

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| James Tobler, | : |
| Petitioner | : |
| v. | : No. 1933 C.D. 2007 |
| | : |
| Workers' Compensation Appeal | : |
| Board (Verizon Pennsylvania, | : |
| Inc.), | : |
| Respondent | : |
| | : |
| Verizon Pennsylvania, Inc., | : |
| Petitioner | : |
| v. | : |
| | : No. 2001 C.D. 2007 |
| Workers' Compensation Appeal | : |
| Board (Tobler), | : |
| Respondent | : Submitted: April 15, 2008 |
| | : |

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
 HONORABLE DAN PELLEGRINI, Judge
 HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY SENIOR JUDGE COLINS**

FILED: June 10, 2008

James Tobler (claimant) petitions for review of order of the Workers' Compensation Appeal Board (Board) affirming the October 3, 2006 decision of Workers' Compensation Judge David Slom (WCJ); Verizon, Pennsylvania, formerly Bell Telephone Company (Employer) cross-appeals.

Claimant was hired in 1969, and was working for Employer as a cable splicer when he injured his back in May, 1995, while he was removing a twenty-

four foot extension ladder from the side of his work truck. The WCJ found that Employer accepted liability for the incident pursuant to a Notice of Compensation Payable (NCP) dated June 8, 1995, describing a work injury in the nature of “lumbar intervertebral disc syndrome, sciatic neuritis, and lumbago.” (Decision of the WCJ, Finding of Fact No. 3, p. 1.) Claimant missed three or four weeks of work after the incident, and returned to work for Employer at modified duty, with no loss of wages. He continued to work at modified duty until November, 2001, when he was terminated from employment for possession of cocaine. He testified that his chiropractic care has continued since the date of his injury. Claimant testified that since he stopped working, his back problems have worsened; in November, 2002, he applied for, and was awarded Social Security Disability benefits.

In July, 2004, Employer filed a Utilization Review Request seeking a determination as to the reasonableness and necessity of treatment provided to claimant by David Barnes, D.O. Thereafter, claimant filed a Petition to Review Utilization Review Determination. In November, 2004, Employer filed a Petition to Terminate Claimant’s Workers’ Compensation Benefits and a Petition to Review Medical Treatment, alleging that claimant resumed medical treatment for a condition unrelated to his work injury and claimant was fully recovered from his work injury.

In March, 2005, claimant filed a Petition to Reinstate Compensation Benefits. In its decision, the WCJ states: “[O]n March 22, 2005, the Claimant filed a Petition to Reinstate Compensation Benefits alleging that *as of March 22, 2005* the Claimant sustained a worsening of condition and injury causing decreased

earning power pertaining to the May 19, 1995, work-related injury.” (Decision of the WCJ, p. 1.) (Italics and emphasis added.)

An issue herein involves an October, 2005 hearing before the WCJ, during which Employer avers that it amended its Termination Petition to also include a Petition to Review the Notice of Compensation Payable, specifically the description of the work injury; however, in his decision, the WCJ concluded that the Notice of Compensation Payable could not be amended, “[A]s a Petition to Review Compensation Benefits was not filed,” citing *Jeanes Hospital v. Workers’ Compensation Appeal Board (Hass)*, 582 Pa. 405, 872 A.2d 159 (2005). (Decision of the WCJ, Conclusion of Law No. 4, p. 7.) On appeal, the Board determined that the WCJ did not err in failing to consider this petition, given the time that elapsed between the 1995 issuance of the NCP and the November, 2004 filing of the Petition to Review the NCP.

All of the petitions were assigned to the WCJ. In his Order, the WCJ: (i) granted claimant’s Reinstatement Petition, directing Employer to pay claimant compensation for total disability at the weekly rate of \$509.00 commencing on March 22, 2005; (ii) denied Employer’s Petition to Terminate Compensation (finding that Employer has not met its burden of proving that claimant is fully recovered from the work injury); (iii) denied Employer’s Petition to Review Medical Treatment (finding that no evidence was submitted establishing that claimant’s medical treatment commencing in 2003 was not related to the accepted work-related injuries); and (iv) granted Employer’s Petition to Review Utilization Review Determination. In his Conclusions of Law, the WCJ stated that because “the Health Care Provider did not submit records within the time limits required and did not submit verification, the Claimant’s Petition for Review of

Utilization Review Determination shall be denied.” (Decision of the WCJ, Conclusion of Law No. 6, p. 7.)

Both Employer and claimant filed appeals with the Board. On September 18, 2007, the Board issued its Opinion and Order affirming the WCJ. These consolidated appeals followed.

On appeal,¹ Employer argues that claimant’s medical evidence is not legally competent to support the WCJ’s findings of fact or conclusions of law related to the Reinstatement Petition. Alternatively, Employer argues that the Board correctly affirmed the WCJ’s award of the Reinstatement Petition as of March 22, 2005.

The WCJ summarized claimant’s testimony with regard to his work history, his back injury, and the progressive worsening of his back problems subsequent to the time he stopped working in November, 2001, and found the testimony credible and uncontradicted by fact witness testimony. (Decision of the WCJ, p. 2.)

In support of his Reinstatement Petition, claimant presented the medical testimony of his treating physician, David Barnes, D.O., who is not board certified. Dr. Barnes initially examined claimant on November 19, 2003, and has continued treating claimant since then. Based upon claimant’s history, physical examinations, a review of medical records, and diagnostic studies, Dr. Barnes opined that claimant sustained an L5-S1 lumbar disc herniation, L5-S1 radiculopathy, chronic low back pain, and lumbosacral sprain and strain caused by

¹ Our standard of review is limited to determining whether the necessary findings of fact are supported by substantial evidence and whether there has been a constitutional violation or an error of law. Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704.

the 1995 work injury. Dr. Barnes opined that claimant's condition worsened after 2001, as a result of the 1995 work injury, and, as a result of the worsening of claimant's symptoms, claimant is not capable of performing the modified cable splicer job with the Employer, and claimant's treatment is reasonable and necessary.

The WCJ determined that Dr. Barnes' opinions with regard to claimant's worsening condition after 2001 and his inability to perform the modified cable splicer job are credible. (Decision of the WCJ, Finding of Fact No. 12, p. 4.)

Claimant also presented the medical testimony of Andrew Berkowitz, M.D., a physician who is board certified in disability evaluations. Dr. Berkowitz examined claimant in February, 2003, at the request of the Pennsylvania Bureau of Disability Determination. Dr. Berkowitz testified that an MRI of claimant's spine showed congenital disc disease and bulge of the intervertebral at L³/₄ and L5-S1, with disc herniation on the right at L5-S1. He noted that the EMG he studied showed L5-S1 radiculopathy. Dr. Berkowitz opined that claimant sustained an L5-S1 radiculopathy and L5-S1 disc herniation as a result of the 1995 work injury. The WCJ determined that Dr. Berkowitz' opinion that claimant is not capable of performing the modified job as a result of the 1995 work injury is credible.

Employer presented the medical testimony of Robert Draper, Jr., M.D., a physician who is board certified in orthopedic surgery, and Michael Brooks, M.D., a physician who is board certified in diagnostic radiology and neuroradiology. Dr. Draper examined claimant on July 1, 2004, and found no evidence of radicular symptoms or radiculopathy. Dr. Draper opined that claimant

had an initial lumbosacral strain which resolved, that degenerative lumbar discs at L4-5 and L5-S1 are not related to the work injury in 1995, and that claimant is fully recovered from that injury. Dr. Brooks reviewed claimant's MRI films, and opined that they revealed degenerative longstanding changes, but no disc herniation at L5-S1, or disc bulging at L4-5 and L5-S1. Dr. Brooks further testified that chronic degenerative changes with compression of nerve roots at the L4-5 level may be associated with a radiculopathy at the L4-5 level that is chronic and pre-existing to the work injury.

The WCJ found that the opinions of Drs. Draper and Brooks that claimant is fully recovered from the 1995 work injury are not credible. (Decision of the WCJ, Findings of Fact Nos. 9-10, pp. 2-3.) The WCJ stated:

Upon review of the conflicting medical evidence presented, the undersigned finds the opinions of Dr. Barnes and Dr. Berkowitz to be more credible and persuasive than the medical opinions of Dr. Draper and Dr. Brooks, regarding the issue of the Claimant's full recovery from the May 19, 1995, work-related injury and the issue of Claimant's physical condition, and capabilities. Significant to this determination are the following factors: As the Claimant's treating physician Dr. Barnes examined the Claimant on more occasions than Dr. Draper and Dr. Brooks and is more familiar with the Claimant's condition. The opinions of Dr. Berkowitz and Dr. Barnes and [sp] more consistent with the Claimant's symptomatology. The opinions of Dr. Berkowitz and Dr. Barnes are supported by positive examination findings.

(Decision of the WCJ, Finding of Fact No. 17, p. 5.) The WCJ also found that no evidence was submitted establishing that claimant's medical treatment commencing in 2003 is not related to accepted work-related injuries.

In its appeal brief, Employer avers that claimant's medical experts had no objective evidence establishing that claimant's condition had worsened, relying instead upon the history provided by claimant. However, the record clearly indicates otherwise. Dr. Barnes, claimant's treating physician, in fact testified to having performed a number of objective medical tests, as well as the review of earlier EMG and MRI reports and the disability report prepared by Dr. Berkowitz. Dr. Berkowitz testified that he examined claimant and reviewed claimant's EMG and MRI reports, as well as functional capacity/range of motion examination reports.

Southeastern Pennsylvania Transportation Authority (SEPTA) v. Workmen's Compensation Appeal Board (Pointer), 604 A.2d 315 (Pa. Cmwlth. 1992) establishes that a claimant seeking reinstatement of benefits after discharge for willful misconduct must show that his medical condition has worsened so that he can no longer perform the job he was doing at the time of his discharge. We find that substantial evidence supports the WCJ's findings and conclusions that claimant met this burden, and we will not disturb them. In a workers' compensation proceeding, the WCJ is the ultimate fact finder and is entitled to accept or reject the testimony of any witness, including medical witnesses, in whole or in part. *Joy Global, Inc. v. Workers' Compensation Appeal Board (Hogue)*, 876 A.2d 1098 (Pa. Cmwlth. 2005). Further, questions of credibility and the resolution of conflicting testimony are within the exclusive province of the WCJ and, thus, are not subject to appellate review. *Id.*

Claimant avers on appeal that the WCJ inadvertently and mistakenly indicated in his decision that claimant's benefits are reinstated as of March 22,

2005, the filing date of the petition, rather than November 21, 2002.² Claimant asserts that his credited testimony, together with the credited testimony of his medical experts, supports this conclusion. Claimant points to the WCJ's Findings of Fact Nos. 5, 12, and 15:

The Claimant testified that his condition worsened approximately at the end of the summer of 2002. The Claimant testified that he started getting more muscle spasms in the back and pain in both legs. The Claimant testified that he has been unable to work because of his back injury since November 2001. The Claimant's testimony is credible. The Claimant's testimony is uncontradicted by any fact witness testimony.

(Decision of the WCJ, Finding of Fact No. 5, p. 2.)

Dr. Barnes' opinion that Claimant's condition worsened after 2001, as a result of the work-related injury of May 19, 1995, is credible. Dr. Barnes' opinion that as a result of Claimant's symptoms the Claimant is not capable of performing the modified cable splicer job is credible...

(Decision of the WCJ, Finding of Fact No. 12, p. 4.)

Based upon Claimant's history, physical examination, a review of medical records, and diagnostic studies, Dr. Berkowitz opined that the Claimant was not capable of performing the essential tasks of the modified job with the Employer as of November 21, 2002...Dr. Berkowitz opined that the Claimant is not capable of performing the modified job as a result of the work injury. Dr. Berkowitz' opinion that the Claimant is not capable of performing the modified job is credible.

(Decision of the WCJ, Finding of Fact No. 15, p. 5.)

² A decision to reinstate benefits as of November 21, 2002 would result in the award of an additional 130 4/7 weeks of benefits at a rate of \$509.00 per week, or \$66,480.86 in benefits exclusive of interest.

In its opinion, the Board found that no error of law had been committed, and stated:

[R]egarding the date of reinstatement, we note that Claimant sought reinstatement as of March 22, 2005. While the form of the petition is not controlling when the facts warrant relief to the claimant, *Westinghouse Electric Corp./CBS v. Workers' Compensation Appeal Board (Burger)*, 838 A.2d 831 (Pa. Cmwlth. 2003), it is apparent that Claimant was not denied relief.

(Board's Opinion, pp. 5-6.) The Board correctly noted that there are several dates which the WCJ could have chosen; however, given the clear record testimony of significantly earlier dates on which claimant's condition worsened, and the WCJ's findings of fact with regard to these dates as noted above, we shall remand for a clarification as to the date for reinstatement of benefits.³

The Board affirmed the WCJ's decision that he lacks jurisdiction to decide claimant's Petition to Review Utilization Review Determination because the provider, Dr. Barnes, failed to properly provide records to the utilization review organization (URO). Claimant argues that the evidence indisputably shows that the URO timely received the records but improperly returned them. The WCJ determined that because Dr. Barnes did not submit claimant's records within the

³ Immediately following claimant's testimony, the WCJ noted on the record that claimant's counsel moved to amend claimant's Reinstatement Petition to reflect November 21, 2002 as the corrected date as of which claimant was alleging a worsening of condition causing decrease of earning power:

Judge Slom: We are back on the record. Claimant's counsel is going to amend the reinstatement petition to allege that the claimant had a worsening of condition causing decrease in earning power as of when?

Mr. Kapner: November twenty-first, 2002, Your Honor.

(Notes of Testimony, June 8, 2005, pp. 25-26.)

time limits required and did not submit verification, claimant's Petition to Review Utilization Review Determination should be denied.

Dr. Barnes testified that his office always encloses a verification form that is signed with the records sent to a URO, and he knows that the URO received the actual medical records; however, the WCJ found that Dr. Barnes' testimony on the issue of whether a verification form was sent to the URO was not credible. On review, the Board opined that it was constrained to affirm the decision of the WCJ pursuant to this Court's holding in *County of Allegheny v. Workers' Compensation Appeal Board (Geisler)*, 875 A.2d 1222 (Pa. Cmwlth. 2005). *Sub judice*, as in *Geisler*, there was no initial finding by the URO as to the reasonableness or necessity of Dr. Barnes' treatment of claimant and therefore, no determination for the WCJ to review. The regulation set forth in 34 Pa. Code §127.459(c) clearly states that the provider under review must sign a verification that the records provided to the URO constitute the true and complete medical chart as it relates to the claimant's work injury. We find that the WCJ's findings are supported by the record, and the WCJ's denial of the Petition to Review Utilization Review Determination was proper.

Finally, we address the arguments presented with regard to Employer's Petition to Review the NCP. Employer avers that the WCJ failed to issue a reasoned decision related to this petition, having made no findings related to its substantive issues; in fact, the WCJ simply determined that no such petition was filed. However, the record clearly demonstrates that at the commencement of the hearing before the WCJ held on October 26, 2005, Employer offered a motion to amend its Termination Petition to include a Petition to Review the NCP, specifically with regard to the description of the injury. (N.T., p. 3.) Claimant's counsel initially objected to this amendment, but subsequently agreed that if he

failed to submit opposition to the WCJ within ten days, the Petition to Review the NCP would be deemed amended. (N.T., p. 8.)

Claimant counters that the WCJ's determination with regard to the NCP Review Petition is harmless error. Claimant argues that Employer failed to state a proposed alternative description of his injury, and failed to introduce any evidence to show that Employer was somehow deceived in the investigation it conducted at the time of the injury ten years previously, or articulate any harm caused by the alleged error. Claimant further avers that Employer has not filed an appeal of the WCJ's dismissal of its Termination Petition, thus rendering moot its appeal of the WCJ's determination with regard to the NCP Review Petition. In its opinion, the Board stated:

Given the time that elapsed between the issuance of the Notice of Compensation Payable was issued and November 3, 2004, filing of the Review Petition, we determine that, pursuant to *Beissel v. Workmen's Compensation Appeal Board (John Wannamaker, Inc.)*, 502 Pa. 178, 465 A.2d 969 (1983), Defendant has accepted Claimant's injury as work-related.

(Board's Opinion, p. 2.) Employer argues that *Beissel* is inapplicable *sub judice* because Employer is simply seeking to amend the description of the work-related injury based on new medical evidence it has obtained, and not to deny liability on the grounds that a claimant's disability was not related to the work injury, after a NCP had already been issued, as in *Beissel*. We disagree. In *Beissel*, 502 Pa. at 183, 465 A.2d at 971-72, our Supreme Court stated:

Since [employer] had an opportunity to, and in fact, did, investigate the cause of appellant's disability, the notice of compensation payable it filed constitutes an admission of its liability to appellant for compensation for a lower back injury...[Employer] may not now, under the guise of a termination petition, come into court and use the

favorable testimony of Dr. Murray to contradict precisely that which it admitted in its notice of compensation payable, namely, that appellant's disability at the time the notice of compensation payable was filed was related to her 1975 fall at work.

Upon review, we concur with the Board's legal conclusion that it would be inappropriate to entertain a Review Petition ten years after the original issuance of the NCP in 1995, when Employer failed to challenge the description of the injuries when the NCP was originally issued.

Accordingly, we remand to the Board, with directions to remand to the WCJ for the purpose of issuing a reasoned decision and explanation as to the appropriate date as of which the reinstatement of benefits are granted; in all other respects, the Board's September 18, 2007 order is affirmed.

JAMES GARDNER COLINS, Senior Judge

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ORDER

AND NOW, this 10th day of June, 2008, we remand to the Board, with directions to remand to the Workers' Compensation Judge for the purpose of issuing a reasoned decision and explanation as to the appropriate date as of which the reinstatement of benefits are granted; in all other respects, the Workers' Compensation Appeal Board's September 18, 2007 order in the above-captioned matter is affirmed.

Jurisdiction is relinquished.

JAMES GARDNER COLINS, Senior Judge