IN THE COMMONWEALTH COURT OF PENNSYLVANIA

GPU Nuclear Corporation and Utilities Mutual Insurance, Petitioners	:	
v.	:	No. 2245 C.D. 2007
	:	Submitted: March 7, 2008
Workers' Compensation Appeal Board (Pelen, Amergen Energy and The PMA Group), Respondents	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN FILED: July 8, 2008

GPU Nuclear Corporation (GPU) and GPU's workers' compensation (WC) insurer, Utilities Mutual Insurance (UMI), petition for review of the November 9, 2007, order of the Workers' Compensation Appeal Board (WCAB) affirming, as modified,[1] the decision of a workers' compensation judge (WCJ) to grant the claim petition filed by Margaret Pelen (Claimant). We affirm.

Claimant has worked as a radiation technician at Three Mile Island (TMI) since January 4, 1979. As a radiation technician, Claimant is responsible for monitoring the radiation levels of everything at TMI, including TMI's garbage,

[1] The WCAB corrected a typographical error relating to the amount of legal costs the WCJ ordered GPU and UMI to pay.

and her duties include carrying garbage to the compactor and compacting it. In 1994, while TMI was owned by GPU, Claimant sustained a work-related low back strain, for which she received WC benefits from GPU/UMI and treated with TMI's physician, who prescribed pain medication, muscle relaxants and physical therapy.[2] Claimant returned to work and wage loss benefits were suspended; however, she continued to take the medications prescribed for the 1994 injury and paid for by GPU/UMI, and she continued the daily home exercises prescribed by her physical therapist. (WCJ's 4/5/2007 op., Summary of Evidence, No. 2.)

In December 1999, Amergen Energy (Amergen) purchased TMI from GPU. During an "outage" period in 2001, Claimant's work duties increased, and her low back became irritated due to the extra work.[3] Although Claimant continued to work, she sought treatment from her primary care physician, who prescribed pain medication and extra muscle relaxants. Claimant completed an accident report on December 19, 2001, after GPU/UMI's workers' compensation coordinator informed her that 2001 increased symptomology was an aggravation of the 1994 injury and, therefore, constituted a new injury. After she filed the injury report, GPU/UMI stopped paying for the medications prescribed for the 1994 injury. Claimant continued working until June 17, 2004, when she underwent

[2] Claimant also sustained a work-related lumbar strain in 1991, which GPU acknowledged in a Notice of Compensation Payable.

[3] Claimant recalled one night in particular, October 29, 2001, when she experienced a sharp pain in her back while she was pulling a bag of garbage to the compactor. Claimant described the pain as a stabbing pain in her back, which shot through her right leg and radiated from her back to her neck. (R.R. at A59-A61.)

surgery on her low back. (WCJ's 4/5/2007 op., Summary of Evidence, Nos. 1, 3, 4; R.R. at A79-A80.)

On April 29, 2002, Claimant filed a claim petition against Amergen and its insurer, The PMA Group (PMA), alleging that she sustained a work-related aggravation of the 1994 back injury during the 2001 outage. Amergen and PMA filed an answer denying the allegation and, in addition, filed a petition seeking to join GPU and UMI as additional defendants, averring that Claimant's 2001 injury was not a new injury but a recurrence of her 1994 injury.[4] GPU and UMI filed answers denying those averments, and hearings were held before a WCJ.

In addition to her own testimony, Claimant presented the deposition testimony of Walter C. Peppelman, Jr., D.O., a board-certified orthopedic surgeon, who began treating Claimant on January 28, 2002. Based on the history Claimant provided him, his examination of Claimant and his review of diagnostic tests, Dr. Peppelman opined that the October 2001 work incident significantly altered Claimant's physical complaints and aggravated her prior condition to the point where surgery was necessary. Dr. Peppelman testified that he performed surgery on Claimant on June 18, 2002, to replace two disks, and that Claimant has been

[4] If an incident materially contributes to a previous work-related injury, a new injury, or aggravation, has occurred, and the employer at the time of the aggravation is liable for the payment of a claimant's compensation benefits. *McNulty v. Workers' Compensation Appeal Board (McNulty Tool & Die)*, 804 A.2d 1260 (Pa. Cmwlth. 2002), *appeal denied*, 574 Pa. 756, 830 A.2d 977 (2003). However, if a compensable disability results directly from a prior injury but manifests itself on the occasion of an intervening incident that does not contribute materially to the disability, the claimant has suffered a recurrence, and the employer at the time of the initial injury is responsible for payment of benefits. *Id.*

disabled from work since that date. Dr. Peppelman stated that he would not release Claimant to work until she can lift fifty pounds. (WCJ's 4/5/2007 op., Summary of Evidence, Nos. 5-7.)

Amergen presented the deposition testimony of Jason J. Litton, M.D., a board-certified orthopedic surgeon, who examined Claimant on August 8, 2002. Dr. Litton testified that he reviewed various medical records concerning Claimant's low back problems, including records from Claimant's June 2002 back surgery. Dr. Litton indicated that he found no abnormalities in Claimant's physical examination, and he opined that Claimant suffered from chronic degenerative disc disease of the lumbar spine with ongoing back pain since 1989. Dr. Litton testified that Claimant had episodes of increased symptoms both at home and at work but that these increases were temporary. Dr. Litton disagreed with Dr. Peppelman's opinion that Claimant suffered a new injury in 2001. Instead, he opined that Claimant had a gradual worsening of her degenerative condition that became symptomatic for low back strain due to several transient incidents occurring at work. Dr. Litton did not believe that the events during the outage period in 2001 caused Claimant's current disability, which, in his opinion, is due to her chronic degenerative disc disease. (WCJ's 4/5/2007 op., Summary of Evidence, Nos. 8-9.)

The WCJ credited Claimant's testimony and found Dr. Litton's testimony more credible and persuasive than Dr. Peppelman's testimony. Relying on Dr. Litton's testimony, the WCJ found that Claimant suffered a recurrence of

the 1994 work injury. Therefore, the WCJ: (1) granted Claimant's claim petition;[5] (2) granted Amergen's and PMA's Joinder petitions; (3) directed GPU and UMI to pay Claimant temporary total disability benefits and the medical bills causally related the treatment of the recurrence;[6] and (4) dismissed Amergen and PMA from the litigation. (WCJ's 4/5/2007 op., Findings of Fact, Nos. 1-7.)

Claimant, GPU and UMI appealed the WCJ's determination. The WCAB affirmed the WCJ's decision but remanded the matter for the WCJ to render findings of fact and conclusions of law pertaining to a subrogation lien of Keystone Health Plan Central, which paid for Claimant's surgery. On remand, the WCJ considered only that issue and concluded that Claimant's 2002 back surgery was not related to any work injury that recurred in 2001. (WCJ's 4/5/2007 op., Conclusions of Law, No. 10.) The WCJ made no other changes to his opinion.

GPU and UMI again appealed to the WCAB, arguing that the WCJ erred in relying on Dr. Litton's testimony to award benefits for a recurrence. The WCAB rejected this argument, noting that, although Dr. Litton did not specifically testify that Claimant sustained a recurrence, he did opine that, as a result of her work activities, Claimant experienced increased symptoms in her low back. The WCAB concluded that Claimant's credible testimony also supported the finding of a recurrence. Thus, the WCAB affirmed the award of benefits.

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[5] Although the WCJ granted Claimant's claim petition, the legal effect was to reinstate Claimant's benefits for a recurrence of a prior work-related injury.

[6] We note that neither the WCJ's findings nor his order specifies any period of total disability attributable to the recurrence.

On appeal to this court,[7] GPU and UMI argue that Dr. Litton's testimony, taken as a whole, does not support the WCJ's finding that Claimant sustained a recurrence of the 1994 low back injury in 2001. After reviewing Dr. Litton's testimony, we disagree.

Here, Dr. Litton credibly testified that Claimant's pre-existing degenerative disc disease became symptomatic for low back strains at work and that Claimant experienced increased symptoms when she performed work activities. (R.R. at A214, A222-A223, A232-A233.) Additionally, Claimant credibly testified that she continued to take medications for her 1994 back strain and that she continued to experience periodic irritations of that injury while performing extra work activities during outages. She further testified that the pain she experienced while performing extra work duties during the 2001 outage occurred in the same location as her prior low back injury. (R.R. at A58-A59, A68-A69, A180-A181.) This credited testimony supports the WCJ's findings and conclusions that in 2001, Claimant sustained a recurrence of her 1994 work injury.[8]

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Judge

[7] Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law or whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

[8] Moreover, where, as here, an employee's benefits merely have been suspended and the employer has not moved to terminate its liability for their payment, the continuation of the work injury is acknowledged. *McNulty*.

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O R D E R

AND NOW, this 8th day of July, 2008, the order of the Workers Compensation Appeal Board (WCAB), dated November 9, 2007, is hereby affirmed.

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ROCHELLE S. FRIEDMAN, Judge