

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Paul Bucksbee, :
Petitioner :
 :
v. : No. 2223 C.D. 2009
 : Submitted: February 26, 2010
Workers' Compensation Appeal :
Board (Bolus Freight Systems, :
Bolus Freight Systems, Inc. and :
State Workers Insurance Fund), :
Respondents :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: June 8, 2010

Paul Bucksbee (Claimant) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) reinstating Claimant's benefits for a closed period of time and, thereafter, terminating them. In doing so, the Board affirmed the decision of the Workers' Compensation Judge (WCJ) that Claimant had injured his neck and back in two different work-related incidents, but had completely recovered from those injuries. As a result, the WCJ terminated benefits as of the date of Claimant's recovery. We affirm the Board.

Claimant was employed by Bolus Freight Systems (Employer) as a truck driver. On September 22, 2006, he was injured when the tractor-trailer he was operating collided with an automobile. After Claimant filed a claim petition,

the parties filed a stipulation, which was approved by the WCJ, providing that Claimant was injured while in the course and scope of his employment. The stipulation described Claimant's injuries as "PAIN-NECK, SHLDR. THORACIC/PARASTHESIA-HAND." Reproduced Record at 5a (R.R. __). The stipulation further provided that Claimant had returned to work on modified duty on October 18, 2006, and received partial disability benefits through December 12, 2006, at which point he resumed full-duty work with no loss of earnings and his benefits were suspended.

On September 11, 2007, Claimant filed a petition to reinstate compensation benefits as of May 2, 2007. Claimant alleged that his work-related injury had worsened, resulting in a decrease in his earning power. He also alleged that the stipulation had not correctly described his work injury. On October 22, 2007, Claimant filed a claim petition alleging that a new work-related injury had occurred on April 19, 2007, which rendered him unable to work. Claimant's claim and reinstatement petitions were consolidated for hearing before the WCJ.

At the hearing, Claimant testified that after he returned to work on December 12, 2006, he continued to experience pain from his injuries. When not working, he treated his symptoms with pain medication and muscle relaxers. On February 5, 2007, Claimant slipped on ice outside of his home, causing a jolt to his body. This caused his work-related back pain to resume. Claimant stated that the pain "went right back to what it was after the [2006] accident." R.R. 181a. He testified that he missed several weeks of work due to the pain, but he did not consult a physician because he had already been prescribed pain medication and muscle relaxers.

Claimant returned to work on February 22, 2007, in spite of pain in his back, shoulders and neck. Claimant testified that on April 19, 2007, he grabbed the bar on the side of his truck to pull himself into the cab and heard a snapping sound in his back. According to Claimant, he experienced severe pain in his back, numbness into his left arm and pain in his shoulders and neck. The pain was too severe to work, so he drove the truck to Employer's garage and went home. Claimant testified that because he is unable to sit or stand for long periods of time without pain and cannot operate a tractor-trailer while on Vicodin, he is no longer able to work.

Leroy J. Pelicci, M.D., who is board-certified in neurology and pain management, testified on behalf of Claimant. Dr. Pelicci first saw and examined Claimant, who complained of neck and back pain, on March 21, 2007. Testing revealed a disc herniation with nerve involvement in the thoracic region of Claimant's spine, specifically at the T11-12 level. A nerve conduction study revealed a problem with the left arm nerve roots in his neck, specifically at the C5-7 level. Dr. Pelicci attributed all of these findings to the September 2006 work-related injury.

Dr. Pelicci saw Claimant again on April 9, 2007, when he treated Claimant with injections for muscle spasms and stiffness. He prescribed Vicodin and recommended that Claimant see a chiropractor for massage therapy. Dr. Pelicci testified that Claimant returned to his office on May 2, 2007, again reporting pain in his neck and back, which Dr. Pelicci treated. Dr. Pelicci concluded that Claimant was unable to return to work.

In November 2007, Dr. Pelicci ordered several diagnostic tests. These tests revealed a new disc herniation at Claimant's T10-11 level and arthritis in

Claimant's neck, which caused cervical radiculopathy. Dr. Pelicci believed, at that time, that the new herniation was a result of the September 2006 work-related accident because he did not know about the incident that occurred when Claimant hoisted himself into his truck on April 19, 2007.

Mark W. Scinico, M.D., testified on behalf of Employer. Dr. Scinico is board-certified in internal medicine and first examined Claimant on October 19, 2007. Dr. Scinico found Claimant's thoracic spine to be normal with no evidence of spasm. Tests for cervical radiculopathy, pinched nerve and brachial plexopathy all produced negative results. There were no signs of atrophy.

Dr. Scinico stated that x-rays of Claimant's spine and left shoulder were normal, and a magnetic resonance imaging (MRI) of Claimant's cervical spine taken on October 16, 2006, was also normal. Dr. Scinico's examination of Claimant revealed no nodules or areas of muscle tightness. Dr. Scinico noted that at the time of the examination Claimant's hands were calloused, and there was dirt and grease under his nails. This suggested to Dr. Scinico that Claimant had been engaged in heavy manual labor, although he had been off work for six months. Dr. Scinico stated that muscle strength was normal in Claimant's left hand and there was no evidence of paresthesia.

Dr. Scinico concluded that Claimant's work injuries from 2006 had resolved. Regarding the alleged April 2007 incident, Dr. Scinico opined that there was no objective evidence to support a new injury. He agreed that a MRI showed a small disc herniation at the T11-12 area, but concluded that it was not caused by the 2006 accident or in any way work-related. Dr. Scinico opined that Claimant had fully recovered from his work-related injuries and was able to return to work.

Eugene Chiavacci, M.D., an orthopedic surgeon, also testified for Employer. At an examination on April 21, 2008, Claimant presented with complaints of neck spasms, back pain, headaches and numbness in the fourth and fifth fingers of his left hand. Dr. Chiavacci testified that his examination did not reveal any objective evidence to support these complaints. Dr. Chiavacci believed that the decreased sensation in Claimant's left hand was due to an irritation of the ulnar nerve, not related to any work injury. He opined that the small disc herniation at the T11-12 level was not work-related and, in any event, was not the cause of any of Claimant's current symptoms. He stated that Claimant suffered a soft tissue sprain or strain in the September 2006 accident. In sum, Dr. Chiavacci concluded that Claimant's current medical complaints were not related to his work injury in 2006 or to his injury in April 2007; Claimant had recovered from all work-related injuries.

The WCJ found Employer's evidence to be more credible, persuasive and convincing than that offered by Claimant. Specifically, the WCJ accepted the testimony of Drs. Scinico and Chiavacci that Claimant had sustained only strains or sprains as a result of his 2006 work-related injury. He rejected Dr. Pelicci's testimony that the disc herniation at T11-12 was due to the 2006 injury or that the disc herniation at T10-11 was due to the April 2007 reinjury. The WCJ found that Claimant's herniated disc at T10-11 was attributable to the February 5, 2007, incident at Claimant's home when he slipped on ice. Nevertheless, the WCJ accepted Claimant's testimony that he was unable to drive his truck after the April 2007 reinjury. Accordingly, the WCJ reinstated benefits effective April 19, 2007, and terminated these benefits as of April 21, 2008, finding that he had fully recovered from all of his work-related injuries by that date.

Claimant appealed to the Board. Claimant argued that the WCJ erred in relying on Dr. Chiavacci's opinion and in finding that Claimant's herniated disc was caused by slipping on the ice at his home. Claimant also asserted that Employer was not entitled to a termination of benefits because Employer had failed to establish a change in his physical condition. The Board affirmed the WCJ's decision, and Claimant petitioned for this Court's review.¹

On appeal, Claimant presents three issues for our consideration. First, Claimant argues that Employer failed to establish that he had recovered from all of his work-related injuries. Second, Claimant contends that the WCJ erred in finding that his herniated disc at T10-11 occurred when he slipped on ice at his home. Third, Claimant asserts that Employer failed to establish a change in Claimant's medical condition necessary for a termination of benefits.²

We begin with a review of the legal standards relevant to Claimant's petitions. In a claim petition, a claimant must prove that he has sustained a work injury and that the injury continues to cause his loss of earnings. *Somerset Welding and Steel v. Workmen's Compensation Appeal Board (Lee)*, 650 A.2d 114, 119 (Pa. Cmwlth. 1994). In a reinstatement, the claimant has the burden of proving that by no fault of his own his earning power has become adversely affected by his work injury. *Sylvania v. Workers' Compensation Appeal Board*

¹ Our scope of review is limited to determining whether there has been a violation of constitutional rights, an error of law or whether necessary findings of fact are supported by substantial evidence of record. *Tri-Union Express v. Workers' Compensation Appeal Board (Hickle)*, 703 A.2d 558, 561 (Pa. Cmwlth. 1997).

² Claimant raises a fourth issue in his brief, *i.e.*, that Employer never provided him with the required notice of ability to return to work. However, Claimant did not raise this issue in his appeal to the Board. As a result, this issue has been waived and we decline to consider it. PA. R.A.P. 1551(a) ("No question shall be heard or considered by the court which was not raised before the government unit").

(*Wilson*), 893 A.2d 186, 189 (Pa. Cmwlth. 2006). Where, as here, the claimant seeks a reinstatement on the theory that his work injury is broader than originally recognized, the claimant bears the burden of proving that the list of accepted work injuries is not complete. *City of Harrisburg v. Workers' Compensation Appeal Board (Palmer)*, 877 A.2d 555, 559 (Pa. Cmwlth. 2005). Where, as here, the WCJ terminates benefits following a closed period of reinstated benefits, the employer's evidence must prove that the claimant's injury has resolved or that any current disability is unrelated to the claimant's work injury. *Jones v. Workers' Compensation Appeal Board (J.C. Penney Co.)*, 747 A.2d 430, 432 (Pa. Cmwlth. 2000). In making these findings, the WCJ has exclusive province over questions of credibility and evidentiary weight. *Acme Markets, Inc. v. Workers' Compensation Appeal Board (Brown)*, 890 A.2d 21, 25 (Pa. Cmwlth. 2006).

Claimant's first argument is that Employer's evidence did not establish a full recovery from his accepted work-related injuries. Specifically, Claimant argues that Employer's medical experts were required to accept a work-related injury to his left hand when they rendered their opinion, and they did not do so. We disagree with this characterization of the testimony of Employer's experts.

Dr. Scinico testified that he tested Claimant's left hand and found it to be normal with no sensory or muscle abnormalities. Stated otherwise, Claimant's work-related hand injury had resolved when Dr. Scinico examined him. Likewise, Employer's other expert, Dr. Chiavacci, did not deny Claimant's left hand injury. He expressly acknowledged that Claimant had decreased sensation in one finger, but he concluded it was not related to a work injury.³

³ As noted by the Board, the accepted injuries, including that to Claimant's hand, were "vague at best." R.R. 54a.

We turn, next, to Claimant's second issue, *i.e.*, that the WCJ erred in finding that his herniated disc at T10-11 was not work-related. Specifically, Claimant challenges Finding of Fact 18, which states that "the cause of the thoracic herniated disc at T10-11" was "the slip at home in February 2007." R.R. 37a. Claimant argues that this finding has no support in the record. He notes that none of the medical experts testified that the T10-11 herniation was caused by the slip at home.

We agree with Claimant that none of the medical experts opined that Claimant's herniated disc at T10-11 was a result of his slip on ice at his home. As such, the WCJ's Finding of Fact 18 is not supported by substantial evidence of record. However, that determination does not change the outcome of this case because a mistake in a finding of fact that does not directly relate to the central issue of the case constitutes harmless error. *Benson v. Workmen's Compensation Appeal Board (Haverford State Hospital)*, 668 A.2d 244, 248-49 (Pa. Cmwlth. 1995). As noted by the Board, the WCJ specifically found that Claimant's disc herniations were not part of his work-related injury and concluded that, "it did not matter what caused Claimant's thoracic disc herniations, as long as they were not a result of either of Claimant's work incidents." R.R. 55a. We agree.

The WCJ rejected the opinion of Claimant's expert that the disc herniation at T11-12 was caused by the 2006 work-related accident or that the disc herniation at T10-11 was caused by the April 2007 incident. Instead, the WCJ determined that Claimant suffered a back strain or sprain in the 2006 injury and that the April 2007 injury was an aggravation thereof. As we have previously explained, "[a] lower back strain is not the same as disc herniations and lumbar radiculopathy. They are separate and discrete conditions." *City of Philadelphia v.*

Workers' Compensation Appeal Board (Smith), 860 A.2d 215, 223 (Pa. Cmwlth. 2004). Because the herniated discs were never accepted work-related injuries, it was Claimant's burden to establish their relationship to the accepted work-related injuries. *Id.* Because the WCJ did not credit his evidence, Claimant failed to meet this burden.

Claimant's third allegation of error is that Employer failed to satisfy its burden for terminating benefits because it did not show a change in Claimant's medical condition. Claimant argues that under *Lewis v. Workers' Compensation Appeal Board (Giles & Ransome, Inc.)*, 591 Pa. 490, 919 A.2d 922 (2007), it was Employer's burden to show that Claimant's physical condition had improved after the stipulation was entered. The Board rejected this argument. It reasoned that *Lewis* applied only to cases involving serial termination petitions, and this is not such a case.

In *Lewis*, the employer tried repeatedly to terminate the claimant's benefits based upon allegations of full recovery. The WCJ granted the employer's fourth termination petition, and that decision was affirmed by the Board and this Court. On appeal, the Pennsylvania Supreme Court reversed, holding that "*where there have been prior petitions to modify or terminate benefits, the employer must demonstrate a change in physical condition since the last disability determination.*" *Id.* at 497, 919 A.2d at 926 (emphasis added). Assuming, *arguendo*, the stipulation constituted an adjudication and that *Lewis* does apply, *Lewis* does not make Claimant's case for him. This is because Employer actually did establish a change in Claimant's condition.

Ironically, it was Claimant who raised the issue of a change in his condition. He alleged, first, that his work-related injury had worsened and, second,

that he had sustained a new work-related injury. Claimant persuaded the WCJ that in April 2007 he aggravated his 2006 work injury, in the nature of a new sprain. However, the WCJ also found that Claimant had recovered as of April 21, 2008, after which date the WCJ terminated benefits. The WCJ credited Employer's medical evidence that Claimant's work-related injuries had resolved, *i.e.*, changed in that he no longer suffered pain or numbness due to the work-related injuries.⁴ Therefore, we reject Claimant's argument that evidence was not presented showing a change in his condition that warranted a termination of benefits.⁵

Accordingly, the order of the Board is affirmed.

MARY HANNAH LEAVITT, Judge

⁴ Employer also presented medical evidence that Claimant had not sustained a new work-related injury.

⁵ Employer acknowledges in its brief that a termination petition was never filed. Even so, the WCJ did terminate benefits at the end of the closed period of reinstated benefits. We have permitted a termination of benefits without a specific request from an employer when litigating a claim petition because the duration of benefits is always at issue in a claim petition. *McQuilken v. Workers' Compensation Appeal Board (Prudential)*, 770 A.2d 376, 379 (Pa Cmwlt 2001). However, we explained that in a proceeding where the issue of full recovery is not being litigated, it is not permissible for the WCJ to grant termination *sua sponte*. *Coover v. Workmen's Compensation Appeal Board (Browning-Ferris Industries of Delaware Valley)*, 591 A.2d 347, 350 (Pa. Cmwlt. 1991). It may be that the WCJ should have suspended, not terminated, benefits in the absence of a request by Employer. However, Claimant has not raised the issue, and it is waived. PA. R.A.P. 1551(a). In any case, it is difficult to posit how Claimant could benefit from a suspension, instead of a termination. Because Claimant has been adjudicated fully recovered from his work injuries, his work injuries should not require medical treatment in the future.

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ORDER

AND NOW, this 8th day of June, 2010, the order of the Workers' Compensation Appeal Board dated October 16, 2009, in the above-captioned matter is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge