IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ethan Lashlee, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (G.M. McCrossin, Inc.), Respondent	:	No. 1725 C.D. 2007
	:	Submitted: December 21, 2007

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: February 25, 2008

Ethan Lashlee (Claimant) petitions for review from the order of the Workers' Compensation Appeal Board (Board) that affirmed the order of the Workers' Compensation Judge (WCJ) that dismissed Claimant's claim petition and granted the termination petition of G.M. McCrossin, Inc. (Employer).

Employer hired Claimant, a journeyman electrician, to tear out electrical equipment. On April 22, 2004, Claimant stepped on the grating on a storm drain that collapsed. Claimant's left leg fell eighteen to twenty-four inches into the drain. As he fell forward, he struck his left kneecap on the grating. Claimant treated with Douglas E.R. Roeshot, M.D., (Dr. Roeshot), an orthopedic surgeon, who placed Claimant on light duty. Claimant was laid off on July 30, 2004.

On December 23, 2004, Claimant petitioned for benefits and alleged that he suffered injuries to his left leg, left knee, and his back, including broken Harrington rods,[1] on April 22, 2004. Employer admitted that Claimant suffered a left knee strain but denied the other allegations.

On August 12, 2005, Employer petitioned to terminate and alleged that Claimant was fully recovered from the left knee injury as of July 19, 2005. Claimant denied the allegation. All matters were consolidated before the WCJ.

Claimant explained his job and the circumstances surrounding his injury. He still had weakness and soreness after the Harrington rods were surgically removed from his back on September 26, 2005, but he was feeling a lot better. Notes of Testimony, December 14, 2005, (N.T. 12/14/05) at 13; Reproduced Record (R.R.) at 279a. Claimant's knee condition gave him quite a bit of pain. N.T. 12/14/05 at 14; R.R. at 280a.[2]

Claimant presented the deposition testimony of Michael W. Molter, D.O. (Dr. Molter), board-certified in physical medicine and rehabilitation and a treating physician of Claimant. Dr. Molter diagnosed Claimant with patellofemoral pain which "means the undersurface of the kneecap is irritated

---

[1] The Harrington rods were used to fuse Claimant's spine after he had suffered a fractured vertebra in a 1988 automobile accident.

[2] Claimant's wife and two of his friends testified that Claimant was restricted in his activities after the fall. Clifford Bennett, a co-worker of Claimant, testified that he worked with Claimant for Employer and that after his injury he was on light duty. N.T. 12/14/05 at 31; R.R. at 297a.

where it contacts the top of the knee joint." as well as degenerative tear of the medial meniscus. Deposition of Michael W. Molter, D.O., August 26, 2005, (Dr. Molter Deposition) at 7 and 9; R.R. at 111a and 113a. Dr. Molter attributed Claimant's left knee condition to the April 22, 2004, work-related injury. Dr. Molter Deposition at 10; R.R. at 114a.

Claimant also presented the deposition testimony of James Kang, M.D. (Dr. Kang), a board-certified orthopedic surgeon who removed the Harrington rods. Deposition of James Kang, M.D., October 5, 2005, (Dr. Kang Deposition) at 15. Dr. Kang opined that the broken Harrington rods and the inflammation of the soft tissue surrounding them were caused by the work-related fall. Dr. Kang Deposition at 17. [3]

Employer[4] presented the deposition testimony of Jeffrey Kann, M.D. (Dr. Kann), a board-certified orthopedic surgeon. Dr. Kann examined Claimant's

---

[3] Claimant presented the deposition testimony of Brett Lawrence Acker, M.D. (Dr. Acker), a board-certified family practitioner and Claimant's family doctor. Dr. Acker testified within a reasonable degree of medical certainty that there was no "other explanation for his [Claimant] back or knee pain other than this fall." Deposition of Brett L. Acker, M.D., August 18, 2005, (Dr. Acker Deposition) at 17; Supplemental Reproduced Record (S.R.R.) at 17. Claimant also presented the deposition testimony of David Raptosh (Raptosh), a registered occupational therapist. Raptosh performed a functional capacity evaluation of Claimant. In his evaluation of Claimant, Raptosh reported that Claimant rated his left knee pain level as a five on a scale of one to ten. Deposition of David Raptosh, November 21, 2005, (Raptosh Deposition) at 10; S.R.R. at 68. Claimant's left knee rated a four on a scale of one to five for motion, flexion, and extension. Raptosh Deposition at 13; S.R.R. at 71.

[4] Greg Blakeley (Blakeley), Claimant's foreman, testified that Claimant informed him of the injury on April 22, 2004. Notes of Testimony, August 17, 2005, (N.T. 8/17/05) at 10-11; R.R. at 78a-79a. Blakeley testified that Claimant returned to regular duty after two weeks. N.T. 8/17/05 at 13; R.R. at 81a. According to Blakeley, Claimant did not complain to him of any

(Footnote continued on next page…)

left knee on July 19, 2005. Dr. Kann opined Claimant had fully recovered from any injury to his left knee sustained on April 22, 2004, and could return to his time of injury job with no restrictions. Deposition of Jeffrey Kann, M.D., September 29, 2005, (Dr. Kann Deposition) at 18-20; R.R. at 145a-147a.

Employer also presented the deposition testimony of Michael Seel, M.D. (Dr. Seel), a board-certified orthopedic surgeon. Dr. Seel examined Claimant on July 19, 2005, and diagnosed Claimant with subjective complaints of thoracolumbar back pain. Deposition of Michael Seel, M.D., November 3, 2005, (Dr. Seel Deposition) at 21; R.R. at 216a. Dr. Seel testified that Claimant's diagnosis was unrelated to the April 22, 2004, injury because there was no mention of low back pain for approximately seven weeks after the injury. Dr. Seel Deposition at 22-24; R.R. at 217a-219a.

At hearing on December 14, 2005, the WCJ sustained Employer's hearsay objection to the report of Dr. Bailey and Claimant's hearsay objection to the report of Dr. Roeshot. N.T. 12/14/05 at 9 and 11; R.R. at 275a and 277a.

The WCJ dismissed Claimant's claim petition and granted Employer's termination petition effective July 19, 2005. The WCJ acknowledged that Claimant suffered a left knee strain but was not disabled. The WCJ found that

---

(continued…)

back problems. N.T. 8/17/05 at 14; R.R. at 82a. Howard "Butch" Haus, safety director for Employer, corroborated Blakeley's testimony.

Claimant failed to meet his burden that the back injury was related to the April 22, 2004, fall. The WCJ did not find Claimant credible. The WCJ accepted the testimony of Claimant's lay witnesses. The WCJ found Blakeley, Dr. Kann, and Dr. Seel credible. The WCJ made the following relevant finding of fact: "75. An adverse inference must be drawn from Claimant's reliance on physicians who did not examine him until seven months after the work injury, and his election to not present testimony from Dr. Roeshot and Dr. Bailey. . . ." WCJ's Decision, May 31, 2006, Findings of Fact No. 75 at 9; R.R. at 356a. The Board affirmed.

Claimant contends that the WCJ erred when he determined that an adverse inference must be drawn from Claimant's failure to call Dr. Roeshot and Dr. Bailey as witnesses.[5]

Claimant treated with Dr. Roeshot soon after the injury. Dr. Bailey examined Claimant's back in August 2004. Claimant did not call either physician. The WCJ found an adverse inference must be drawn against Claimant because he relied on physicians who did not examine him until seven months after the work injury and did not present live testimony from Dr. Roeshot and Dr. Bailey. The Board affirmed because Claimant failed to produce testimony from physicians who had an integral role in his early treatment.

[5] 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 Marriott Corporation v. Workers' Compensation Appeal Board (Knechtel), 837 A.2d 623, 631 (Pa. Cmwlth. 2003), this Court held that the "missing witness" rule, which permits an adverse inference, is only applicable where the uncalled witness is only within the reach of and knowledge of one of the parties.

Here, nothing in the record indicates Claimant was the only party who had the opportunity to call Dr. Roeshot and Dr. Bailey. The Board erred.

Employer acknowledges that the WCJ and Board erred but asserts that the error was harmless because the WCJ's findings that Claimant had no persistent injury at the time of his layoff were supported by substantial evidence and the WCJ set forth specific credibility determinations to support the findings.

In Monaghan v. Board of School Directors of Reading School District, 618 A.2d 1239, 1243 (Pa. Cmwlth. 1992), this Court determined that only findings of fact that are necessary to support an adjudication must be supported by substantial evidence. If a finding is not supported by substantial evidence, the reviewing court does not automatically have to reverse. The finding in question must be necessary to the adjudication. In order for a reviewing court not to affirm an adjudication, the finding of fact must be unsupported and necessary to the adjudication. An unsupported finding of fact which is not necessary to the adjudication constitutes harmless error.

Under the harmless error test in Monaghan, this Court determines that the finding regarding the adverse inference was critical to the adjudication. The finding regarding the adverse inference was made in error. This finding could possibly have colored the view of the WCJ of the medical witnesses Claimant did present. However, because the WCJ could possibly reach the same decision without drawing an adverse inference, this Court must remand to the Board with instructions to remand to the WCJ to reach a decision without considering an adverse influence against Claimant.

Accordingly, this Court vacates the order of the Board and remands to the Board with instructions to remand to the WCJ for proceedings consistent with this opinion.[6]

BERNARD L. McGINLEY, Judge

[6] Because of this Court's decision to vacate and remand, this Court need not consider Claimant's other issues. Claimant also contends that the Board erred when it affirmed the WCJ's finding that Claimant was not entitled to ongoing benefits for a work-related left knee injury because the finding was not supported by substantial evidence, the WCJ capriciously disregarded evidence, the decision was not well-reasoned, and Dr. Kann's opinion as to full recovery is equivocal and incompetent. Claimant also contends that the Board committed an error of law when it affirmed the admission into evidence of Dr. Roeshot's report when it was admitted only to the extent that it was corroborated by other evidence when no such evidence was submitted.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ethan Lashlee, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (G.M. McCrossin, Inc.), Respondent	:	No. 1725 C.D. 2007

O R D E R

AND NOW, this 25th day of February, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is vacated and this case is remanded to the Workers' Compensation Appeal Board with instructions to remand the case to the Workers' Compensation Judge for proceedings consistent with this opinion. Jurisdiction relinquished.

_____

BERNARD L. McGINLEY, Judge