

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Randy Duncan,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 207 C.D. 2008
	:	SUBMITTED: May 2, 2008
Workers' Compensation Appeal	:	
Board (Cambridge Lee Industries),	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER**, President Judge
 HONORABLE RENÉE COHN JUBELIRER, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: June 23, 2008

Randy Duncan petitions this court for review of a Workers' Compensation Appeal Board (Board) order that affirmed the decision of a Workers' Compensation Judge (WCJ) denying Duncan's review petition seeking to amend his Notice of Compensation Payable (NCP) to include a right shoulder injury.

On June 12, 2003, Duncan suffered an injury while stepping down from a machine he was operating in the course of his job for Employer, Cambridge Lee Industries. Employer issued a NCP, accepting Duncan's injury as a left ankle sprain. On April 19, 2006, Duncan filed a petition to review compensation benefits, alleging that he was exercising on the advice of his treating orthopedist, Dr. Enyi Okereke, on March 17, 2006, when he injured his shoulder. He specifically asserted that, "[a]s the exercise was for the purpose of rehabilitating

his body to improve the condition of his left foot, the injury to his right shoulder should be included.” Petition to Review Compensation Benefits (filed April 19, 2006) at 1. The record is clear that Duncan weighed approximately four hundred pounds and his physicians believed that weight loss would help improve his level of function. On September 8, 2006, Duncan filed a second Petition to Review Compensation Benefits, alleging that his work-related injury was not a left ankle sprain but was, rather, “status post left FDL tendon transfer, calcaneal osteotomy with left iliac crest bone graft due to posterior tibial tendon rupture[.]” Petition to Review Compensation Benefits (filed September 8, 2006) at 1. A WCJ consolidated the petitions for his review.

In support of his petitions, Duncan provided the medical testimony of Robert W. Mauthe, M.D., his treating physician, who is board-certified in physical medicine and rehabilitation. The WCJ denied Duncan’s initial review petition seeking to amend the NCP to include a right shoulder injury, but granted the second review petition and redefined the injury as a “sprain left ankle, left posterior tibial tendon rupture.” *See* WCJ’s order (circulated April 9, 2007).

On appeal, Duncan raised only the issue of whether the NCP should have been amended to include his right shoulder injury, and the Board affirmed. In so doing, the Board explained in part:

The WCJ found that Claimant sustained a right shoulder injury while performing upper extremity weightlifting, that Claimant had been advised to lose weight by his doctors in order to facilitate recovery from his work injury, and that Claimant engaged in weightlifting which he believed would help him lose weight, but that Dr. Mauthe advised Claimant to lose weight by riding a stationary bicycle, and that Claimant presented no evidence that any medical doctor specifically instructed him to engage in upper extremity weightlifting to facilitate his loss of weight. (Findings of Fact 35, 36, 37, 38; Discussion). The WCJ has complete authority over questions

of credibility, conflicting medical evidence and evidentiary weight and can accept or reject the testimony of any witness, in whole or in part. *Lombardo v. [Workers' Compensation Appeal Board (Topps Co., Inc.)]*, 698 A.2d 1378 (Pa. Cmwlth. 1997). The Board will not disturb the WCJ's findings if they are supported by substantial competent evidence. *Greenwich Collieries v. [Workmen's Compensation Appeal Board] (Buck)*, 664 A.2d 703 (Pa. Cmwlth. 1995).

Board decision (No. A07-0952, dated January 9, 2008) at 5-6.

Duncan is now here, contending that the Board erred in affirming the WCJ's determination that there was no connection between his March 17, 2006, right shoulder injury and his initial work injury to the lower extremity. The law is clear that when an injured employee develops further physical or psychological difficulties, "an employer is responsible not only for the direct and immediate consequences of a work-related injury, but also for injuries that are causally related to the accepted work injury." *Jeanes Hosp. v. Workers' Comp. Appeal Bd. (Shawn Hass)*, 582 Pa. 405, 414, 872 A.2d 159, 164 (2005).

Duncan argues that the WCJ overlooked "a line of cases which hold that where claimant, in good faith, seeks medical treatment for his injury, and the medical treatment itself either aggravates the existing injury or causes new or additional injuries, the law regards the latter as having been caused by the original incident." Duncan's brief at 9-10. Duncan further asserts that the absence in the record of specific medical evidence tending to show that upper extremity weight lifting was recommended as a way for him to lose weight and improve function in his ankle/foot does not negate his good faith belief that he was engaging in activity that would help accomplish these tasks. In this regard, Duncan queries "how else would [he] lose weight, if not by engaging in upper extremity/weight lifting" as he could not bear weight on his ankle. Duncan's brief at 12. He further posits that "Dr. Okereke did not advise that [he] not use the universal exercise machine." *Id.*

Initially, we have reviewed the “line of cases” that Duncan contends the WCJ overlooked and deem them to be of little aid to Duncan on these facts. This is because no medical professional afforded Duncan treatment that further disabled him, and there is no evidence that Duncan was told to lift weights in order to lose weight. By contrast, in *Hurchick v. Falls Township Board of Supervisors*, 32 Pa. D.&C.2d 729 (1963), *affirmed per curiam on the opinion of the court below*, 198 A.2d 356 (Pa. Super. 1964), a myelogram performed by a claimant’s doctor to determine the cause of genuine symptoms apparently related to the claimant’s work injury led to the aggravation of his existing cyst, and the court found that the record did not support a termination of benefits. In *Workmen’s Compensation Appeal Board (Bartosevich) v. Ira Berger & Sons*, 470 Pa. 239, 368 A.2d 282 (1977), our Supreme Court relied on the reasoning of *Hurchick* in deciding that a conversion neurosis resulting from negligent treatment of a claimant’s work-related injury by his self-selected chiropractor was causally connected to his initial compensable injury and, thus, termination of benefits was not warranted. In *Moltzen v. Workmen’s Compensation Appeal Board (Rochester Manor)*, 646 A.2d 748 (Pa. Cmwlth. 1994), this court held that termination of a claimant’s benefits was improper where the accepted medical evidence indicated that the claimant was suffering pain due to tendonitis caused by exercises performed in her physical therapy program.¹ Last but not least, in *Owens Brockway v. Workers’*

¹ We note that, in *Pritchett v. Workers’ Compensation Appeal Board (Justice Juanita Stout)*, 713 A.2d 1214 (Pa. Cmwlth. 1998), another termination case cited by Duncan, this court clarified that “*Moltzen* stands for the proposition that the WCJ must believe evidence that a claimant continues to suffer pain related to her work-related injury in order to issue a suspension rather than a termination.” *Id.* at 1216. However, *Pritchett* does not implicate a situation in which medical treatment for a compensable injury arguably aggravated that injury or caused new or additional injuries.

Compensation Appeal Board (Collins), 792 A.2d 631 (Pa. Cmwlth. 2002), this court deemed compensable a claimant’s disability resulting from scar tissue that formed due to surgeries that were supposed to relieve her pain arising from her original work-related low back injury. In reaching this conclusion, this court noted, *inter alia*: “[I]t is well settled that a claimant may recover workers’ compensation benefits for an injury or illness that results from unnecessary or negligent medical treatment.” *Id.* at 635.

Again, Duncan admits that “there is no specific medical evidence suggesting that upper extremity weight lifting was recommended” Duncan’s brief at 11.² Duncan’s medical expert, Dr. Mauthe, opined in this regard as follows:

Q. Now, Doctor, did you see any one [sic] of the records that you reviewed that any doctor specifically told him to perform weightlifting activities as part of his rehabilitation program?

A. I don’t see any specific recommendations for upper extremity weightlifting in the medical records.

Q. And, in fact, did you make any recommendation to him that he perform any kind of weightlifting activities?

A. No, I told him to lose weight using the stationary cycle.

Q. And typically with a person who weighs as much as Mr. Duncan does, in order to start a program of weight loss, would you agree with me that it makes more sense to do cardiovascular training before they start doing weight training?

² *Cf. Berro v. Workmen’s Compensation Appeal Board (Terminix International, Inc.)*, 645 A.2d 342 (Pa. Cmwlth. 1994), where this court held that, but for driving to his prescribed physical therapy session, the claimant would not have been positioned for the car accident that caused his additional injuries.

A. Yes.

.....

Q. And did you see anywhere in any of the doctors' records that you have reviewed, Dr. Okereke, Dr. Canner, your own records, any indication from any of the doctors who have treated him, did they recommend that he perform upper extremity weightlifting as part of his rehab for his work injury?

A. No.

Notes of Testimony, N.T., Deposition of Robert W. Mauthe, M.D., dated August 29, 2006, at 24-25, 26-27.

Unfortunately for Duncan, in an attempt to lose weight as suggested by his doctors, he engaged in weightlifting that they did not specifically prescribe or recommend.³ His own medical expert, Dr. Mauthe, testified that he told Duncan to ride a stationary bicycle in order to lose weight. Because the record is devoid of evidence that Duncan injured himself in connection with a form of treatment recommended for his work injury, we discern no error in the Board's denial of his review petition seeking to add a right shoulder injury to the NCP.

Order affirmed.

BONNIE BRIGANCE LEADBETTER,
President Judge

³ Duncan testified that Dr. Okereke did tell him not to use the treadmill, but never said not to use his stationary bicycle or his universal exercise machine. N.T., Hearing of May 24, 2006, Testimony of Randy Duncan at 29.

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ORDER

AND NOW, this 23rd day of June, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge