IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Wimer, Petitioner	:	
v.	:	No. 201 C.D. 2007
	:	Submitted: November 30, 2007
Workers' Compensation Appeal Board (Total Transportation Corp. and State Workers Insurance Fund), Respondents	:	

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: March 10, 2008

William Wimer (Claimant) petitions for review from an Order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of a Workers' Compensation Judge (WCJ) that denied his Review Petition. We affirm.

Claimant was injured in the course of his employment with Total Transportation Corporation (Employer) on February 1, 1989. Employer acknowledged this injury in a Notice of Compensation Payable (NCP) dated March 9, 1989 that described Claimant's injury as a "LS strain of the back." Claimant's benefits were commuted on January 19, 1995. Pursuant to the Commutation Agreement, Employer agreed to pay Claimant $35,000.00. In commuting Claimant's benefits, the parties stipulated that Claimant sustained injuries to his neck and back as a result of the February 1, 1989 work incident. Employer remained liable for Claimant's causally related medical expenses.

Claimant filed a Review Petition on October 2, 2003 alleging Employer failed to pay causally related medical bills and prescriptions despite the fact that they were submitted to the insurer with proper documentation.[1] On March 31, 2005, Employer filed a Petition for Physical Examination or Expert Interview of Employee alleging that Claimant refused to submit to an independent medical examination to be done at Tri Rivers Consulting Services, Inc. on August 12, 2004.

By a decision circulated May 31, 2006, the WCJ acknowledged that the NCP described Claimant's injury as a back strain and the injury description was amended to include a neck injury upon commutatation. She explained that Claimant sought payment for medical bills that were for treatment for multiple conditions, including a jaw problem. She further recognized that most of the prescriptions Claimant sought payment for were pain medications. The WCJ pointed out that not only did Claimant sustain substantial injuries in a 1984 motor vehicle accident, prior to his 1989 work injury, he sustained injuries in accidents in 1993, 1995, 1999, and 2003. Consequently, the WCJ concluded that the causal connection between Claimant's medical treatment and prescription medication to his accepted work injuries was not obvious. As a result, relying on Kurtz v. Workers' Compensation Appeal Board (Waynesburg College), 794 A.2d 443 (Pa. Cmwlth. 2002), the WCJ placed the burden on Claimant to establish that the outstanding bills he wished to have paid were causally related to his employment.

[1] On March 29, 2004, Claimant filed another Review Petition seeking to amend his injury description to include anxiety disorder, psychological factors affecting physical condition, post traumatic stress disorder, and chronic pain problems. Via correspondence to the WCJ, Claimant later requested that this Petition be withdrawn.

The WCJ found Claimant failed to meet his burden of proof in this matter. She denied Claimant's Review Petition and dismissed Employer's Petition for Physical Examination or Expert Interview of Employee as moot. Claimant appealed the WCJ's May 31, 2006 Decision to the Board which affirmed in an Order dated December 27, 2006. This appeal followed.[2]

Claimant argues on appeal that the WCJ's Decision is not supported by substantial, competent evidence. He further contends that Employer's medical evidence submitted in this matter was equivocal.

An employer is liable to pay for a claimant's medical expenses so long as they arise from and are caused by a work-related injury. Kurtz, 794 A.2d 447 (Pa. Cmwlth. 2002). Originally, the burden is on the claimant to establish that an injury is work-related. Id. Once the claimant has established that an injury is work-related, however, he is not required to continually establish that the medical treatment he is receiving is causally related to the work injury. Gens v. Workmen's Compensation Appeal Board (Rehabilitation Hosp.), 631 A.2d 804 (Pa. Cmwlth. 1993). Rather, the burden shifts to the employer to establish that medical treatment is not causally related to the claimant's work injury. Kurtz, 794 A.2d at 447. If, however, the claimant is getting treatment for new symptoms that are not obviously related to the work injury, he must establish causation by unequivocal medical testimony. Id. An obvious connection involves a nexus that is so clear that an untrained lay person would not have a problem in making the connection between the new symptoms and the compensable injury. Id. at 447-8.

[2] Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated. DeGraw v. Workers' Compensation Appeal Board (Redner's Warehouse Mkts., Inc.), 926 A.2d 997 (Pa. Cmwlth. 2007).

Claimant testified on March 30, 2004 that he was working for Employer as a truck driver on February 1, 1989 and that on that date he was rear ended by a drunk driver. According to Claimant, he injured his head, neck, back, jaw, legs, ribs, and arms in that accident. Claimant testified that since the February 1, 1989 work injury, he has undergone approximately seven to eight surgeries to his jaw. He added that his Employer paid all of his medical bills until 1994. He explained that since that time, prescriptions have gone unpaid. Claimant stated that he did not have any problems with his jaw prior to the February 1, 1989 accident.

Claimant admitted at a hearing held November 8, 2005 that, contrary to prior testimony, he had jaw problems prior to his 1989 work injury. He conceded he injured his jaw in an October 20, 1984 motor vehicle accident and required surgery. He further agreed that Guy A. Catone, D.M.D. performed surgery on his jaw on January 22, 1986.

Claimant conceded that he had been involved in some accidents since February 1, 1989. He noted that in 1999, he was working for William Hoy Construction and he was struck from behind by the bucket of a backhoe, fell, and struck his face. Claimant stated that his symptoms increased following the 1999 incident but that he returned to prior levels within a year. He further acknowledged that in 1993 he was struck by a car as a pedestrian and that he was in a motor vehicle accident on March 12, 2003. He was not sure if he was in a motor vehicle accident in 1995. Claimant denied being placed in a rehabilitation program for substance abuse or narcotics abuse.

Claimant submitted a two page report of Brian Cicuto, D.O., dated March 24, 2003 wherein Dr. Cicuto stated that Claimant provided a history that he

was initially injured in October of 1999 when he tripped and fell and a shovel struck the right side of his face. According to Dr. Cicuto, he was providing treatment for chronic pain, specifically mandibular pain resulting from the multiple temporomandibular surgeries that Claimant has undergone. Dr. Cicuto failed to identify that the February 1, 1989 work injury necessitated his current treatment in the March 2003 report. Rather, he indicated that Claimant's right facial pain intensified after the accident that occurred in 1999. Claimant further submitted into the record a seven sentence report by Dr. Cicuto dated August 28, 2003 that read:

> …I have been treating [Claimant] for both pain in his facial region/jaw consistent with TMJ syndrome after surgical intervention. In addition, I have been treating his lumbar spine and lower extremity pain. The treatment rendered is the result of an injury that occurred on February 01, 1989. Thank you for your attention.

(R.R. at 63a).

Claimant submitted additional voluminous medical records into the record. Included in these records is a 1999 Outpatient Chart Note of George C. Sotereanos, D.M.D. wherein he indicates "[Claimant] has seen the Pain Center in the past for detoxification and he does not want to see them again." (R.R. at 301a).

Employer submitted a May 12, 2005 report of R. Kent Galey, D.M.D., board certified maxillofacial surgeon, wherein he opined that Claimant did not sustain any further injury to his temporomandibular joint in the motor vehicle accident of February 1, 1989. He opined that the surgery performed by Dr. Catone in June of 1989 was related to his pre-existing condition. Dr. Galey noted that the medical records he reviewed failed to indicate that Claimant had any

temporomandibular joint symptomatology when seeking care immediately following his 1989 work injury.

Employer further submitted a May 12, 2005 report from Michael Weiss, M.D., board certified in orthopedic surgery, who saw Claimant on that same date. Dr. Weiss questioned Claimant if he had any back problems prior to his 1989 work injury. Claimant responded in the negative. Dr. Weiss noted that medical records indicated that the 1984 motor vehicle accident resulted in a rib fracture, facial lacerations, a jaw injury, *and ongoing thoracic spine pain*. Dr. Weiss opined that Claimant sustained a soft-tissue sprain of the neck, mid-back and low back as a result of the February 1, 1989 work injury. He noted that despite undergoing multiple diagnostic tests including CT scans, MRIs, EMGs, and X-rays, none showed abnormality until 1995. Dr. Weiss added that Claimant sustained multiple intervening injuries since the 1989 work injury, including injuries in 1993, 1995, 1999, and 2003. Dr. Weiss opined that Claimant was fully recovered from his 1989 work injury. He added that there was no anatomic link between the narcotic pain medication Claimant was taking and the 1989 motor vehicle accident.

Employer also submitted reports from Dr. Catone, dated in 1986 and 1987, wherein he discusses a coronoidectomy surgery he performed on Claimant in 1986 as well as a temporomandibular joint surgery he performed previously. In the 1986 report, Dr. Catone indicated that he did "not think this letter can explain the amount of trauma, pain and suffering this young man has endured over the last year."

Based upon her personal observations of Claimant, the WCJ rejected his testimony. In further support of her decision to reject Claimant's testimony, the

WCJ noted inconsistencies in Claimant's testimony. For instance, the WCJ reiterated that at the March 30, 2004 hearing Claimant specifically denied having any problems with his jaw prior to the work-related incident in question. Subsequently, however, Claimant admitted that he had a prior injury to his jaw resulting from a serious motor vehicle accident in 1984. The WCJ emphasized the seriousness of Claimant's 1984 jaw injury by referencing the contents of Dr. Catone's 1986 report that indicated the amount of pain claimant was in following his motor vehicle accident was beyond words. The WCJ, *inter alia*, also pointed out that Claimant denied that he was ever involved in a detoxification program despite the fact that the medical records indicate otherwise.[3]

The WCJ rejected the records of Dr. Cicuto to the extent they indicate that Claimant's treatment is causally related to the February 1, 1989 work injury. Significant to this determination was Dr. Cicuto's March 24, 2003 letter indicating that the medications he prescribed and the treatment he provided was for Claimant's chronic pain, specifically the mandibular pain resulting from the multiple temporomandibular surgeries that he has undergone. The WCJ explained that the March 24, 2003 letter demonstrated that Dr. Cicuto was aware of Claimant's 1989 work injury but he did not attribute his treatment to that injury at that time. The WCJ acknowledged that Dr. Cicuto later authored a report to Claimant's counsel indicating that his treatments were causally related to

[3] Claimant asserts that Dr. Galey acknowledged that he has a poor memory. Claimant suggests that the WCJ should have taken this into account when considering the inconsistencies between his testimony and certain facts. A WCJ, however, is not required to give a line-by-line analysis of each statement made by each witness, explaining how a particular statement affected the ultimate decision. Acme Mkts., Inc. v. Workers' Compensation Appeal Board (Brown), 890 A.2d 21 (Pa. Cmwlth. 2006).

Claimant's 1989 work injury. She rationalized, however, that this was inconsistent with Dr. Cicuto's prior, more extensive report of March 2003.[4]

The WCJ credited the opinions of Drs. Galey and Weiss. The WCJ noted that as a doctor of dental medicine, Dr. Galey was more qualified than Dr. Cicuto, a doctor of osteopathic medicine, to discuss Claimant's jaw problems. She further noted that the medical records submitted by both parties indicated that Claimant had serious jaw problems prior to his February 1, 1989 work injury and corroborated Dr. Galey's statement that Claimant did not treat for jaw problems in the period immediately following the work incident.[5] The WCJ added that the medical records support Dr. Weiss' statement that the diagnostic tests of Claimant's spine were normal until approximately six years after Claimant's 1989 work injury. The WCJ is the final arbiter of witness credibility and the weight to be accorded evidence and may accept or reject the testimony of any witness in whole or in part. Greenwich Collieries v. Workmen's Compensation Appeal Board (Buck), 664 A.2d 703 (Pa. Cmwlth. 1995).

[4] Claimant contends that the WCJ erroneously rejected the opinions of Dr. Cicuto by giving such a great amount of credence to the fact that the March 24, 2003 letter did not suggest a causal link between Dr. Cicuto's treatment and the February 1, 1989 work injury. We are prohibited, however, from second-guessing the WCJ's reasons for the credibility determinations rendered. Dorsey v. Workers' Compensation Appeal Board (Crossing Constr. Co.), 893 A.2d 191 (Pa. Cmwlth. 2006).

[5] Claimant argues that Dr. Galey failed to take into account the fact that Claimant was free from jaw pain in the years immediately preceding his 1989 work injury. The WCJ was free to take this into account when rendering her credibility determinations.

Upon review of the aforementioned, we see no error in the WCJ's determination.[6] The evidence submitted to the WCJ revealed that Claimant had a motor vehicle accident that resulted in serious injuries, specifically to his jaw, prior to his 1989 work injury. Further Claimant was involved in several other accidents in the years that followed the incident in question that led to other varying degrees of injuries. Consequently, the causal connection between Claimant's treatment and the prescription costs he seeks to have paid is not necessarily obvious to an untrained lay person. Therefore, in order for Employer to be held liable for these expenses, as stated by the WCJ, Claimant was required to present unequivocal medical evidence to establish that causal connection. Kurtz.[7] The WCJ rejected his medical expert evidence. Instead, she credited the medical evidence submitted by Employer.[8] As such, Claimant was unable to satisfy his burden. Thus, the WCJ did not err in denying Claimant's Review Petition.

We reject Claimant's argument that the WCJ should have credited his expert testimony as Employer's medical experts failed to offer an unequivocal opinion in this matter. Initially, we point out that Employer was not even required

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[6] Although not discussed by the WCJ, even if Claimant's medical evidence was found credible, it is questionable whether Claimant's medical bills and prescriptions relating to his jaw could be held to be Employer's responsibility at this point as Employer recognized back and neck injuries only. See Seekford v. Workers' Compensation Appeal Board (R.P.M. Erectors), 909 A.2d 421 (Pa. Cmwlth. 2006)(holding that a claimant was time barred from amending an NCP to include additional injuries when he filed his petition outside of three years of commuting his benefits).

[7] Claimant does not argue that the burden was improperly placed on him to establish causation.

[8] Claimant argues that the WCJ could not reasonably have credited Employer's medical evidence in light of the time that had passed since Claimant's 1989 work injury and the examinations of Dr. Galey and Dr. Weiss. We reiterate, however, that credibility determinations are the sole province of the WCJ. Buck. As such, we will not disturb them on appeal.

to present any evidence in this case as Claimant bore the burden of proof. See generally Bonegre v. Workers' Compensation Appeal Board (Bertolini's), 863 A.2d 68 (Pa. Cmwlth. 2004)(holding that an employer is under no obligation to submit evidence in a claim petition as the claimant bears the burden of proof). Therefore, at least in theory, it is irrelevant whether Employer's medical experts' testimony is equivocal.

Nonetheless, for the sake of completeness, we address Claimant's argument that Dr. Galey's opinion that Claimant sustained no further injuries to his jaw as a result of the February 1, 1989 work injury is equivocal because Dr. Galey stated as follows in his May 12, 2005 report:

> Therefore, I believe at the time of his accident [Claimant] probably had achieved maximum medical improvement relative to his temporomandibular joints.

(R.R. at 270a).

Medical testimony will be deemed incompetent if it is equivocal. Kurtz v. Workers' Compensation Appeal Board (Waynesburg College), 794 A.2d 443 (Pa. Cmwlth. 2002). Medical testimony will be found unequivocal if the medical expert, after providing a foundation, testifies that in his professional opinion that he believes a certain fact or condition exists. Lewis v. Workmen's Compensation Appeal Board (Pittsburgh Bd. of Educ.), 472 A.2d 1176 (Pa. Cmwlth. 1984). Medical testimony is equivocal if, after a review of a medical expert's entire testimony, it is found to be merely based on possibilities. Signorini v. Workmen's Compensation Appeal Board (United Parcel Serv.), 664 A.2d 672 (Pa. Cmwlth. 1995). In determining whether medical testimony is unequivocal, the medical witness's entire testimony must be reviewed and taken as a whole and a final decision should not rest upon a few words taken out of the context. Indian

Creek Supply v. Workers' Compensation Appeal Board (Anderson), 729 A.2d 157 (Pa. Cmwlth. 1999).

By using the term "probably" in expressing his opinion that Claimant reached maximum medical improvement to his jaw prior to the work injury in question, we can hardly disagree with Claimant that Dr. Galey was less than positive on this point. Nonetheless, as per Anderson, medical testimony must be reviewed as a whole, not simply one statement looked at in a vacuum. Dr. Galey unequivocally stated numerous times throughout his May 12, 2005 report that he did not believe Claimant sustained any new injury to his temporomandibular joint on February 1, 1989 and that there is no causal relationship between any subsequent surgeries and the work incident in question. Thus, Claimant's argument must fail.

Claimant also argues on appeal that subsequent to the Board's December 27, 2006 Order, he received a comprehensive narrative report from Dr. Catone that he originally requested at the time his Review Petition was being litigated before the WCJ. He contends that the WCJ should be afforded the opportunity to consider this after-acquired evidence as this new report would undoubtedly convince the WCJ to grant his Review Petition.

We note that while this appeal was pending, Claimant filed a Petition for Rehearing with the Board pursuant to Section 426 of the Act, added by the Act of June 26, 1919, P.L. 642, 77 P.S. 871.[9] The Board denied his Petition in an

[9] Section 426 of the Act states, in pertinent part:

> The board, upon petition of any party and upon cause shown, may grant a rehearing of any petition upon which the board has made an award or disallowance of compensation or other order or ruling, or

(Footnote continued on next page…)

Order dated August 9, 2007. Claimant did not appeal this Order. On November 21, 2007, Claimant filed a "Petition for Post-Trial Relief" in the nature of a petition to submit after-acquired evidence into the record with this Court. This Petition was denied as it was an attempt to file an untimely petition for review of the Board's August 9, 2007 Order denying rehearing.

Claimant did not file an appeal of the Board's August 9, 2007 Order denying rehearing within thirty days as required by Pa. R.A.P. 1512(a)(1). Consequently, we cannot address his arguments concerning the newly acquired report of Dr. Catone.

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JIM FLAHERTY, Senior Judge

(continued…)

> upon which the board has sustained or reversed any action of a [WCJ]…

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O R D E R

AND NOW, this 10th day of March, 2008, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

JIM FLAHERTY, Senior Judge