Review Petition. Moreover, the WCJ found Employer met its burden of proving Claimant was fully recovered from her work-related lumbar sprain and strain as of January 23, 2007. As such, she granted its Termination Petition.[1] The Board affirmed in an order dated July 7, 2008. This appeal followed.[2]

Claimant argues that the WCJ erred in denying her Review Petition inasmuch as Dr. Naftulin's testimony was not equivocal. Moreover, Claimant contends that the WCJ's granting of Employer's Termination Petition is not supported by substantial, competent evidence. Specifically, she contends that Employer's medical expert failed to express an opinion that Claimant was fully recovered from the injury listed on the NCP.

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[1] A WCJ is free to accept or reject, in whole or in part, the testimony of any witness. Campbell v. Workers' Compensation Appeal Board (Pittsburgh Post Gazette), 954 A.2d 726 (Pa. Cmwlth. 2008). The appellate role in a workers' compensation case does not include the reweighing of evidence or reviewing the credibility of the witnesses. Id. at 729.

[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. YDC New Castle-PA DPW v. Workers' Compensation Appeal Board (Hedland), 950 A.2d 1107 (Pa. Cmwlth. 2008). The party who prevailed before the WCJ is entitled to the benefit of all favorable inferences that can be drawn from the evidence. Krumins Roofing & Siding v. Workmen's Compensation Appeal Board (Libby), 575 A.2d 656 (Pa. Cmwlth. 1990).

A review petition should be filed to amend an NCP to include additional injuries when the NCP is materially incorrect. Jeanes Hosp. v. Workers' Compensation Appeal Board (Hass), 582 Pa. 405, 872 A.2d 159 (2005). The burden remains on the claimant as if a claim petition was filed. Id. at 169. In a claim petition, the burden of proving all necessary elements to support an award rests with the claimant. Inglis House v. Workmen's Compensation Appeal Board (Reedy), 535 Pa. 135, 634 A.2d 592 (1993). The claimant must establish that her injury was sustained during the course and scope of employment and is causally related thereto. McCabe v. Workers' Compensation Appeal Board (Dep't of Revenue), 806 A.2d 512 (Pa. Cmwlth. 2002). 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. DeGraw v. Workers' Compensation Appeal Board (Redner's Warehouse Mkts, Inc.), 926 A.2d 997 (Pa. Cmwlth. 2007).

In a termination proceeding, the burden of proof is on the employer to establish that the claimant's work-related injury has ceased. Udvari v. Workmen's Compensation Appeal Board (USAir, Inc.), 550 Pa. 319, 705 A.2d 1290 (1997). The employer meets this burden when its medical expert unequivocally testifies that it is his opinion, within a reasonable degree of medical certainty, that the claimant is fully recovered**,** can return to work without restrictions, and that there are no objective medical findings which either substantiate the claims of pain or connect them to the work injury. Id. at 327, 705 A.2d at 1293. An opinion that does not recognize the work-relatedness of an injury previously determined to be

work-related or speak of full recovery of that injury is insufficient to support a termination of benefits. GA & FC Wagman, Inc. v. Workers' Compensation Appeal Board (Aucker), 785 A.2d 1087 (Pa. Cmwlth. 2001). See also Gillyard v. Workers' Compensation Appeal Board (Pa. Liquor Control Bd.), 865 A.2d 991 (Pa. Cmwlth. 2005).

Notwithstanding a medical expert's failure to recognize an injury found to be work-related, that expert's testimony can nonetheless support a termination of benefits based on an opinion that the claimant fully recovered from such injury if it, in fact, occurred. Jackson v. Workers' Compensation Appeal Board (Res. for Human Dev.), 877 A.2d 498 (Pa. Cmwlth. 2005); To v. Workers' Compensation Appeal Board (Insaco, Inc.), 819 A.2d 1222 (Pa. Cmwlth. 2003). In evaluating whether an employer's medical expert's opinion is sufficient as a whole to terminate benefits, we have concluded that "[a]t a bare minimum, the expert must know what the accepted work-related injury was to be competent to testify that a claimant has fully recovered from a work-related injury." Elberson v. Workers' Compensation Appeal Board (Elwyn, Inc.), 936 A.2d 1195 (Pa. Cmwlth. 2007). Indeed, a medical professional is not required to believe a condition existed; he is merely required to acknowledge as true the accepted fact that a condition existed and opine as to whether the condition continues to exist at the time of the examination. Folmer v. Workers' Compensation Appeal Board (Swift Transp.), __ A.2d __ (Pa. Cmwlth., No. 596 C.D. 2007, filed Oct. 22, 2008).

Upon review of the aforementioned, we see no error in the WCJ's determinations. As Claimant alleged the NCP is materially incorrect, she had the

burden in this proceeding to establish causation for the additional injuries by unequivocal medical evidence as if a claim petition were filed. Jeanes Hosp.; DeGraw. The WCJ rejected Dr. Naftulin's testimony suggesting that Claimant either sustained a herniated disc at L5-S1 or that the work injury aggravated a protrusion at that site. Instead, the WCJ credited Dr. Levine's testimony that the herniation at L5-S1 is attributable to the degenerative process, not the November 2004 work injury. She credited Dr. Levine's testimony over that of Dr. Naftulin regarding causation based on the absence of an annular tear on the MRI, a negative EMG, inconsistent results on straight leg raising tests, and the absence of calf atrophy. Credibility determinations are the sole province of the WCJ and are not reviewable. Campbell. Consequently, the WCJ did not err in denying Claimant's Review Petition.

We reject Claimant's argument that the WCJ's apparent finding that Dr. Naftulin's testimony was equivocal is erroneous and that a remand is warranted in order to reconsider the Review Petition. We acknowledge that medical testimony will be deemed incompetent if it is equivocal. Coyne v. Workers' Compensation Appeal Board (Villanova Univ.), 942 A.2d 939 (Pa. Cmwlth. 2008). Moreover, medical testimony is equivocal if, after a review of a medical expert's entire testimony, it is found to be merely based on possibilities. Signorini v. Workmen's Compensation Appeal Board (United Parcel Serv.), 664 A.2d 672 (Pa. Cmwlth. 1995). In determining whether medical testimony is equivocal, the medical witness's entire testimony must be reviewed and taken as a whole and a final decision should not rest upon a few words taken out of the context. Indian Creek Supply v. Workers' Compensation Appeal Board (Anderson), 729 A.2d 157 (Pa. Cmwlth. 1999).

The WCJ indicated that Dr. Naftulin "seemed rather equivocal" in opining Claimant had work-related "discogenic pain" or an "internal disc disruption at L5-S1." In stating as such, the WCJ reiterated Dr. Naftulin's use of the terms "most likely" and "possible' in rendering his opinion as to Claimant's diagnosis. The use of these terms appropriately gave rise to a concern by the WCJ as to whether Dr. Naftulin's opinion was equivocal or unequivocal. Signorini. Assuming his testimony was equivocal, his opinions would be rendered incompetent and unable to support a finding that Claimant is hindered by these conditions. Coyne. Generally, however, as medical testimony should be considered as a whole and not based on one or two excerpts taken from a medical expert's transcript, it would ordinarily be prudent to review the remaining testimony given by Dr. Naftulin to determine whether it is equivocal as a whole. Anderson.

A review of Dr. Naftulin's testimony as a whole is unnecessary here, however. The WCJ's purported finding that Dr. Naftulin offered an equivocal opinion served only to supplement the WCJ's initial finding that Dr. Levine was more credible than Dr. Naftulin concerning whether Claimant's herniated disc or aggravation of the same was caused by Claimant's work injury of 2004. In so stating, we note the WCJ's use of the phrase "I also note." Dr. Levine's credible opinion indicates that Claimant's herniation at L5-S1 was not traumatically induced but rather part of the degenerative process. We can not reweigh this finding consistent with Campbell. Consequently, even if we were to assume a thorough review of Dr. Naftulin's opinion would indicate Dr. Naftulin's opinion was unequivocal, no relief, i.e., a remand, would be warranted.[3]

[3] Claimant makes no argument that her Review Petition was merely a protective measure in defending against Employer's Termination Petition and that she need not establish causation

Regarding Claimant's argument that the WCJ erred in granting Employer's Termination Petition, we reiterate that Employer had the burden in this proceeding to establish by unequivocal medical evidence that Claimant was fully recovered from her work-related injury, that she could return to work without restriction, and that any complaints of pain are due to a non-work-related cause. Udvari. It met its burden based on the credible testimony of Dr. Levine.

It is acknowledged that Dr. Levine indicated in his deposition that Claimant's work-related diagnosis was "back pain," not a lumbosacral sprain and strain as memorialized in the NCP. Nonetheless, a review of relevant case law reveals that whether a medical expert's testimony can support a termination of benefits depends on a thorough review of the employer's medical evidence and that a termination of benefits is supported by the record here.

In Aucker, the claimant sustained an initial back injury in 1981 necessitating spinal fusion surgery at the L4-5 level. The claimant returned to work and in 1990 he sustained a new injury when he fell onto steel rebars. He was awarded benefits for this new injury pursuant to an NCP that described his injury as an "exacerbation of pseudoarthrosis L4-5." Aucker, 785 A.2d at 1088. The employer attempted to terminate benefits through the testimony of Dr. Morris. Dr.

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between her work injury and the herniated disc at L5-S1 because that condition is similar to or involves the same body part as the accepted lumbosacral sprain and strain. See Marks v. Workers' Compensation Appeal Board (Dana Corp.), 898 A.2d 689 (Pa. Cmwlth. 2006)(holding that the employer must establish, *inter alia*, that a herniated disc at L5-S1 was unrelated to the claimant's work injury acknowledged as a lumbosacral sprain and strain or, in the alternative, that he was fully recovered from that condition because those conditions affected the same body part); But see City of Phila. v. Workers' Compensation Appeal Board (Smith), 860 A.2d 215 (Pa. Cmwlth. 2004)(holding that a lower back strain is not the same as a disc herniation and that when the former is the accepted injury, the claimant must file a review petition and establish causation to amend an NCP to include the latter).

Morris testified that the claimant sprained the muscle ligaments in his back during the July 25, 1990 work-related incident and that the injury had resolved. He acknowledged there was possible pseudoarthrosis at the L4-5 region as a result of the fusion procedure. Dr. Morris further stated "I agree that there is a pseudoarthrosis that I think is of no consequence here." Id. at 1089. This Court held that the NCP of record indicated that the claimant sustained an exacerbation of pseudoarthrosis and that the employer had to present evidence of full recovery from this injury in order to obtain a termination of benefits. As Dr. Morris failed to recognize that the claimant ever sustained an *exacerbation* of pseudoarthrosis at L4-5, and because the claimant's work injury was not a muscular sprain, we concluded it was impossible for him to offer an opinion of full recovery from this injury. Id. at 1092.

In Gillyard, the claimant received benefits pursuant to an NCP describing his injury as a lower back sprain and strain. The employer filed a termination petition alleging he was fully recovered from his work injury as of May of 1995. The WCJ denied the employer's termination petition finding that claimant continued to suffer from disabling "chronic sciatica at the L5-S1 distribution on the right side with disc bulging at L4-5 and L5-S1 area" attributable to the work injury. Gillyard, 865 A.2d at 992-993. No appeal was taken from the WCJ's decision. The employer filed a subsequent termination petition alleging the Claimant fully recovered from his work-related injury as of May of 2001. The employer presented the testimony of Dr. Balasubramanian who indicated the claimant's back was normal with no sign of chronic sciatica or L5-S1 radiculopathy. Dr. Balasubramanian diagnosed the claimant with a lumbar

sprain/strain by history that fully resolved by the time of his examination. Dr. Balasubramanian opined that the claimant could not return to his pre-injury position but attributed his disability to hip problems unrelated to his employment with the employer. He agreed his opinion of full recovery was limited to the sprains and strains. The WCJ credited Dr. Balasubramanian's testimony and granted the employer's termination petition. The Board affirmed.

This Court, on appeal found that because the unappealed decision denying the employer's first termination petition found that the claimant's work injury was chronic sciatica at the L5-S1 distribution on the right side with disc bulging at L5-S1, the employer needed to present evidence of full recovery from these injuries. We reversed the order of the Board affirming the WCJ's decision. We indicated that Dr. Balasubramanian expressly testified that the claimant sustained only a lumbar sprain and strain as a result of his work injury. Further, he limited his opinion of full recovery to only sprain and strain. Relying on Aucker, we determined Dr. Balasubramanian's testimony could not support a termination of benefits. This Court indicated that as a matter of law, the employer failed to meet its burden of proof inasmuch as he failed to offer an opinion of full recovery of all his established work-related injuries. Id. at 996.

The claimant, in To, sustained an injury in the course and scope of his employment on April 23, 1999. The issue in that case was whether the WCJ properly granted the employer's termination petition based upon the testimony of its medical expert, Dr. Mauthe, who did not believe that the injury acknowledged in the NCP ever occurred.[4] Upon review, we affirmed noting that regardless of Dr. Mauthe's disbelief that an injury occurred, he suggested that even if the injury did

[4] Although the parties in To agreed an NCP was issued, no NCP was ever submitted into evidence.

occur as described the claimant was fully recovered. In support of his opinion, Dr. Mauthe referenced the claimant's normal physiologic examination, his review of the medical records, and his belief that the claimant was a malingerer.

To was relied upon by this Court in the Jackson case. In Jackson, the claimant sustained injuries to her knees, back, and arms. The WCJ granted the employer's termination petition based on the credible testimony of the employer's medical expert, Dr. Meller. Dr. Meller's testimony, to the extent pertinent to this matter, was that "if there was an injury [to the claimant's knee], it resolved." Jackson, 877 A.2d at 501. We affirmed the WCJ's grant of the employer's termination petition noting that even if Dr. Meller did not believe the claimant sustained a knee injury as a result of the work incident, he assumed that if such an injury had occurred, the claimant was nonetheless recovered from it.

We reiterate that Dr. Levine opined that he diagnosed Claimant's work injury as an episode of back pain and that it had resolved. This is a distinct diagnosis from a lumbosacral sprain and strain recognized in the NCP. Dr. Levine's testimony is devoid of any express statement such as if Claimant sustained a lumbosacral sprain and strain as recognized in the NCP, he was fully recovered from the same. Thus, To and Jackson are inapplicable here. Nonetheless, we note that the facts of this case are also distinguishable from Aucker and Gillyard. Dr. Levine did not refer to any lumbar sprains and strains that Claimant may have had and indicate that they are "of no consequence here." Moreover, he was never questioned whether he was specifically limiting his opinion of full recovery to his diagnosis of "back pain" to the exclusion of any other possible diagnosis.

As indicated above, Elberson and Folmer hold that a medical expert need only accept as true that a claimant sustained the work-related injury referenced in an NCP to competently render an opinion of full recovery. The fact that his opinion of the nature of the injury differentiates from the accepted diagnosis or that he may disagree that an injury occurred at all may be rendered immaterial if this criteria is met. Dr. Levine was questioned whether the NCP that describes Claimant's injury as a lumbosacral sprain and strain should be amended to include a herniated disc or an aggravation of a herniated disc. Dr. Levine answered this question in the negative. More importantly, he did not dispute the diagnosis contained in the NCP, nor did he at any point recant his opinion of full recovery subsequent to this discussion. Consistent with Elberson and Folmer, we believe Dr. Levine's testimony was competent to support a termination of benefits. It is unquestionable that this was a close case. In affirming the Board's order, we are mindful of the mandate in Krumins Roofing that the party who prevailed before the WCJ is entitled to the benefit of all favorable inferences that can be drawn from the evidence. The WCJ found in Employer's favor. We do so as well.

JIM FLAHERTY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ann McGouldrick, Petitioner	:	
v.	:	No. 1449 C.D. 2008
Workers' Compensation Appeal Board (Synthetic Thread Company), Respondent	:	

ORDER

AND NOW, this 3rd day of December, 2008, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

JIM FLAHERTY, Senior Judge