IN THE COMMONWEALTH COURT OF PENNSYLVANIA

US Airways, Inc. and Sedgwick CMS, Petitioners	:	
v.	:	No. 501 C.D. 2008
	:	Submitted: June 20, 2008
Workers' Compensation Appeal Board (Ferguson), Respondent	:	

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN FILED: August 12, 2008

US Airways, Inc. and Sedgwick CMS (together, Employer) petition for review of the February 20, 2008, order of the Workers' Compensation Appeal Board (WCAB), which affirmed the decision of a workers' compensation judge (WCJ) denying Employer's termination, suspension and joinder petitions and granting the claim, review, reinstatement and penalty petitions filed by Kelly Ferguson (Claimant).[1] We affirm.

For five years, Claimant worked for Employer as a fleet service agent, a position that involved loading and unloading baggage, freight and mail. Claimant worked eight hours per day, five days per week, plus an average of

[1] Because neither party has challenged the propriety of the various petitions filed, we need not address any issues concerning the procedural history of this matter.

twenty-four hours per week overtime. On December 21, 2004, Claimant suffered a work injury involving her left wrist, elbow, shoulder and neck while she was unloading baggage from a plane. At the time, Employer was self-insured. (R.R. at 452a.) Claimant reported the injury to her supervisor and was seen by panel physician Norman Werther, M.D. The next day, Claimant returned to light duty work that did not require the use of her left extremity. The light duty position did not allow Claimant to work overtime and was available only until February 6, 2005. (WCJ's Findings of Fact, Nos. 1, 20.) On February 10, 2005, Employer issued a notice of temporary compensation payable (NTCP), which described Claimant's injury as a left wrist strain/sprain caused by repetitive lifting. (R.R. at 46a.) Claimant received payments for partial disability from December 22, 2004, through February 6, 2005, based on her loss of overtime. (R.R. at 76a.) Claimant received total disability benefits for the following week during which work was not available. (R.R. at 444a.) On February 14, 2005, Dr. Werther returned Claimant to full duty without restrictions. Claimant returned to her pre-injury position, but she did not feel able to work overtime.

Employer filed a notice of suspension on February 14, 2005,[2] (R.R. at 48a), and, on February 22, 2005, Employer filed a notice stopping temporary compensation and a notice of workers' compensation denial, (R.R. at 364a, 368a). The latter notice acknowledged a work injury in the nature of a left wrist sprain but

[2] Section 413(c) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, added by the act of July 1, 1978, P.L. 692, *as amended*, 77 P.S. §774.2, allows an employer to suspend compensation upon the filing of written notice (Form LIBC-751) accompanied by an affidavit that the employee has returned to work at prior or increased earnings.

denied that Claimant was disabled as a result. On March 30, 2005, Employer filed a petition to terminate or suspend Claimant's benefits based on her return to her pre-injury job. (R.R. at 1a-2a.)

In the meantime, Claimant filed a challenge to the notice of suspension. Following a special supersedeas hearing, the WCJ issued a decision and order dated May 6, 2005, granting Claimant's challenge petition, finding that Claimant's inability to work overtime resulted in a loss of earnings and directing Employer to pay continuing partial disability benefits as of February 14, 2005. (R.R. at 129a-33a.)

On March 14, 2005, while the decision on Claimant's challenge petition was pending, Claimant filed: 1) a claim petition alleging that she suffered a work injury to her neck, left shoulder, elbow and wrist on December 21, 2004, caused by the repetitive nature of her job duties; 2) a review petition, seeking to amend the description of her injury to include her neck, left shoulder and elbow and to amend the statement of her average weekly wage to include wages she earned for overtime; and 3) a penalty petition, alleging that Employer violated the Act by filing the notice of suspension. (R.R. at 17a-19a, 25a-26a, 30a-32a.)

Claimant continued working until June 1, 2005; thereafter, Claimant filed a reinstatement petition alleging a recurrence of total disability due to her work injury. On January 23, 2006, Employer filed a petition to join the State Workers' Insurance Fund (SWIF), alleging that Claimant's current disability was caused by a work injury on June 1, 2005, at which time SWIF provided insurance

coverage.[3] Employer subsequently filed a termination petition alleging that Claimant had fully recovered from her work injury as of January 17, 2006. (R.R. at 11a-13a, 37a-38a, 43a-44a.)

The parties filed responsive answers, and the petitions were assigned to the WCJ for hearings. Claimant testified by way of deposition on August 30, 2005, and April 18, 2006. In relevant part, Claimant described the December 21, 2004, work injury as the onset of pain in her left wrist, shooting pains and numbness from her left elbow to her fingertips and pain in her left shoulder and neck. Claimant testified that she continued to experience pain from the injury even while working the light duty job that did not require the use of her left extremity; she stated that she told Dr. Werther about elbow and neck pain in January 2005 and about pain in her shoulder in February. (R.R. at 67a-68a, 313a, 345a-46a.) Claimant testified that she did not feel like she had recovered from the work injury in February, when Dr. Werther cleared her to return to her pre-injury job; Claimant explained that she went back to her regular position because she was afraid she would lose her job if she did not. Claimant testified that her pain worsened when she worked and that she felt unable to work overtime due to her continuing pain. Claimant also stated that she spoke to her supervisor about her problems numerous times. (R.R. at 77a-80a, 104a, 303a, 324a.)

Claimant testified that she sought treatment from Walter W. Schwartz, D.O., in March of 2005 and remains under his care. Claimant stated that Dr.

[3] The record indicates that SWIF began providing insurance coverage to Employer in February 2005. (R.R. at 453a.)

Schwartz restricted her to light duty work in April 2005. Ultimately, Employer confirmed that light duty work was not available, and Claimant has not worked since June 1, 2005. Claimant does not believe she is capable of returning to her pre-injury job, but she feels she could return to work in a light duty capacity if such work were available. (R.R. at 80a-83a, 88a-89a.)

Claimant also offered the deposition of Dr. Schwartz, who is board-certified in internal medicine and cardiology and is a senior disability analyst and certified disability consultant. Dr. Schwartz began treating Claimant on March 3, 2005. He testified that Claimant reported having a work injury on December 21, 2004, in which she experienced throbbing pain in her left forearm, shooting up into her shoulder and down to her wrist, and numbness in her fingers. Dr. Schwartz's examination revealed pain in Claimant's left wrist upon gripping, pain in her left elbow and tenderness in the ulnar notch. Based on the history provided by Claimant, his review of her medical records and the results of a March 8, 2005, EMG, Dr. Schwartz diagnosed Claimant with brachial plexopathy, which he described as a repetitive or cumulative trauma injury that evolved due to repetitive lifting. Dr. Schwartz testified that he noted an increase in Claimant's symptoms during his examinations in March, April and May 2005. Concluding that Claimant's regular duties were aggravating her underlying problem, Dr. Schwartz restricted Claimant to light duty as of April 28, 2005. He further observed that, as of September 6, 2005, Claimant's symptoms continued to worsen, even though she had not been working. (R.R. at 155a, 158a, 160a-66a, 170a-80a, 185a-86a, 190a.) Dr. Schwartz opined that Claimant's complaints were directly related to the December 21, 2004, work injury. (WCJ's Findings of Fact, No. 21.)

Claimant also submitted the deposition testimony of Dean W. Trevlyn, M.D. Dr. Trevlyn, who is board-certified in orthopedics, first saw Claimant on August 8, 2005, with regard to her left elbow complaints. Based on his examination of Claimant, Dr. Trevlyn's initial diagnoses were possible cubital tunnel syndrome and possible brachial plexopathy and trapezius strain. (R.R. at 566a-69a.) Dr. Trevlyn ultimately diagnosed Claimant with cubital tunnel syndrome; he operated on Claimant's left elbow on March 17, 2006, and he stated that he expected Claimant to be fully recovered about six months after the surgery. According to Dr. Trevlyn, the repetitive pushing and pulling involved in Claimant's pre-injury job can bring on the symptoms of cubital tunnel syndrome. Based on his review of Claimant's medical records and his treatment of Claimant, Dr. Trevlyn opined that Claimant's cubital tunnel syndrome was causally related solely to the December 21, 2004, work injury. (R.R. at 557a-58a, 572a-78a.)

Brian J. Sennett, M.D., a board-certified orthopedic surgeon, testified on Employer's behalf. Dr. Sennett evaluated Claimant on June 21, 2005. He described his findings upon physical examination, and he diagnosed Claimant with a resolved left wrist strain and an unresolved brachial plexopathy injury. Dr. Sennett testified that the repetitive pulling involved with Claimant's work caused her wrist and brachial plexopathy injuries on December 21, 2004. He stated that the continuation of Claimant's duties from February on aggravated the brachial plexopathy injury, which never resolved between December 21, 2004, and June 1, 2005. (R.R. at 218a-20a, 230a-33a, 240a, 250a.)

The WCJ accepted the testimony of Claimant, Dr. Schwartz and Dr. Trevlyn as credible and convincing. He found the testimony of Dr. Sennett to be credible with respect to Claimant's continued inability to perform her pre-injury job, but he rejected Dr. Sennett's opinion that Claimant had fully recovered from her wrist injury. Based on these credibility determinations, the WCJ found and concluded that Claimant suffered a left wrist strain and sprain, left brachial plexopathy and left elbow cubital tunnel syndrome as a result of her work injury on December 21, 2004, which rendered Claimant partially disabled for the period from December 21, 2004, through June 1, 2005, and totally disabled thereafter. The WCJ also concluded that Employer failed to establish a reasonable basis for its contest and failed to prove that SWIF is liable for Claimant's injury. (WCJ's Findings of Fact, Nos. 25-28, 30; WCJ's Conclusions of Law, Nos. 2, 7, 8.) Accordingly, the WCJ granted Claimant's various petitions, denied Employer's joinder and termination petitions and ordered Employer to pay Claimant compensation due plus attorney's fees for its unreasonable contest. Employer appealed to the WCAB, which affirmed the WCJ's decision.

On appeal to this court,[4] Employer first argues that the WCJ erred in failing to consider substantial competent evidence that Claimant sustained a repetitive trauma injury on June 1, 2005, a date on which SWIF was liable for Employer's workers' compensation claims. According to Employer, all of the medical witnesses testified that Claimant's repetitive trauma injury began in

[4] Our scope of review is limited to determining whether an error of law was committed, whether constitutional rights were violated or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

February 2005 and ended on June 1, 2005, and "there is no dispute" that Claimant was able to continue working in a full duty capacity after her December 21, 2004, injury. (Employer's brief at 14.) We conclude that Employer misunderstands or misrepresents the record.[5]

Contrary to Employer's assertions, Dr. Schwartz, Dr. Trevlyn and Dr. Sennett each testified that Claimant suffered work injuries on December 21, 2004, which had not resolved as of June 1, 2005. Moreover, in making these arguments, Employer ignores the fact that Claimant remained partially disabled when she returned to her pre-injury job in February 2005. (See WCJ's decision, May 6, 2005, R.R. at 129a-33a.) As the WCAB correctly observed, the "credible medical evidence supports a finding that Claimant's condition, although perpetuated by her work duties, was related to the recognized work injury [of December 21, 2004]. When Claimant returned to [her pre-injury] work on February 14, 2005, she was working at less than her pre-injury wage due to her continu[ing] symptoms." (WCAB op. at 7.)

Employer contends that in repetitive trauma cases, the injury date is always the last date the claimant worked. However, it is well-settled that in cases involving cumulative trauma and/or aggravation injuries, determinations of the date of injury depend largely on the facts of each case, the purpose for which the injury date must be established and the medical evidence presented. *City of*

[5] Employer states that the WCJ "failed to even mention" that Claimant's injuries were caused by repetitive trauma and that "there is no suggestion of repetitive trauma in the [WCJ's] entire decision…." (Employer's brief at 11.) We direct Employer's attention to WCJ's Findings of Fact, Nos. 21, 22 and 23.

Philadelphia v. Workers' Compensation Appeal Board (Williams), 578 Pa. 207, 851 A.2d 838 (2004); *Curran v. Workmen's Compensation Appeal Board (Maxwell Industries)*, 664 A.2d 667 (Pa. Cmwlth. 1995), *appeal denied*, 543 Pa. 732, 673 A.2d 337 (1996). Thus, where the injury date must be determined in order to ascertain whether proper notice of an aggravation/cumulative trauma injury was given, our courts have reasoned that the remedial purpose of the Act is best effectuated by acknowledging each day of employment as a new injury; in those instances, "the last day of employment is the preferred injury date for notice purposes."[6] *City of Philadelphia*, 578 Pa. at 214, 851 A.2d at 842.

In *Piad Corporation v. Workers' Compensation Appeal Board (Moskyok)*, 761 A.2d 640 (Pa. Cmwlth. 2000), *appeal denied*, 565 Pa. 657, 771 A.2d 1292 (2001), we clarified that: "where disability results from aggravation over a course of time, the [WCJ], as fact finder, may rely on medical evidence for [the] determination [of date of injury]." Id. at 642-43, quoting *Curran*, 664 A.2d at 672. In *Piad*, we also emphasized the significance of the date on which the claimant becomes disabled, i.e., suffers a wage loss, as a result of a repetitive trauma/aggravation type of injury. "In reality the only moment when such injury can be visualized as taking compensative form is the date of last exposure, *when*

[6] In *Curran*, however, we relied on the humanitarian purpose of the Act to reach a different result. In that case, the WCJ found that the claimant's daily exposures to harmful fumes during the period from October 1987 through June 6, 1989, constituted a continual aggravation of the claimant's pre-existing lung disease. The employer, which had filed for bankruptcy, was insured only through March 31, 1988. We reasoned in *Curran* that the remedial purpose of the Act would best be served in that case by a determination that the claimant's injuries during the six-month period in which his employer's insurance coverage was in effect were a substantial contributing factor to the claimant's ultimate disability.

the cumulative effect causes disability." *Id.* at 642 n.8 (emphasis added) (quoting *Beverage v. Industrial Accident Commission*, 175 Cal. App. 2d 592, 595, 346 P.2d 545, 547-48 (1959)).

In the present case, the purpose of establishing the date of injury is to determine which insurance carrier is liable for Claimant's injuries. Under these circumstances, we look not to the remedial purpose of the Act, but, instead, to the general proposition that Employer bears the burden of proof with respect to its joinder petition. Although the medical witnesses described Claimant's disability as causally related to the repetitive nature of her job duties, such testimony, in and of itself, is not proof that Claimant's return to her pre-injury work caused her condition to worsen such that she suffered a new injury in 2005.

Here, the medical testimony supports the WCJ's finding that Claimant suffered a work injury on December 21, 2004, which caused her disability (wage loss) from that date through June 1, 2005, and beyond, (WCJ's Finding of Fact, No. 30). Moreover, *even if the evidence accepted by the WJC could support a contrary finding*, that circumstance would not be grounds to disturb the WCJ's determination on appeal. *Reliable Foods, Inc., v. Workmen's Compensation Appeal Board (Horrocks)*, 660 A.2d 162 (Pa. Cmwlth. 1995). The acceptance of all or part of a witness' testimony is within the exclusive province of the WCJ and is not a review prerogative of this court. *Id.* Accordingly, we conclude that the WCJ properly determined that Employer failed to meet its burden of proof in the joinder petition.

Employer's remaining argument, that the WCJ erred in awarding counsel fees for an unreasonable contest, is entirely without merit; the only evidence Employer presented during this contest was the deposition of Dr. Sennett, who did not examine Claimant until June 21, 2005, and who opined that Claimant continued to suffer from a brachial plexus injury. To the extent Dr. Sennett's testimony was offered to establish that Claimant suffered additional injuries beginning in February 2005, we remind Employer that all of the medical testimony supports the conclusion that Claimant sustained work-related injuries. The issue of *when* Claimant suffered those injuries is relevant only to determining the liable insurer and has no bearing on the issue of whether Claimant is entitled to compensation. *Pittsburgh Greentree Marriott v. Workmen's Compensation Appeal Board (McVay)*, 657 A.2d 1327 (Pa. Cmwlth.), *appeal denied*, 543 Pa. 699, 670 A.2d 145 (1995).

Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Judge

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O R D E R

AND NOW, this 12th day of August, 2008, the order of the Workers' Compensation Appeal Board, dated February 20, 2008, is hereby affirmed.

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ROCHELLE S. FRIEDMAN, Judge