

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jerith Manufacturing and	:	
PMA Insurance Group,	:	
	:	
Petitioners	:	
	:	
v.	:	No. 1686 C.D. 2009
	:	
Workers' Compensation Appeal	:	Submitted: January 8, 2010
Board (Connell),	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: March 2, 2010

In this appeal, we consider whether the Workers' Compensation Appeal Board (Board) erred in affirming an order of a Workers' Compensation Judge (WCJ). The order granted Joseph Connell's (Claimant) petition to review a notice of compensation payable (NCP) and denied Jerith Manufacturing's (Employer) petition to terminate benefits. The WCJ amended the original NCP to include an aggravation of pre-existing left hand carpal tunnel syndrome and right hand carpal tunnel syndrome. Before the Board, Employer maintained Claimant failed to establish through competent medical evidence the connection between his work injury and the carpal tunnel syndrome. Based on the accepted testimony of Claimant and Dr. Saied Talaie (Claimant's Physician), the Board concluded that substantial evidence supported the WCJ's findings. We affirm.

Claimant worked for Employer as a saw operator for five months prior to his injury. Claimant's work duties included using his hands repetitively to cut metal pickets ranging in weight from 50 to 100 pounds.

On March 20, 2006, Claimant cut his left thumb with a knife while performing his work duties causing a tendon and nerve laceration. Approximately one week later, Claimant's Physician, a board-certified plastic surgeon, performed a surgery to repair the injury.

In April, 2006, Employer issued a notice of temporary compensation payable which converted to a NCP by operation of law.

In September, 2007, Dr. Stephanie Sweet (Employer's Medical Expert), a board-certified orthopedic surgeon, performed the last of three independent medical examinations (IME) of Claimant. Shortly thereafter, Employer filed a petition to terminate benefits, alleging Claimant fully recovered from the work injury. Claimant filed a timely answer denying all material allegations.

In addition, in February, 2008, Claimant filed a petition to review the NCP. Hearings before the WCJ ensued.

At hearing, Claimant testified that in November, 1998, while working for a different employer, he began experiencing left hand pain following a work injury. Claimant sought treatment, and the treating physician prescribed Claimant

cortisone injections. Claimant testified he did not believe the treating physician diagnosed left hand carpal tunnel syndrome.¹

Regarding Claimant's current work injury, he testified that approximately one week following surgery, he experienced a "tingling, burning sensation, loss of grip, [and] pain shooting up and down [his] arm." WCJ Dec., 1/22/09, Finding of Fact (F.F.) No. 6c. This pain increased in the months following the surgery, making it difficult for Claimant to dress, cook, and care for his young child.

In July, 2006, Claimant complained to his Physician about the pain in his left hand. As a result of the pain, Claimant began to use his right hand more to compensate for his inability to use his left hand. Shortly thereafter, Claimant developed similar pain in his right hand.

Claimant testified that prior to his work injury, he had no problems performing his job, nor did he experience tingling, burning, and shooting pains in either hand. Claimant believes his work injury to his left thumb has not fully resolved.

In support of his petition to review the NCP, Claimant presented the deposition testimony of his Physician, who testified to Claimant's work injury and

¹ However, Employer's Medical Expert testified that Claimant's 1998 medical records confirm his treating doctor diagnosed him with left hand carpal tunnel syndrome. In addition, Claimant's Physician testified that Claimant informed him that a doctor had diagnosed Claimant with left hand carpal tunnel syndrome in 1998.

resulting carpal tunnel syndrome. Claimant's Physician testified that in July, 2006, Claimant complained of numbness along the left median nerve distribution of his left hand. Claimant's Physician testified he performed a Tinel's sign and Phalen's test that were both positive for nerve irritation. Claimant's Physician ordered an electromyogram (EMG) test, which confirmed Claimant has left hand carpal tunnel syndrome.

Claimant's Physician further acknowledged that Claimant previously received treatment for carpal tunnel syndrome in his left hand in 1998. Ultimately, Claimant's Physician opined that the March, 2006 work injury aggravated Claimant's pre-existing left hand carpal tunnel syndrome. In addition, Claimant's Physician opined that as a result of overuse of the right hand, Claimant developed right carpal tunnel syndrome. Accordingly, Claimant's Physician opined the left and right hand carpal tunnel syndrome occurred as a residual effect of Claimant's work injury. Claimant's Physician opined Claimant has not fully recovered from the work injury and its residual effects.

In opposition, Employer presented the deposition testimony of Employer's Medical Expert. However, the WCJ rejected this testimony to the extent it conflicted with Claimant's Physician's testimony.

Accepting Claimant's and his Physician's testimony as credible, the WCJ determined Claimant sustained a complex thumb laceration that aggravated his pre-existing left hand carpal tunnel syndrome and, as a result of overuse of the right hand, he developed right hand carpal tunnel syndrome. Also, the WCJ denied Employer's petition to terminate benefits, concluding Employer failed to present

competent medical evidence that Claimant fully recovered from his work injury. Accordingly, the WCJ amended the NCP to include an aggravation of pre-existing left hand carpal tunnel syndrome and the development of right hand carpal tunnel syndrome.

Employer appealed, contending the WCJ erred in finding Claimant established through competent medical evidence that his work injury resulted in left and right hand carpal tunnel syndrome. The Board, however, concluded that substantial evidence supported the WCJ's findings that Claimant's carpal tunnel syndrome resulted from his work injury.²

In this further appeal, Employer asserts Section 311 of the Workers' Compensation Act (Act), 77 P.S. §631, required Claimant to provide notice of the carpal tunnel syndrome within 120 days of its occurrence. Employer argued Claimant failed to provide notice within 120 days. Employer further contends Claimant did not establish through unequivocal medical evidence that he

² In their decisions, both the WCJ and the Board referred to the first paragraph of Section 413(a) of the Workers' Compensation Act (Act), Act of June 2, 1913, P.L. 736, as amended, 77 P.S. §771 (relating to modification of an NCP that is materially incorrect). Here, however, Claimant filed a review petition to amend the NCP to include a subsequently-arising medical condition. Under these circumstances, the applicable provision is the second paragraph of Section 413(a), 77 P.S. § 772 (relating to amendment of an NCP based upon a subsequently-arising medical condition related to the original injury). See Cinram Mfg., Inc. v. Workers' Comp. Appeal Bd. (Hill), __ Pa. __, 975 A.2d 577 (2009) (clarifying that amendments based on consequential conditions are to be made only upon consideration of a review petition).

Despite improperly referring to the first paragraph of Section 413(a) of the Act, the workers' compensation authorities properly considered whether Claimant established the connection between his work injury and the subsequently-arising carpal tunnel syndrome through competent medical evidence. Moreover, Employer does not take issue with the improper reference to the first paragraph of Section 413(a) of the Act, 77 P.S. §771.

aggravated his pre-existing left hand carpal tunnel syndrome and developed right hand carpal tunnel syndrome as a result of his work injury. Finally, Employer asserts it established through competent medical evidence that Claimant fully recovered from his work injury and, thus, the WCJ erred in denying its petition to terminate benefits. After reviewing the record, we disagree.³

First, relying on Matthews v. Workers' Compensation Appeal Board (Elwyn Institute), 967 A.2d 452 (Pa. Cmwlth. 2009), Employer contends Claimant failed to notify Employer of the carpal tunnel syndrome in either hand within 120 days of its occurrence. Employer, however, failed to raise this issue before the WCJ or the Board; therefore, Employer is prohibited from raising it before this Court. Id. (issue of notice waived where party failed to raise it before the WCJ, thereby denying an opportunity for full litigation of the issue and any resultant fact findings necessary for effective appellate review); see also Bittinger v. Workers' Comp. Appeal Bd. (Lobar Assocs., Inc.), 932 A.2d 355 (Pa. Cmwlth. 2007) (failure to raise an issue before the WCJ or Board constitutes a failure to preserve that issue for review by this Court); Pa. R.A.P. 1551(a) (no question shall be heard or considered by the Court that was not raised before the government unit).

Next, Employer contends Claimant did not establish through competent medical evidence that he aggravated his pre-existing left hand carpal tunnel syndrome and developed right hand carpal tunnel syndrome as a result of

³ Our review is limited to determining whether the record supported the necessary findings of fact, whether errors of law were made, or whether constitutional rights were violated. Lahr Mech. & State Workers' Ins. Fund v. Workers' Comp. Appeal Bd. (Floyd), 933 A.2d 1095 (Pa. Cmwlth. 2007).

his work injury. In particular, Employer asserts Claimant's Physician diagnosed Claimant's left hand carpal tunnel syndrome without reviewing Claimant's medical records regarding his left hand carpal tunnel treatment in 1998. Employer thus asserts Claimant's Physician's testimony was not competent. As a result, Employer argues, the WCJ erred in granting Claimant's petition to review to amend the NCP to include an aggravation of existing left hand carpal tunnel syndrome and the development of right hand carpal tunnel syndrome.

We note that a claimant seeking to amend a NCP pursuant to Section 413(a) of the Act, 77 P.S. §772, has the burden of proving through unequivocal medical evidence that his disability has increased and that the original work-related injury caused the amending disability. See Huddy v. Workers' Comp. Appeal Bd. (U.S. Air), 905 A.2d 589 (Pa. Cmwlth. 2006); see also Cinram Mfg., Inc. v. Workers' Comp. Appeal Bd. (Hill), ___ Pa. ___, 975 A.2d 577 (2009).

Furthermore, unequivocal medical testimony is testimony that in the opinion of the medical expert, the claimant's condition resulted from the work experience. Johnson v. Workers' Comp. Appeal Bd. (Abington Mem'l Hosp.), 816 A.2d 1262 (Pa. Cmwlth. 2003). In reviewing an expert's testimony, it must be taken as a whole, and a final decision "should not rest upon a few words taken out of the context of the entire testimony." Lewis v. Commonwealth, 508 Pa. 360, 366, 498 A.2d 800, 803 (1985). In addition, we recognize "the requirement that medical evidence be unequivocal cannot reasonably be viewed as a demand for perfect testimony from members of the medical profession." Children's Hosp. of Phila. v. Workmen's Comp. Appeal Bd. (Washington), 547 A.2d 870, 872 (Pa. Cmwlth. 1988).

Here, Claimant's Physician testified he performed a Tinel's sign and a Phalen's test to determine whether Claimant felt numbness along the left median nerve distribution and both tests were positive for nerve irritation. Dep. of Saied Talaie M.D., 8/25/09, at 12. As a result, Claimant's Physician sent Claimant for an EMG, which confirmed he has left hand carpal tunnel syndrome. Id. at 13. Furthermore, Claimant's Physician testified that since Claimant previously had left carpal tunnel treatment, Claimant's thumb injury aggravated his pre-existing left hand carpal tunnel syndrome. Id. at 15. In addition, Claimant's Physician testified that as a result of favoring his left hand and overusing his right, Claimant developed right hand carpal tunnel syndrome. Id. at 15-16.

Claimant's Physician explained that Claimant's work-related thumb injury was in close proximity to his left median nerve distribution and that, in general, the carpal tunnel consists of "[n]ine tendons and a median nerve [that goes] through the tunnel [resulting in] an extremely tight space." Dep. of Saied Talaie, M.D., at 17. Thus, "the residual swelling as a result of surgery, trauma, [and] physical therapy can bring [out] those symptoms of Carpal Tunnel Syndrome that have been in remission." Id. at 18. Accordingly, Claimant's Physician testified that Claimant's work injury aggravated his pre-existing left hand carpal tunnel syndrome and caused him to develop right hand carpal tunnel syndrome. The additional injuries are the "residual effect[s] of [his] original work injury to his left thumb." Id. at 17.

Thus, Claimant's Physician unequivocally testified that Claimant's aggravation of pre-existing left hand carpal tunnel syndrome and the development of right hand carpal tunnel syndrome resulted from his work injury. Accordingly,

we agree with the Board that, based on the record as a whole, Claimant's Physician's testimony was competent to support an amendment to the NCP.

As to Employer's argument that failure to review 1998 treatment records rendered Claimant's Physician's testimony incompetent, we disagree. The amount of background information available to an expert witness is a factor which affects the credibility and weight, not the competency, of the expert's opinion. The WCJ, as fact finder, has exclusive province over questions of credibility, and a reviewing court is not to reweigh the evidence or review the credibility of witnesses. City of Phila. v. Workers' Comp. Appeal Bd. (Reed), 785 A.2d 1065 (Pa. Cmwlth. 2001).

Thus, the WCJ was free to accept Claimant's Physician's competent and unequivocal testimony, which indicated that Claimant's work injury resulted in an aggravation of his left hand carpal tunnel syndrome and the development of right hand carpal tunnel syndrome. WCJ Dec., F.F. No. 9d. Furthermore, the WCJ was also free to reject Employer's Medical Expert's testimony to the extent that it conflicted with Claimant's Physician's testimony. WCJ Dec., F.F. No. 9b; City of Phila.

Upon review, we conclude there is substantial evidence to support the WCJ's findings that Claimant's injury to his left thumb resulted in an aggravation of his pre-existing left hand carpal tunnel syndrome and in the development of right hand carpal tunnel syndrome. City of Phila.; Ne. Hosp.

Finally, Employer asserts it established through competent medical evidence that Claimant fully recovered from his work injury and, thus, the WCJ should have granted its petition to terminate benefits.

It has long been held that the burden of proof in a termination petition is on the employer. Giant Eagle, Inc. v. Workmen's Comp. Appeal Bd. (Chambers), 635 A.2d 1123 (Pa. Cmwlth. 1993). Termination is proper where the WCJ credits testimony of the employer's medical expert, who testifies unequivocally that, within a reasonable degree of medical certainty, the employee is fully recovered and can return to work without restrictions, and there are no objective medical findings that either substantiate the claims of pain or connect them to the work injury. Udvari v. Workmen's Comp. Appeal Bd. (USAir, Inc.), 550 Pa. 319, 705 A.2d 1290 (1997). This burden is considerable because disability is presumed to continue until demonstrated otherwise. Giant Eagle, Inc.

Here, the WCJ specifically rejected Employer's Medical Expert's testimony as not credible to the extent it conflicted with Claimant's Physician's testimony. WCJ Dec., F.F. No. 9b. Moreover, the WCJ specifically stated Employer's Medical Expert "failed to present competent and credible medical evidence that Claimant was fully recovered from the work injury." WCJ Dec., F.F. No. 9c. The WCJ was free to reject as not credible portions of Employer's Medical Expert's testimony offered to support Employer's petition to terminate benefits, including the opinion of full recovery. Thus, there is no accepted evidence to support a termination.

Accordingly, we affirm the Board's order.

ROBERT SIMPSON, Judge

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ORDER

AND NOW, this 2nd day of March, 2010, the Workers' Compensation Appeal Board's order is **AFFIRMED**.

ROBERT SIMPSON, Judge