IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert Davis, Petitioner	:	
v.	:	No. 1880 C.D. 2007
Workers' Compensation Appeal Board (Temporary Personnel Services), Respondent	:	Submitted: January 25, 2008

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: March 12, 2008**

In this workers' compensation appeal, Robert Davis (Claimant) asks whether a Workers' Compensation Judge (WCJ) erred in denying his claim petition. Because we agree Claimant did not prove his two-week employment with Temporary Personnel Services (Employer) aggravated his preexisting injury, we affirm.

Claimant began working for Employer, a temporary staffing agency, in September 2005. Employer assigned Claimant to the American Bridge Company, where Claimant worked for approximately two weeks as a "grinder." This position required Claimant to use both hands on a grinding machine to "grind metal down." WCJ Op., 2/28/07, Finding of Fact (F.F.) No. 1.

In October 2005, Claimant filed a claim petition alleging that as of September 22, 2005, he sustained an aggravation of preexisting tendonitis in his thumbs.[1] Employer denied the material allegations. Litigation ensued.

Before the WCJ, Claimant testified he worked for American Bridge as a grinder for approximately two weeks. He testified that as a result of this work he began to experience pain and numbness in his thumbs. Claimant further testified he previously worked at Redcap Cleaners as a shirt presser and, as a result of his employment at Redcap, he developed tendonitis in both thumbs. Claimant explained he previously underwent two surgeries to alleviate the tendonitis.

In support of his claim petition, Claimant presented the deposition testimony of Dr. Oriente A. DiTano, who is board certified in orthopedic surgery (Claimant's Physician). Claimant's Physician testified Claimant initially developed tendonitis in his thumbs while working for Redcap Cleaners. He further testified he performed surgery on Claimant's thumbs in January and April 2005, and released Claimant to return to work in June 2005. Claimant's Physician further testified he treated Claimant for pain in his left thumb in August 2005. At that time, he diagnosed an exacerbation of a preexisting arthritic condition in the joints of the thumbs. Claimant's Physician opined Claimant sustained a new injury in August 2005 as a result of his work for Employer, and Claimant was disabled from performing full duty work as a grinder. On cross-examination, however, Claimant's Physician agreed he was unaware Claimant did not begin work as a grinder until

[1] Claimant further alleged this condition led to mental depression. However, he did not develop this issue before the WCJ, and, as such, the WCJ made no findings on this issue. Claimant does not pursue this claim on appeal.

September 2005, and he acknowledged if this were the case, his opinion would change.

In opposition, Employer presented the deposition testimony of Dr. Robert P. Durning, who is also board certified in orthopedic surgery (Employer's Physician). Based on his examination, a review of Claimant's medical records and Claimant's history, Employer's Physician opined Claimant did not sustain a new injury or an aggravation of preexisting arthritis as a result of his work for Employer.

In addition, Employer presented the testimony of its director of administration, who confirmed Claimant began work at American Bridge on September 2, 2005.[2]

Ultimately, the WCJ credited Claimant's testimony that he "has pain complaints in his thumbs"; however, the WCJ determined Claimant's condition was not related to his "very short employment as a grinder." F.F. No. 7(a) (emphasis in original). In addition, the WCJ accepted Employer's Physician's testimony over that of Claimant's Physician. Specifically, the WCJ credited Employer's Physician's opinion that, while the work as a grinder could increase Claimant's symptoms, it did not in any way change his underlying arthritic condition. Further, in rejecting Claimant's Physician's testimony, the WCJ stated: "[C]laimant reported 'new' thumb symptoms to [his Physician] on August 23, 2005, days before he began working as a grinder. [Claimant's Physician] indicated that this fact could 'change' his opinions."

[2] Employer also presented the testimony of its regional sales manager, who testified that no one from American Bridge advised her Claimant sustained a work injury, but Claimant informed her he could not physically perform the job.

F.F. No. 7(b). Based on these determinations, the WCJ concluded Claimant did not meet his burden of proving he sustained a work injury while working for Employer. Thus, the WCJ denied Claimant's claim petition.

Claimant appealed, and the Workers' Compensation Appeal Board affirmed. Claimant now appeals to this Court.

On appeal,[3] Claimant argues the testimony of both his Physician and Employer's Physician support his position that he suffered an aggravation of his preexisting arthritic condition while working for Employer as a grinder. Claimant asserts, even though the WCJ credited Employer's Physician's opinions over those of Claimant's Physician, the WCJ should have granted the claim petition because Employer's Physician clearly testified Claimant's job as a grinder made his condition worse. Claimant also maintains Employer's Physician's testimony does not support the WCJ's finding that Claimant did not sustain a compensable aggravation because Employer's Physician did, in fact, testify Claimant's condition worsened as a result of his work with Employer.

In a claim petition proceeding, the claimant bears the burden of proving he suffers from a work-related injury that occurred in the course and scope of his employment and the injury results in a loss of earning power. Inglis House v. Workmen's Comp. Appeal Bd. (Reedy), 535 Pa. 135, 634 A.2d 592 (1993). In cases

[3] Our review is limited to determining whether the WCJ's findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Minicozzi v. Workers' Comp. Appeal Bd. (Indus. Metal Plating, Inc.), 873 A.2d 25 (Pa. Cmwlth. 2005).

where the injury is not attributable to a specific incident and the causal relationship between the injury and the employment is not obvious, unequivocal medical testimony is required to establish this causal relationship. Lynch v. Workmen's Comp. Appeal Bd. (Teledyne Vasco), 545 Pa. 119, 680 A.2d 847 (1996).

Where a claimant alleges aggravation of a preexisting condition, compensation is payable where a claimant proves, "(1) that the injury or aggravation arose in the course of employment, and (2) that the injury was related to that employment." Vazquez v. Workmen's Comp. Appeal Bd. (Masonite Corp.), 687 A.2d 66, 68 (Pa. Cmwlth. 1996).

This Court explained the legal test for whether an employer is liable for workers' compensation benefits when a claimant alleges an aggravation of a preexisting injury:

> We have held that if a compensable disability results directly from a prior injury but manifests itself on the occasion of an intervening incident which does not contribute materially to the physical disability, then the claimant has suffered a recurrence. Conversely, where the intervening incident does materially contribute to the renewed physical disability, a new injury, or aggravation, has occurred. It is well settled in Pennsylvania that an "aggravation of a pre-existing condition" is deemed a new injury for purposes of workers' compensation law, thus, rendering the employer's current insurance carrier responsible for all medical and wage loss benefits arising from claimant's new injury. Alternatively, if a claimant has sustained a "recurrence of a prior injury," the insurance carrier responsible for employer's coverage at the time of claimant's original injury will be held liable for all disability benefits resulting from claimant's most recent injury.

S. Abington Twp. v. Workers' Comp. Appeal Bd. (Becker & ITT Specialty Risk Servs.), 831 A.2d 175, 181 (Pa. Cmwlth. 2003) (emphasis in original) (citations omitted). Thus, in order to prove an aggravation rather than a recurrence, the claimant must prove the intervening incident materially contributed to the disability. Pittsburgh Steelers Sports, Inc. v. Workers' Comp. Appeal Bd. (Williams), 814 A.2d 788 (Pa. Cmwlth. 2002).

The question of whether a disability results from an aggravation (making the employer at the time of the aggravation liable) or a recurrence (making the employer at the time of the original injury liable) is a question of fact to be determined by the WCJ. C.P. Martin Ford, Inc. v. Workers' Comp. Appeal Bd. (Resad Dzubur & Norristown Ford), 767 A.2d 1164 (Pa. Cmwlth. 2001). When the claimant questions the substantiality of the evidence, we examine the entire record to determine if there is evidence a rational person could accept to support the WCJ's findings. Minicozzi v. Workers' Comp. Appeal Bd. (Indus. Metal Plating, Inc.), 873 A.2d 25 (Pa. Cmwlth. 2005). The WCJ has exclusive province over questions of credibility and evidentiary weight. McNulty v. Workers' Comp. Appeal Bd. (McNulty Tool & Die), 804 A.2d 1260 (Pa. Cmwlth. 2002). The WCJ is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part. Williams v. Workers' Comp. Appeal Bd. (USX Corp.-Fairless Works), 862 A.2d 137 (Pa. Cmwlth. 2004).

Here, Claimant challenges the WCJ's finding of no injury. At the core of Claimant's argument is a portion of Employer's Physician's initial report, in which Employer's Physician opined Claimant "developed an exacerbation, or temporary worsening, of pre-existing bilateral thumb abnormalities, and therefore sustained an

aggravation (as I understand the meaning of the term) of pre-existing abnormalities at work on September 22, 2005." Reproduced Record (R.R.) at 39a. From this statement in Employer's Physician's initial report, Claimant argues the WCJ should have found a compensable injury occurred.

As our previous discussion explains, the distinction between an aggravation and a recurrence involves specialized legal terms used to attribute causation of the current disability to a particular event or series of events. S. Abington Twp. Thus, reference by Employer's Physician to an aggravated or exacerbated condition requires further analysis.

Here, Claimant did not prove any exacerbation of a condition in his thumbs materially contributed to disability. Clearly, the WCJ made no such finding. To the contrary, the WCJ credited Employer's Physician's opinion that "while [Claimant's] work as a grinder could increase his symptoms, it did not in any way change his underlying arthritic condition." F.F. No. 7(b) (emphasis added). Further, the WCJ determined Claimant's condition was "not … related to his very short employment as a grinder." F.F. No. 7(a) (emphasis in original). Our review of the record as a whole discloses adequate support for these determinations.

Specifically, although in his initial report, Employer's Physician opined Claimant "developed an exacerbation, or temporary worsening, of pre-existing bilateral thumb abnormalities, and therefore sustained an aggravation (as I understand the meaning of the term) of pre-existing abnormalities at work on September 22, 2005," R.R. at 39a, he subsequently clarified his opinion in his supplemental report

and deposition testimony. More particularly, in his supplemental report, Employer's Physician stated (with emphasis added):

> I examined [Claimant] on July 10, 2006 and issued a report on that date. I have since reviewed my July 10, 2006 report and realize it contains an important error. Please receive this letter as my correction.
>
> In my July 10, 2006 letter, I indicated it was my opinion that [Claimant] did not sustain a new work-related injury to either of his thumbs on September 22, 2005. That remains my opinion.
>
> On page 7, Line 3 of my July 10, 2006 letter I incorrectly and mistakenly referred to an "aggravation" as occurring on September 22, 2005. In my opinion, [Claimant] did not sustain an "aggravation" of any abnormal physical condition in September 2005.
>
> As I understand the meaning of the terms, [Claimant] sustained a "recurrence" or exacerbation, or continuation of pre-existing thumb abnormalities in September 2005 and did not sustain an "aggravation", and did not sustain new injuries to either of his thumbs in September 2005.
>
> In my opinion, [Claimant's] work activity in September 2005 did not cause any substantial change in the medical condition of either of his thumbs and did not materially contribute to any lasting objective change in either of his thumbs.
>
> I apologize for this potentially confusing error. I hope this letter will clarify my opinion in this case and eliminate potential misinterpretation of my intended meaning.

R.R. at 41a.

In addition, in his deposition testimony Employer's Physician opined that, although Claimant suffers from arthritis in his thumbs, this condition was not

caused by Claimant's work with Employer. R.R. at 95a. Employer's Physician opined Claimant did not sustain an aggravation of his preexisting arthritis, stating:

> I'm aware this word aggravation has specific legal meaning, and I've already mistakenly said aggravation before. But now as I understand it, no aggravation occurred. This is a condition, that because [sic] more bothersome, it was exacerbated or extended or, you know, bothered him, but I don' think it really changed. It was the same basic condition which had been symptomatic before.

R.R. at 96a-97a. Moreover, Employer's Physician clearly and consistently opined Claimant did not sustain a new injury or an aggravation of his preexisting arthritis as a result of his work for Employer. R.R. at 96a, 102a. As such, the WCJ's determination that Claimant did not sustain a compensable injury is adequately supported. Therefore, we affirm.[4]

ROBERT SIMPSON, Judge

[4] Claimant also briefly asserts Employer's Physician's testimony is equivocal, and, therefore, insufficient to support the WCJ's denial of benefits. However, Claimant did not raise this issue before the Board; thus, it is waived. See Bittinger v. Workers' Comp. Appeal Bd. (Lobar Assocs., Inc.), 932 A.2d 355 (Pa. Cmwlth. 2007). In any event, we find this argument puzzling given that Claimant first attempts to rely on Employer's Physician's testimony to establish he suffered a compensable injury. In addition, although Claimant argues Employer's Physician's testimony is legally insufficient to support a denial of benefits, it was Claimant who the bore the burden of proof in this claim proceeding, and the WCJ rejected Claimant's Physician's testimony because he lacked an accurate understanding of Claimant's work history. For these reasons, Claimant's argument is unavailing.

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O R D E R

AND NOW, this 12th day of March , 2008, the order of the Workers' Compensation Appeal Board is **AFFIRMED**.

ROBERT SIMPSON, Judge