IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Timothy Kreider, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (The Hershey Company), Respondent	:	No. 546 C.D. 2008
	:	Submitted: August 22, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY JUDGE BUTLER **FILED: October 9, 2008**

Timothy Kreider (Claimant) petitions for review of the February 28, 2008 order of the Workers' Compensation Appeal Board (Board) affirming as modified the January 10, 2006 order of the Workers' Compensation Judge (WCJ) which granted Claimant's claim petition. Claimant's objections to the Board's order include: 1) the Board erred, as a matter of law, in failing to affirm the totality of the WCJ's order since Claimant's medical expert's testimony was legally sufficient to support an ongoing work-related disability when reviewed as a whole, and 2) the Board erred, as a matter of law, in not remanding the matter for findings

of fact and conclusions of law on the issue of unreasonable contest under Section 440(a) of the Workers' Compensation Act (Act).[1]

Claimant was employed as a floor mechanic in the Reese plant of the Hershey Foods Corporation (Employer). On July 23, 2003, Claimant alleges that in the process of fixing a conveyor belt, he had to lift an A-frame ladder over the conveyor belt. In the process, he felt a pulling sensation in his back and abdomen. He continued to work, but the pain got worse over the next few days. Claimant made an appointment to see his family physician, but on August 12, 2003 when he mentioned the appointment to his supervisor, the supervisor told him to see the company nurse.

The nurse set up an appointment on August 13, 2003 with C. David Haverstick, M.D. (Dr. Haverstick) at Careworks, Employer's occupational medical provider. Claimant received treatment through Careworks for several months and as part of that treatment was referred for a neurosurgical evaluation. During this time Claimant continued to work, at first on modified job duties and then at his regular job duties. During his visits with Dr. Haverstick, Claimant's primary complaint was abdominal pain, the back pain was secondary. In March 2004, after seeing Employer's neurosurgeon for three months, the company nurse told Claimant that he could choose his own physician for any future treatment.

On April 23, 2004, Claimant went to the emergency room for severe pain in his back and down his leg. Claimant subsequently started seeing his own physician, Peter Lewis, M.D. (Dr. Lewis) who issued a do-not-work order in April 2004. He remained under Dr. Lewis' care, but was evaluated by James Shaer, M.D. (Dr. Shaer), an orthopedic surgeon chosen by Employer, on November 15,

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §996(a).

2004 as a result of filing a claim petition. Dr. Shaer concluded that Claimant's work injury was not directly related to his need to stop working in April 2004.

Claimant filed his claim petition on June 29, 2004 seeking payment for loss of wages, medical bills, counsel fees, and full disability from April 22, 2004. Hearings were held in front of the WCJ on September 28, 2004, November 30, 2004 and March 22, 2005. Claimant testified during these hearings. In addition, Dr. Lewis testified *via* deposition for Claimant, and Drs. Haverstick and Shaer and the company nurse testified by deposition for Employer. The WCJ found Claimant's testimony and medical evidence more credible and persuasive than Employer's, and granted Claimant's petition for full disability, loss of wages, medical costs, and attorneys' fees.

Employer appealed to the Board, and the Board modified the WCJ's decision to reflect that Claimant was not fully disabled, but should receive medical benefits for the time period between July 23, 2003 and November 15, 2004, the date that Dr. Shaer indicated Claimant was fully recovered from his injuries. Claimant also appealed arguing that the case should be remanded because the WCJ failed to determine whether Employer's appeal established a reasonable contest. The Board found that the contest was reasonable as a matter of law because Employer raised a legitimate issue as to the extent of the work injury and whether the injury rendered Claimant disabled. Claimant appealed the Board's decision to this Court.[2]

[2] The Court's review of the Board's order is limited to determining whether Claimant's constitutional rights have been violated, whether an error of law has been committed or whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704; *Visteon Sys. v. Workers' Comp. Appeal Board (Steglik)*, 938 A.2d 547 (Pa. Cmwlth. 2007).

Claimant first argues that the evidence of record is unequivocal and legally sufficient to support his claim of full disability as determined by the WCJ. In workers' compensation cases, "[t]he claimant has the burden of proving a causal relationship between the work-related incident and his alleged disability." *Lewis v. Commonwealth*, 508 Pa. 360, 365, 498 A.2d 800, 802 (1985). Where the connection between the injury and alleged cause is not obvious, unequivocal medical testimony must be used to establish the connection. *Id.*[3] The medical witness's testimony must be reviewed as a whole and a decision as to whether it is unequivocal cannot be based on a few words taken out of context. *Id.*

Both parties and the Board refer to segments of Dr. Lewis' testimony where he responds "I guess" repeatedly. As the Claimant suggests in his brief, this appears to be a vocal pause or figure of speech, such as "ah" or "um." However, even if these phrases were removed from the testimony, Dr. Lewis' testimony reviewed as a whole would still be equivocal. "[T]he medical witness must testify, not that the injury or condition might have or possibly came from the assigned cause, but that in his professional opinion the result in question *did come from* the assigned cause." *Odd Fellow's Home of Pennsylvania v. Workmen's Comp. Appeal Board (Cook)*, 601 A.2d 465, 469 (Pa. Cmwlth. 1991) (citation omitted and emphasis added).

Claimant's work incident occurred in July 2003 and his severe back pain did not occur until April 2004. Dr. Lewis first treated Claimant in April 2004. (Lewis Notes of Testimony (N.T.) at 12, December 22, 2004.) Claimant had several diagnostic tests before seeing Dr. Lewis, and Dr. Lewis used those tests in

[3] "A determination that certain medical testimony is equivocal is not … a finding of fact; rather it is a conclusion of law, and as such fully reviewable." *Lewis*, 508 Pa. at 366, 498 A.2d at 803.

his examination of Claimant. (Lewis N.T. at 16.) Dr. Lewis reported seeing "a slightly asymmetric annular bulge at the L5-S1 level" and that the bulge may account for Claimant's pain. (Lewis N.T. at 16-17.) Concerning the disk bulge, Dr. Lewis testified as follows:

> Q. How about the disk bulge itself, would that be a degenerative change or would that be an injury caused change?
>
> A. It's really somewhat speculative I guess somewhat on my part. It's not really an uncommon finding in association with sort of degenerative features. You can certainly find or see those radiology findings in people that don't have any preexisting trauma or existing complaints of pain. I guess in Mr. Kreider's case I guess there's been some uncertainty, quite honestly, I guess whether that is productive of his symptoms.
>
> ….
>
> Q. Would it be accurate to say that the disk bulge could be related to the back pain and leg pain, but we're just not medically certain at this time?
>
> A. I would agree with that statement.

(Lewis N.T. at 17-18.) When asked by Claimant's counsel if, within a degree of medical certainty, Claimant's back and leg pain could have been caused by the workplace incident reported by Claimant, Dr. Lewis responded, "[t]he specific, yes, *could have been caused* by the injuries reported." (Lewis N.T. at 24) (emphasis added). Dr. Lewis further testified:

> Q. … You're not sitting here diagnosing [Claimant] with a herniated disk related to this event, are you?
>
> ….

> A. Correct. I cannot make a clear correlation between the disk bulge on the MRI December '03 and his symptoms.
>
> Q. And the same thing with the radiculopathy, correct?
>
> A. Correct. The abnormalities characterized on his July '04 EMG, correct, I cannot say that definitively related to the injury from work.
>
> Q. And just for the benefit of the Judge then and what Counsel had asked you on Direct was, what we have here is a patient just reporting pain, correct?
>
> ….
>
> A. Right. I guess he certainly is reporting pain and I guess more significantly disability related to that pain.

(Lewis N.T. at 53-54.)[4] Dr. Lewis failed to unequivocally relate Claimant's back pain to his July 23, 2003 work incident. Therefore, the Board's decision to modify the WCJ's order must be upheld.

Claimant's second argument is that Employer failed to meet its burden of proof for a reasonable contest. Section 440(a) of the Act states:

> In any contested case where the insurer has contested liability in whole or in part … the employe … in whose favor the matter at issue has been finally determined in whole or in part shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred for attorney's fee, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend proceedings: Provided, That cost for attorney fees may be excluded when a reasonable basis for the contest has been established by the employer or the insurer.

[4] Claimant's attorney objected twice to these questions on the basis that they were outside the scope of his redirect. There is nothing to indicate that the objections were raised again in front of the WCJ or that the WCJ made any ruling on the objections.

"A reasonable contest is established when medical evidence is conflicting or susceptible to contrary inferences, and there is an absence of evidence that an employer's contest was frivolous or intended to harass a claimant." *Wood v. Workers' Comp. Appeal Board (Country Care Private Nursing)*, 915 A.2d 181, 186 (Pa. Cmwlth. 2007).

Claimant argues that the Board's decision indicates that Employer was contesting the extent of Claimant's injury when in fact it was contesting the entirety of the injury because Employer's answer to the claim petition denied all allegations made by Claimant, and therefore the contest was unreasonable. Claimant's analysis is correct, but the outcome still results in favor of Employer.

The claim petition was received July 7, 2004. Employer responded on July 26, 2004. Dr. Shaer did not examine Claimant until November 15, 2004 and was not deposed until January 24, 2005. At the time the claim petition was filed, Claimant had been examined by Dr. Haverstick, Employer's neurosurgeon, and Dr. Lewis. Dr. Haverstick had treated Claimant in August and September primarily for abdominal pain although there were indications that Claimant was experiencing slight pain in the lower back, that Claimant indicated had been resolved. (Haverstick N.T. at 7-8, 12, June 13, 2005.) Dr. Haverstick never testified that Claimant's injuries were work-related. Dr. Lewis treated Claimant starting in April 2004 for back and leg pain. (Lewis N.T. at 24.) As mentioned earlier, Dr. Lewis never definitely related Claimant's back and leg pain to the July 23, 2003 work incident. At the time of Employer's answer to the claim petition there was conflicting medical evidence and there is no evidence that Employer intended to harass Claimant. The contest is, therefore, reasonable.

For the reasons stated, the Board's order is affirmed.

JOHNNY J. BUTLER, Judge

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Respondent	:	

O R D E R

AND NOW, this 9th day of October, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

JOHNNY J. BUTLER, Judge