IN THE COMMONWEALTH COURT OF PENNSYLVANIA

US Airways, Inc., and Sedgwick CMS,	:	
Petitioners	:	
	:	
v.	:	No. 1956 C.D. 2007
	:	Submitted: March 7, 2008
Workers' Compensation Appeal Board (Kranik),	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: April 10, 2008

US Airways, Inc. (Employer) appeals from an order of the Workers' Compensation Appeal Board (Board) affirming the decision of the Workers' Compensation Judge (WCJ) granting the claim petition of Patrick Kranik (Claimant) because he suffered a work-related right shoulder injury. Because certain findings of the WCJ are inconsistent, we vacate and remand.

Claimant worked for Employer in fleet service as a baggage handler for 20 years lifting luggage weighing between five and 50 pounds. On June 14, 2004, while lifting baggage, he felt a snap in his right shoulder. He continued loading another 20 or 30 pieces of baggage and then filled out an accident report with his

supervisor, Mark Bloomer. On July 23, 2004, while lifting baggage at work, he again felt a snap in his right shoulder. After finishing his work, he filled out another accident report with Mark Bloomer. He did not seek treatment for the pain he was having with his right shoulder. Although Claimant's right shoulder problem became worse, he continued working for Employer until he was furloughed. Claimant sought other employment and became employed as an electrician.

Because Claimant's right shoulder continued to be painful and problematic, Claimant contacted Employer who advised Claimant to seek treatment from one of its panel physicians. Claimant was treated on March 22, 2005, by Melissa Moon, D.O. (Dr. Moon), who was unable to determine the work-relatedness of his injury. She diagnosed Claimant with a right shoulder strain/trapezius strain and recommended physical therapy.[1] Claimant did not pay for Dr. Moon's services. Instead, two health insurance claim forms were submitted to the State Workers' Insurance Fund (SWIF) by Dr. Moon's office for treatments on March 22 and March 30, 2005, rather than to Employer's insurance carrier, Sedgwick CMS. Both claim forms indicated that the injury was employment-related.

Employer and its insurance carrier, Sedgwick CMS, issued a notice of workers' compensation denial indicating that Claimant did not suffer a work-related injury on June 14, 2004. Claimant then filed a claim petition on May 11, 2006, alleging that he suffered a right shoulder injury in the course of his employment only on June 14, 2004, and that he reported the injury to his shift manager, Mark Bloomer.

[1] Claimant subsequently underwent an MRI on his right shoulder.

The claim petition did not mention the second right shoulder injury on July 23, 2004, either as a new injury or a recurrence of the June 14, 2004 injury. Employer filed an answer denying the allegation.

At the hearing before the WCJ, Claimant testified that he never suffered an injury to his right shoulder before June 14, 2004, when he injured it lifting baggage. His shoulder continued to hurt and he reinjured it again on July 23, 2004, when he felt it snap again when lifting luggage. He stated that he filled out accident reports both times and gave them to his supervisor. He felt his shoulder problem was progressively getting worse. Claimant offered into evidence copies of the two accident reports that he filled out at work, as well as the insurance claim forms showing treatment from Dr. Moon and payment by SWIF.

Claimant also offered the deposition testimony of Mark Rodosky, M.D. (Dr. Rodosky), a board-certified orthopedic surgeon and a shoulder specialist in Pittsburgh. Dr. Rodosky only saw Claimant once on November 7, 2005, at which time Claimant complained of right shoulder pain and weakness. He reviewed Claimant's history of working as a baggage handler and stated that Claimant only told him of one work incident causing his injury; however, Claimant's counsel had talked about a second incident involving the same shoulder. Dr. Rodosky also stated that Claimant told him he thought the incident occurred in April. However, Dr. Rodosky stated that it was more important how the injury occurred, and if it occurred in June or July of 2004 rather than in April, it would not make a difference in his opinion or diagnosis. He noted that Claimant had no prior injury to his shoulder. He reviewed his MRI, performed a physical examination, and diagnosed Claimant with a

subacromial impingement and a partial thickness rotator cuff tear, although it could be a complete tear. He opined that Claimant would benefit from surgery. He denied that there was arthritis or a degenerative condition of the shoulder. He disagreed that if Claimant had sustained a rotator cuff tear at either one of the work incidents that he would still be physically able to perform work as a baggage handler with a small tear. He opined in his experience as a shoulder surgeon that individuals continued to perform activities with small rotator cuff tears. He believed that if Claimant underwent surgery, he would have a near-full or full recovery with a small tear like the one Claimant had.

In its defense, Employer offered the deposition testimony of Jon Tucker, M.D. (Dr. Tucker), board-certified in orthopedic surgery and practicing that specialty of medicine in Pittsburgh, with 40% of his practice related to disorders of the shoulder. Dr. Tucker examined Claimant once on August 17, 2006, at which time he obtained a history of the two work injuries, conducted a physical examination, and reviewed the MRI and x-rays which had been taken. Dr. Tucker believed that the x-rays showed arthritis of the acromioclavicular joint of the right shoulder and diagnosed Claimant with a right shoulder impingement syndrome or bursitis. He also opined, based on the MRI, that there was evidence of degeneration of the supraspinatus portion of the rotator cuff. He further opined that it would have been unlikely that Claimant would have been able to work as a baggage handler without significant accommodation if he had a small rotator cuff tear, and such a tear was almost certain to be symptomatic immediately. The impingement from the level of the acromioclavicular joint and degeneration of the rotator cuff tendons in 2005 were compatible with individuals of Claimant's age and who require arthroscopic surgery.

Dr. Tucker did not believe that the right shoulder impairment was work-related because Claimant was able to work at his regular job for five months and that would have been highly unlikely with a small full-thickness tear.

The WCJ found Claimant's testimony "very believable and very credible. The cross-examination of claimant by employer was ineffective in weakening or damaging claimant's credibility." (WCJ's February 22, 2007 decision at 13.) He also found Dr. Rodosky credible, stating, "I find Dr. Rodosky's superior experience in shoulder surgery and treatments of shoulders more extensively than Dr. Tucker entitles Dr. Rodosky's opinion to greater weight." (*Id.* at 14.) Regarding Dr. Tucker's testimony, the WCJ did not find it believable, specifically noting that it gave "the impression of him being an advocate for the employer, since it leaves the impression he was trying to make the case that claimant's right shoulder impairment was not work-related." (*Id.*) The WCJ then went on to note that Employer's contest was reasonable based on Dr. Tucker's opinion and based on Dr. Moon's opinion. In discussing the reasonableness of the contest, the WCJ noted that the three-year statute of limitation was tolled as evidenced by the fact that payments were made in lieu of compensation, i.e., that SWIF paid for Dr. Moon's two bills and that "employer intended to pay for treatment for a work-related injury, and specifically for claimant's treatment on March 22, 2005 and March 30, 2005," because there was no evidence offered by Employer to the contrary.

Employer appealed to the Board arguing that 1) the WCJ erred by finding that Claimant's medical bills had actually been paid by SWIF, and that was an admission of liability on Employer's part; 2) the WCJ erred because a

compensable work injury occurred on July 23, 2004, even though Claimant's claim petition alleged an injury date of June 14, 2004; and 3) the WCJ erred because Dr. Rodosky's medical opinion was incompetent to support Claimant's burden of proof because he relied upon an incorrect injury date given to him by Claimant of April 2004. The Board determined that the health insurance claim forms which had been submitted to SWIF were checked as being employment-related even though Dr. Moon stated in her records that she was unable to opine whether Claimant's shoulder injuries were work-related. Further, "The Judge stated that while this evidence [the payments] was persuasive to establish Claimant suffered a work injury and that payments were made in lieu of compensation, this evidence served only to extend the statute of limitations and was not as such an admission liability, contrary to Defendant's allegation on appeal." (Board's September 21, 2007 decision at 5.) As for the incorrect date of injury and Dr. Rodosky's reliance upon it, the Board stated, "the Judge specifically discounted any adverse influence Claimant's failure to initially give an accurate injury date had on [Dr. Rodosky's] credibility determination." The Judge stated that "the history given Dr. Rodosky coincided and correlated exactly with the history Claimant had given concerning the July 23, 2004 work incident. Dr. Rodosky had testified that the difference in dates would not change his diagnosis or opinion." (*Id.* at 6.) The Board affirmed the WCJ's decision, and this appeal by Employer followed.[2]

[2] Our scope of review of the Board's decision is limited to determining whether findings of fact are supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. *Schemmer v. Workers' Compensation Appeal Board (U.S. Steel)*, 833 A.2d 276 (Pa. Cmwlth. 2003).

I.

Employer contends that the WCJ erred in relying on Dr. Rodosky's testimony because he provided an equivocal medical opinion based on an incomplete and incorrect medical history. Specifically, Employer argues that Claimant stated on his claim petition that he was injured on June 14, 2004, by lifting a bag from the ground to put in DQF, but Claimant testified that he was injured that date when he was lifting a bag overhead to load a pod injuring his shoulder as it kicked back striking another bag. Also, Claimant originally alleged that he was injured in April 2004, the date from which Dr. Rodosky made his initial diagnosis. As for the July 23, 2004 injury, Claimant stated in his report that he injured his shoulder when he reached through a bag cart on the bottom shelf to push a bag sideways when he felt a pop in his right shoulder. However, he testified that the injury occurred when he was putting luggage on a top shelf and sliding it across when his shoulder snapped. Because Dr. Rodosky was not made aware of the actual claimed mechanism of the injury, he was given an erroneous injury mechanism and could not unequivocally testify regarding the exact cause of Claimant's symptoms.

Addressing the incorrect month of April as the month of injury, the WCJ recognized the mistake and stated the following in his findings of fact #18d:

> Dr. Rodosky obviously obtained a history of an April, 2004 injury from the claimant, that correlated with the July, 2004 injury claimant testified to. Employer's records establish June and July, 2004 injuries. (see findings of fact #12 and 13.) Therefore, employer's attempt to discredit Dr. Rodosky on having the wrong month of injury is exulting a technicality over substance. Dr. Rodosky's opinion was much more believable that he does see individuals that are able to continue working with small rotator cuff tears, as

> opposed to Dr. Tucker's conclusion that an individual could not work doing the baggage handling work claimant did with a rotator cuff tear.

We agree with the WCJ that Claimant's error in telling Dr. Rodosky the wrong month of his injury did not make Dr. Rodosky's testimony equivocal. As for the inconsistencies in Claimant's testimony as to how he was injured, Dr. Rodosky testified that in addition to talking to Claimant to hear his version of events, he also reviewed the report from Claimant's primary care physician and discussed the incidents with Claimant's attorney so he was provided with two other versions of the events regarding his shoulder being injured twice while loading luggage. Consequently, based on the above and the fact that Dr. Rodosky testified that Claimant sustained at least a partial rotator cuff tear as a result of either of the two work incidents, we find no fault with the WCJ's finding that Dr. Rodosky's testimony was unequivocal.[3]

II.

Employer then argues that the WCJ should not have granted the claim petition for the July 23, 2004 injury when the only injury litigated was for the June 14, 2004 injury, and the WCJ found that Claimant failed to prove any diagnosis of a work injury related to that event at work. Employer points out that Claimant

[3] Employer also argues that the WCJ erred by admitting the two claim forms into evidence and relying upon them to find that the treatment for the June 14, 2004 injury was related to the July 23, 2004 injury. Despite the claim forms, the WCJ relied upon Claimant's testimony, Dr. Rodosky's testimony, as well as Claimant's incident reports that he submitted to Employer. The WCJ also specifically discounted Dr. Tucker's testimony.

specifically alleged the July 23, 2004 event was a recurrence, not a new injury, which formed the legal basis as to how he proceeded with his claim.

Employer is correct that throughout the litigation, Claimant treated the second injury as a recurrence of the first. While the claim petition only alleged a June 14, 2004 injury, the June 19, 2006 hearing record indicates that Claimant's counsel specified that the July 23, 2004 injury was a recurrence of the June 14, 2004 injury. At the June 19, 2006, hearing before the WCJ, Claimant's counsel stated the following:

> JUDGE JONES: What I was going to say is there's no Petition, I'm showing, for a July 23, 2004 injury. So is this being litigated as a separate injury?
>
> ATTORNEY CHABAN: We're treating it as a recurrence.
>
> JUDGE JONES: Anything in this document that references back to June 14th?
>
> ATTORNEY CHABAN: Yes.
>
> JUDGE JONES: Help me out. Because I'm looking at it for the first time.
>
> ATTORNEY CHABAN: On the first page, under where--- in the third block down, it says agent reinjured right shoulder while working in bag room. And on the second page, in the first block, in the second question, it says this is the same shoulder that was injured before and precautionary was filled out.
>
> JUDGE JONES: Okay. So it doesn't mention June 14th, but by context you're arguing it refers back?
>
> ATTORNEY CHABAN: Yes.

(June 19, 2006 hearing transcript at 38-39.) Despite determining that Claimant *did not* prove a work injury related to the first injury on June 14, 2004, the WCJ went on to find that he did prove a recurrence of that first injury when he suffered a work-related injury on July 23, 2004, which he could not have possibly done because he already found there was no first injury proven. Because this is an internal inconsistency, we remand to the Board to remand to the WCJ for further findings.

III.

Employer also argues again that the WCJ erred by finding that the payment of Dr. Moon's two medical bills by SWIF was an admission of liability by Employer even though SWIF was not Employer's insurer.[4]

After making his finding that Dr. Rodosky and Claimant were more credible than Dr. Tucker, the WCJ never made any finding of facts or conclusions of law stating that Employer made an admission of liability based on SWIF's payment of Dr. Moon's medical bills. The findings of fact related to the medical bills are as follows:

> 18g. Employer's payment of medical expenses through the State Workers' Insurance Fund also contradicts employer's position that it was not treating claimant's injuries as work-related. In fact, employer even objected to the admission of those records showing payment by State Workers' Insurance Fund. Even though employer had documented

[4] While Employer further argues that there was no evidence that SWIF ever paid the two bills totaling $150, and that the WCJ erred by taking judicial or administrative notice that SWIF paid those bills, the exhibits clearly indicate that they are stamped by SWIF as being processed. Therefore, the WCJ did not err by taking judicial notice that the claims were paid.

reports of injuries, employer's litigation position gave the impression it wanted to pretend that those injury reports never existed.

18h. I have taken into account that employer obviously paid for medical expenses by employer's workers' compensation insurer, State Workers' Insurance Fund (SWIF). (see finding of fact #15) I take administrative notice that SWIF, a government agency of the Commonwealth of Pennsylvania under the jurisdiction of the Department of Labor & Industry, would not be paying for treatment unless the treatment was at least arguably work-related. In other words, SWIF would not be paying general health insurance treatment incurred by employees of employer. Based on the current record, since employer offered no contrary evidence, it is clear that employer intended to pay for a work-related injury, and specifically for claimant's treatment on March 22, 2005 and March 30, 2005. See finding of fact #15. The evidence is persuasive that claimant both sustained a work-related injury, and that payments were made in lieu of compensation. That is sufficient evidence to toll the running of the 3-year statute of limitation in Section 315 of the Workers' Compensation Act. See Schreffler v. WCAB (Kocher Coal Company), 788 A.2d 963 (Pa. 2002).[5]

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[5] Finding of fact #15 states the following:

> **Health insurance claim forms**. Claimant offered as Claimant's exhibit 7 health insurance claim forms showing treatment from Dr. Moon and payment by State Workers' Insurance Fund. (Claimant's exhibit 7.)
>
> The health insurance claim form shows date of service on March 22, 2005. It refers to the doctor as Dr. Moon. At the top it has stamped "copy of archived paper claim processed on 03/28/05" and the address of "WC State Workers' Ins. Fund, 607 Main Street, Suite 300, Johnstown, PA 15901." It is checked off as "related to employment."
>
> Another health insurance claim form is for treatment on March 30, 2005 by Dr. Moon. It has the same reference to a copy of an archived paper claim processed by the Workers' Compensation State Insurance

(Footnote continued on next page…)

The WCJ seems to treat the submission and payment of the medical bills as an admission of liability by Employer,[6] but that is unclear based on the WCJ's further finding that those payments served to extend the statute of limitations which was not even an issue in this matter.[7] Because we cannot discern the intent of the WCJ's findings, we also remand to the Board to remand to the WCJ for further findings on this issue.

Accordingly, we vacate the order of the Board and remand the matter back to the WCJ to make new findings consistent with this opinion.

DAN PELLEGRINI, JUDGE

(continued…)

> Fund on April 8, 2005. It is also checked as employment related. (Claimant's exhibit 7.)

[6] We note that the WCJ would have erred if he had found that there was sufficient evidence to support a finding of an admission of liability based on the lack of evidence in the record. The claim forms submitted by Dr. Moon's office (Claimant's Exhibits 7) indicated that Claimant was injured due to his employment despite the fact that Dr. Moon's diagnosis note (Employer's Exhibit B) states that she is "unable to determine work relatedness of injury." This internal inconsistency does not support a finding that Claimant was injured at work. Most importantly, the claim forms should have been submitted to Employer's insurer, Sedgwick CMS, rather than SWIF, and no explanation was provided as to why this was not done.

[7] It is unclear why the WCJ even mentioned the statute of limitations in his decision. Claimant was first injured on June 14, 2004, and again on July 23, 2004. Pursuant to Section 315 of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended,* 77 P.S. §602, Claimant had three years from the initial date of injury to file his claim petition. He filed his petition on May 11, 2006, well within the three year statute of limitations. It was not an issue in the case.

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O R D E R

AND NOW, this 10th day of April, 2008, the order of the Workers' Compensation Appeal Board, dated September 21, 2007, at No. A07-0557, is vacated, and the matter remanded to the Workers' Compensation Judge for further findings consistent with this opinion.

Jurisdiction relinquished.

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DAN PELLEGRINI, JUDGE