

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joyce Kiritchenko, :
Petitioner :
 :
v. : No. 2274 C.D. 2007
 : Submitted: June 20, 2008
Workers' Compensation Appeal :
Board (Moon Area School District), :
Respondent :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: July 11, 2008

Joyce Kiritchenko (Claimant) appeals from an order of the Workers' Compensation Appeal Board (Board) affirming the decision of the Workers' Compensation Judge (WCJ) denying her review petition to expand the description of her left wrist work injury to include a left shoulder injury. Because Claimant failed to meet her burden of proof, we affirm the Board's decision.

Claimant sustained an injury while in the course and scope of her employment with Moon Area School District (Employer) on February 12, 2002. The injury was described in the notice of compensation payable as a "left wrist fracture." Several years after Claimant had been receiving workers' compensation benefits for the injury, on January 28, 2005, Claimant filed a petition to review compensation benefits alleging that the description of her work injury should be

expanded to include “left shoulder bicipital tendinitis” as of February 17, 2003. Employer filed a timely answer denying the allegations.

At the hearing before the WCJ,¹ Claimant testified that she worked for Employer as a dishwasher/server in a middle school and injured her hand while lifting a stack of 42 meal trays. She initially underwent a bone graft and was placed in a cast for eight weeks. When it was determined that she tore ligaments in her wrist, she underwent surgery on May 16, 2002, which was performed by Glen Buterbaugh, M.D. (Dr. Buterbaugh). That was followed up by physical therapy which began in July 2002. Sometime in July, she stated that she began having problems with her left shoulder from the physical therapy. Specifically, she stated that she believed that her shoulder problem was the result of her third visit to physical therapy in July 2002 when the physical therapist moved her left arm over her head and Claimant felt something loosen at the front part of her shoulder from her ear to her shoulder. She also stated that she had injured her shoulder when one of the physical therapists moved the lower part of her arm causing her shoulder and biceps to hurt. Due to her shoulder pain, she stated that Dr. Buterbaugh discontinued her physical therapy.

In April 2003, Claimant stated that she underwent left shoulder surgery to repair a rotator cuff tear. She then restarted physical therapy in May 2003 and continued until August 2003. The physical therapy was directed to the

¹ Employer had filed a suspension petition which was consolidated with the review petition and heard by the WCJ at the same time. The suspension petition was denied by the WCJ, affirmed by the Board, and is not at issue on appeal.

left wrist, hand, arm and shoulder. Claimant testified that in August 2003, she stopped physical therapy because she was having a second left wrist surgery due to torn ligaments and tendons in her wrist following a trip and fall at home in which she re-injured her left wrist. She underwent surgery in September 2003 and restarted physical therapy in October 2003, which she continued until November 2003. In September 2004, she had another rotator cuff repair surgery to her left shoulder. At the April 26, 2006 hearing, Claimant stated that she returned to work for Employer on October 3, 2005, earning wages greater than she had at the time of her work injury.

In support of her petition, Claimant offered the expert testimony of Dr. Buterbaugh, a board-certified orthopedic surgeon with a certificate of added qualification in hand surgery. Dr. Buterbaugh testified that he had performed the surgery to Claimant's left wrist due to her work injury and continued to treat her following surgery. He also recommended physical therapy for her wrist, and she did well with the physical therapy. Dr. Buterbaugh stated that according to his office notes, Claimant did not report pain or problems with her left shoulder until January 6, 2003. He had her undergo an MRI of her left shoulder on January 8, 2003, which revealed bicipital tendonitis for which he recommended physical therapy. At that same time, Claimant's wrist showed improvement. He next saw Claimant in September 2003 and Claimant continued to complain of wrist pain, but he was unaware of her fall at home. He stated that he operated on her left wrist again. He also operated on Claimant's left shoulder on September 16, 2004, but did not have any records showing that he saw her again for her left shoulder after January 2005.

Dr. Buterbaugh admitted that while he first dictated office notes of Claimant's reported left shoulder symptoms on January 6, 2003, he had seen Claimant previously on November 6, 2002; September 25, 2002; August 14, 2002; and July 15, 2002; and there were no dictated notes regarding any left shoulder pain. He also admitted that his January 8, 2004 letter to Claimant's counsel did not mention any left shoulder pathology, and that the left shoulder pathology that Claimant had was what he saw in many patients, even absent trauma. As to Claimant's physical therapy records, Dr. Buterbaugh agreed that there was no indication in any of the records that Claimant contended that she suffered a left shoulder injury during physical therapy.

In response to the review petition, Employer offered the expert testimony of Brian F. Jewell, M.D. (Dr. Jewell), a board certified orthopedic surgeon fellowship trained in arthroscopic surgery and sports medicine, with a practice close to 50% involved with shoulder cases. Dr. Jewell testified that he reviewed Claimant's medical records, diagnostic studies, and was aware of her work injury and treatment history, including her four surgeries performed by Dr. Buterbaugh. Regarding her left shoulder problems, he noted that her problems were first mentioned in her physical therapy records on July 18, 2002, when she reported to her physical therapist that she was swimming the prior day and had trouble gripping. When she returned on July 22, 2002, she again reported that she was swimming over the weekend and irritated her left arm and shoulder. Going forward, Dr. Jewell noted that there were some records indicating shoulder problems with and without swimming and other activities. However, he reviewed Claimant's records from Dr. Buterbaugh and there was no mention of any shoulder

problems until January 6, 2003. Dr. Jewell also stated that at the time of his exam on May 20, 2005, Claimant stated that her left shoulder was 90% of the ongoing problems she was experiencing. She believed that physical therapy either worsened the problems or caused them to the point where she brought them to others' attention.

However, Dr. Jewell was the Director of the Health South physical rehabilitation facilities and was very familiar with the therapies and how they were developed for the various body parts. Dr. Jewell explained that Claimant would have performed almost no activities with her left shoulder while in physical therapy, because, when there was an injury to a specified joint in the body, the job of the therapist was to isolate that joint and to work on the rehabilitation of that joint and to separate it from other joints. Therefore, wrist rehabilitation involved wrist motion, dorsiflexion and palmer flexion of the wrist, radial and ulnar deviation of the wrist, supination and pronation of the forearm and wrist, finger function and hand function. Dr. Jewel did not see any notes in Claimant's physical therapy file regarding movement of the left shoulder beyond that of daily life activity. Further, when he stated that he asked Claimant what she was doing at physical therapy when her left shoulder complaints began, she could not remember and could not state what exercises she was performing. When he asked her what home exercises she was performing, she stated she was just walking.

As for Dr. Jewell's exam of Claimant's left shoulder, he found she had full passive motion. He opined within a reasonable degree of medical certainty that she had not incurred any other injuries at the time of her February 12,

2002 work injury to the left wrist. He did not believe her treatment for the left wrist caused any injury to her left shoulder. He noted that she was swimming during the summer of 2002, and that activity could cause the type of problems she reported. He opined that Claimant had impingement and bursitis and some arthritis of the acromioclavicular joint, but opined with a very high degree of medical certainty that there was no cause and effect relationship between the development of Claimant's left shoulder problems and her work injury.

The WCJ found Dr. Jewell's testimony and opinions credible and rejected those of Dr. Buterbaugh where they were not consistent with Dr. Jewell's stating:

The opinions offered by Dr. Brian Jewell are credible and fact as to the claimant's review petition, as I found his analysis of the likelihood of a shoulder injury in physical therapy to be the most persuasive evidence of record on that issue. His opinions were consistent with the claimant's medical history, including (i) the *lack* of any account in Dr. Buterbaugh's record (the long-term treating physician who saw her regularly) or the physical therapy records of an in-therapy injury or problem; (ii) her reported outside swimming activity while in therapy; and (iii) the intervening, unrelated fall at home which the claimant conceded involved her left arm and wrist. The claimant did not sustain any type of left shoulder injury as a result of the February 12, 2002 work injury.

(WCJ's September 28, 2006 decision at 14.) The WCJ also rejected Claimant's recounting of the July 2002 physical therapy treatment where she claimed to have hurt her left shoulder when the physical therapist raised it over her head. Claimant appealed to the Board arguing that the WCJ's findings were not supported by

substantial, competent evidence. The Board affirmed the WCJ's decision because Claimant failed to prove through her medical expert that her left shoulder injury was the result of her work injury to her left wrist on February 12, 2002. This appeal by Claimant followed.²

Claimant again contends that the WCJ's determination that her left shoulder injury was not related to her work injury was not supported by substantial evidence because she presented evidence that she injured her shoulder in July 2002 while undergoing physical therapy for her recognized work injury of her left wrist.³ What this argument fails to take into consideration is that a party seeking to add a new injury to the notice of compensation payable has the burden of establishing by competent evidence that the injury was caused and arose out of the work-related

² Our scope of review of the Board's decision is limited to determining whether constitutional rights have been violated, whether an error of law was committed, or whether findings of fact are supported by substantial evidence. *Morella v. Workers' Compensation Appeal Board (Mayfield Foundry, Inc.)*, 935 A.2d 598 (Pa. Cmwlth. 2007).

³ Specifically, she argues that she testified at the hearing before the WCJ that she felt her left shoulder pop at her third physical therapy treatment in July 2002 after her physical therapist maneuvered her arm over her head. Further, it is well documented in the physical therapy notes dated September 23, 2002, October 21, 2002, and November 21, 2002, that she suffered pain in her left shoulder while at physical therapy. Additionally, Dr. Buterbaugh unequivocally testified that she injured her left shoulder as a result of the therapy that was required by him for the work injury. He further noted that Claimant began informing him of her shoulder pain in July or August of 2002, and again notified him of that pain in November 2002. His notes also indicated that her pain began following the rehabilitation of her left hand when she felt a pop in her shoulder during therapy. Claimant also states that she reported her shoulder pain to a functional capacity evaluator in September 2002. Finally, Claimant states that Dr. Jewell testified that her physical therapy records from July 2002 confirmed her complaints of left shoulder problems because they indicated that she had problems both during and in the absence of activities such as swimming.

injury. *Jeanes Hospital v. Workers' Compensation Appeal Board (Hass)*, 582 Pa. 405, 872 A.2d 159 (2005). Just as in a claim petition, the claimant has the burden to establish a causal relationship between the work injury and her injury by unequivocal medical testimony unless the relationship is obvious. *Jeannette District Memorial Hospital v. Workers' Compensation Appeal Board (Mesich)*, 668 A.2d 249 (Pa. Cmwlth. 1995). Because, in this case, the left shoulder injury is not obviously caused by the accepted left wrist injury, unequivocal medical evidence is necessary to prove a causal relationship.

Here, the WCJ rejected Claimant's version of events and rejected Dr. Buterbaugh's testimony to the extent it conflicted with the testimony of Dr. Jewell.⁴ The WCJ found Dr. Jewell credible that Claimant could not have

⁴ The WCJ also made the following findings of fact regarding Dr. Buterbaugh and Claimant's shoulder injury:

C. (1) Dr. Buterbaugh was not familiar with the claimant's medical history, including his *own* treatment...In regard to the claimant's left shoulder complaints. Dr. Buterbaugh had no independent recollection of seeing the claimant at all after January 2005. He initially testified that he did not perform any surgery to the claimant's left shoulder; and he was unaware of any. It was not until the doctor was provided with medical records by claimant's counsel that he recalled that he had, in fact, performed two surgeries to the claimant's left shoulder.

C. (2) Dr. Buterbaugh failed to unequivocally testify that the claimant had, in fact, injured her left shoulder as a result of the February 12, 2002 work injury. Dr. Buterbaugh agreed that, according to his office notes, claimant did not report pain or problems with her left shoulder until January 6, 2003. Prior to this appointment, claimant had been seen by Dr. Buterbaugh four times in the latter half of 2002. Despite being seen by the doctor on these four occasions, claimant reported *no* left shoulder pain

(Footnote continued on next page...)

sustained a left shoulder injury during physical therapy based on the following: “The reason I do not believe anything occurred in therapy is, No. 1, it’s not documented; No. 2, that exercises that are described here in the program and areas are isolated from that area. Daily life has a much higher chance of causing a shoulder injury in this patient than what they do there.” (March 29, 2006 deposition testimony of Dr. Jewell at 32.) Because the WCJ is the ultimate factfinder and the sole arbiter of credibility in a workers’ compensation proceeding, *Rissi v. Workers’ Compensation Appeal Board (Tony DePaul & Son)*, 808 A.2d 274 (Pa. Cmwlth. 2002), we will not disturb those findings. Consequently, Claimant failed to prove by unequivocal medical testimony that her left shoulder injury was related to her work-related left wrist injury.

Accordingly, the order of the Board is affirmed.

DAN PELLEGRINI, JUDGE

(continued...)

complaints. Dr. Buterbaugh agreed that his January 8, 2003 report to claimant’s counsel made no mention of any of the claimant’s reported left shoulder problems. Furthermore, Dr. Buterbaugh agreed that in regard to claimant’s physical therapy records, there was no indication in any of these records that claimant contended that she injured her left shoulder while in physical therapy.

(WCJ’s September 28, 2006 decision at 13-14.)

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ORDER

AND NOW, this 11th day of July, 2008, the order of the Workers' Compensation Appeal Board, at No. A06-2403, dated November 14, 2007, is affirmed.

DAN PELLEGRINI, JUDGE