

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anastasios Bobotas, :
Petitioner :
 :
v. : No. 593 C.D. 2008
 : Submitted: August 15, 2008
Workers' Compensation Appeal :
Board (Home Depot USA), :
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE FLAHERTY

FILED: October 22, 2008

Anastasios Bobotas (Claimant) petitions for review from an order of the Workers' Compensation Appeal Board (Board) affirming the decision of the Workers' Compensation Judge (WCJ), which granted in part Claimant's review petition and amended the notice of compensation payable (NCP) to include an injury to the right knee and left shoulder and granted Home Depot's (Employer) termination petition, thereby terminating Claimant's benefits as of August 22, 2006. We affirm.

Claimant was employed as a forklift operator for Employer. He had been driving the forklift and lifting 80 to 100 pounds for Employer for almost five years. On April 15, 2004, while in the course and scope of his employment with Employer, Claimant injured his back and right knee while lifting an 80 pound bag of salt. Employer accepted liability and an NCP was issued on June 23, 2004. Pursuant to the NCP, Claimant received total disability benefits at the rate of

\$419.36 per week, based upon an average weekly wage of \$629.01. The NCP listed the injury as a “sprain/strain/tear/jammed.” The NCP further described the injury as “a pop in his lower back, causing pain. The associate then fell to the floor, striking his right knee on the racking, causing swelling.”

On July 27, 2006, Claimant filed a petition for review alleging that the NCP should be amended to include injuries to the right knee and left shoulder. Employer denied the allegations. On September 18, 2006, Employer filed a petition for termination, alleging that Claimant was fully recovered from his work-related injury as of August 22, 2006. Claimant denied this allegation. The petitions were consolidated before the WCJ.

Employer presented the deposition testimony of Dr. Anthony Salem, board certified in orthopedic surgery (Dr. Salem), who examined Claimant on August 22, 2006. Dr. Salem testified that Claimant advised him that on April 15, 2004, while picking up an eighty-pound bag of salt, his back went out causing him to bang his right knee on a steel beam. As a result, Claimant maintained that he injured his right knee, left shoulder and lower back. Claimant underwent a hemiarthroplasty of the right knee on February 16, 2005 and left shoulder surgery on October 6, 2005.

Dr. Salem examined Claimant and determined that Claimant had no muscle atrophy involving the neck and muscles on the side of his neck out into the shoulder girdle or into the shoulder. There was some atrophy of the left supraspinatus muscle of the rotator cuff which is common post surgery. No other muscle atrophy was noted in the shoulders or thighs. Dr. Salem noted that there were inconsistencies during the examination and opined that Claimant was not putting forth any effort. Dr. Salem found decreased motion in both shoulders

which was indicative of chronic degenerative changes. Lateral bending and extension was a little less than normal and there was a well-healed soft surgical scar present on his right knee with no ligamentous laxity present. Dr. Salem further found no fluid in the knee and that the knee has full extension, although Claimant did complain of pain in his right knee. Dr. Salem determined that there was no nerve damage to Claimant's upper and lower extremities.

Dr. Salem testified that he reviewed an MRI that was done on May 2, 2004, of Claimant's lumbar spine. Dr. Salem stated that the MRI showed multiple levels of degenerative disease and opined that such did not result from a single incident. Dr. Salem reviewed a March 29, 2005 MRI of Claimant's lumbosacral spine which showed stenosis and bulging and burned out discs from T12 to his sacrum, with multiple significant levels involved. Dr. Salem opined that it is impossible to have multiple levels of severe disease from lifting one bag less than one year prior. He opined that the changes reflected long-standing problems and showed no acute changes, no fractures, no edema, no torn ligaments, and nothing new. Dr. Salem found that Claimant's back injuries were not caused by the work incident, but were instead a result of a pre-existing degenerative process.

Dr. Salem also reviewed x-rays of the right knee taken on April 24, 2004, which showed severe collapse and degeneration of the medial joint with subluxation of the knee, and significant advanced arthritis with secondary deformity. The April 24, 2004 MRI showed no edema, no bone bruises and no fluid in the knee. The MRI showed no acute changes or any aggravation of an underlying condition, but instead showed significant painful arthritis.

Dr. Salem had asked Claimant about his past medical history and Claimant denied any prior pain or troubles involving his back, right knee or

shoulder before the April 15, 2004 work incident. Dr. Salem found Claimant's statement to be inconsistent with prior medical records. Dr. Salem reviewed medical records from Lansdale Medical Group including a 1991 CAT scan, which revealed bulging discs and chronic back pain "for many years" and the records indicated that the pain was "getting worse." Dr. Salem reviewed 1992 medical records from Dr. Tom Greene, which confirmed Claimant's long history of left shoulder pain. The records noted that Claimant worked at a steel mill and did a lot of heavy lifting, pulling and pushing and that Claimant had a rotator cuff tear in the left shoulder. The records documented similar problems and significant pain in Claimant's right shoulder as well. Additional medical records from 2000 indicated treatments, surgery discussion, injections and complaints regarding the left shoulder. Dr. Salem also reviewed medical records from Lansdale Medical Group which showed a narrowing of the joint space of Claimant's right knee, osteoarthritis and possible meniscal tear. Claimant received an injection at that time.

Dr. Salem opined that Claimant may have sustained a right knee contusion, lumbar strain and left shoulder strain as a result of the April 15, 2004, work injury. He further opined that Claimant would benefit from anti-inflammatories and exercise, but that this treatment would not be related to the April 15, 2004, work injury. Dr. Salem determined that any injuries that Claimant received due to the work injury had resolved within a few weeks, that Claimant was capable of returning to his pre-injury position and that there were no work restrictions as a result of the April 15, 2004, work injury. Dr. Salem found Claimant had fully recovered from his work injury as of August 22, 2006.

Claimant presented the deposition testimony of Dr. Bruce Menkowitz (Dr. Menkowitz), board certified in orthopedic surgery. Dr. Menkowitz first treated Claimant for the work injury on July 19, 2004. Dr. Menkowitz testified that initially, Claimant complained of right knee and low back pain and then, in November of 2004, began complaining of left shoulder pain. Dr. Menkowitz treated Claimant with epidural steroid injections and physical therapy. On February 16, 2005, Dr. Menkowitz performed an unicondylar knee arthroplasty and on October 6, 2005, he repaired Claimant's left rotator cuff.

Dr. Menkowitz diagnosed Claimant's work-related condition as a lumbar sprain and strain, exacerbation of degenerative changes in his right knee secondary to the trauma and the ligamentous injury to the knee, an exacerbation and further tearing of his rotator cuff and the tearing of his glenoid labrum. Dr. Menkowitz opined that Claimant has not fully recovered from the April 5, 2004, work incident and that Claimant's current right knee and left shoulder pain are related to the work injury. Dr. Menkowitz opined that Claimant is not capable of returning to his pre-injury position with Employer.

Dr. Menkowitz confirmed Claimant's prior history of left shoulder, right knee and back problems after reviewing records from 1991, 1992, and 2000. Dr. Menkowitz last saw Claimant on September 21, 2006, but did not discuss returning to work in any type of position with Claimant.

Next, Claimant presented the deposition testimony of Dr. Robert Ackert (Dr. Ackert), a licensed chiropractor. Dr. Ackert began treating Claimant on December 1, 2004. After Claimant's February 2005, right knee surgery, Dr. Ackert provided rehabilitation therapy per Dr. Menkowitz's prescription. Claimant first complained to Dr. Ackert about left shoulder pain in October of 2005. Dr.

Ackert opined that Claimant's present injuries are a result of the April 15, 2004, work incident. He further opined that Claimant was not fully recovered from his work injuries and that he could not return to work at his pre-injury position.

Dr. Ackert reviewed the prior medical records of Claimant and agreed that the degenerative arthritis was not caused by the work injury and that the degenerative arthritis could have caused the tear of the supraspinatus tendon and not the work injury. Dr. Ackert acknowledged that records documented Claimant's chronic back pain since at least 1991 and chronic right knee pain since at least 2000.¹

Claimant testified that he injured his knee and low back while lifting an 80 pound bag of rock salt during the course and scope of his employment with Employer. Claimant was taken to the hospital, was treated by panel doctors and received two injections to his right knee by Dr. Baumgartner. Claimant sought further treatment from Dr. Menkowitz, who operated on his right knee on February 16, 2005 and on his left shoulder on October 6, 2005. Claimant stated he was unable to return to his pre-injury position due to back and right knee pain. Claimant takes Percocet daily for pain and treats with Dr. Ackert and Dr. Menkowitz. Claimant, after having denied to Dr. Salem any prior problems with his right knee and left shoulder, agreed that he had received treatment for his back, left shoulder and right knee from 1991 through at least 2000. Claimant stated that surgery was not recommended to him prior to April 15, 2004 and that he never had x-rays of his back, left shoulder or right knee prior to that date. Also, Claimant had not lost any time from work due to back, right knee or left shoulder pain prior to

¹ Dr. Ackert also acknowledged Claimant's non-work related injuries to his neck and right shoulder in December of 2004 and to his right shoulder again in August of 2005

the work incident. Claimant is almost sixty years old and receives Social Security Disability Benefits.

The WCJ found Claimant credible only with regard to his continuing symptoms and need for treatment, and not credible regarding all issues relating to causation of his injuries. The WCJ further found the testimony of Dr. Salem more persuasive than that of Dr. Menkowitz or Dr. Ackert. The WCJ determined that Claimant sustained a right knee contusion, lumbar strain and left shoulder strain as a result of the April 15, 2004 work injury, that Claimant's arthroscopic knee surgery and shoulder surgery were not caused by or related to the April 15, 2004, work injury, and that Claimant was fully recovered from such work injury on August 22, 2006.

The WCJ concluded that the NCP should be amended to include the right knee and left shoulder injury, however, the ligamentous injury to the knee and the tearing of the left shoulder rotator cuff were not established as work-related injuries. The WCJ granted Claimant's review petition in part. The WCJ further concluded that the Employer did establish that Claimant was fully recovered from his work injury on August 22, 2006, and, accordingly, granted Employer's termination petition as of that date. Claimant appealed to the Board. The Board affirmed the WCJ and now Claimant petitions our court for review.²

Claimant contends that the Board erred in affirming the WCJ's grant of the termination petition based on the evidence presented. In addition, he suggests that the record does not support a finding that his knee and shoulder

² Our review is limited to a determination of whether constitutional rights were violated, whether an error of law was committed and whether the necessary findings were supported by substantial evidence. Boehm v. Workmen's Compensation Appeal Board (United Parcel Services), 576 A.2d 1163 (Pa. Cmwlth. 1990).

surgeries are unrelated to his work injury. In making these arguments, Claimant contends that the WCJ, in Finding of Fact (F.F.) No. 7, erroneously indicates that Claimant treated for right knee and left shoulder problems within the “five year period” that he worked for Employer. According to Claimant, he only worked for Employer for “four years.” Claimant further suggests that Dr. Salem’s opinion cannot support a finding of full recovery because he was unable to disassociate a free fragment at L5-S1 from the work injury.

An employer is only required to establish that a claimant’s disability has ceased when litigating a termination petition. Mason v. Workmen’s Compensation Appeal Board (Hilti Fastening Systems Corp.), 657 A.2d 1020 (Pa. Cmwlth. 1995), appeal denied 542 Pa. 679, 668 A.2d 1140 (1995). Section 413 of the Workers Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §772, states that:

A workers’ compensation judge designated by the department may, at any time, modify, reinstate, suspend or terminate a notice of compensation payable, an original or supplemental agreement or an award of the department or its workers’ compensation judge, upon petition filed by either party with the department, upon proof that the disability of an injured employe has increased, decreased, recurred, or has temporarily or finally ceased, or that the status of any dependent has changed.

The WCJ is the ultimate fact finder and has complete authority for all credibility determinations. Universal Cyclops Steel Corporation v. Workmen’s Compensation Appeal Board, 305 A.2d 757 (Pa. Cmwlth. 1973). A party may not challenge or second-guess the WCJ’s reasons for the credibility determinations rendered. Dorsey v. Workers’ Compensation Appeal Board (Crossing Constr.

Co.), 893 A.2d 191 (Pa. Cmwlth. 2006). Indeed, determining the credibility of a witness is the quintessential function of the fact finder. Id. at 195.

Claimant questions the validity of the WCJ's F.F. No. 7, which reads as follows:

7. After reviewing the testimony of the Claimant, I find it to be credible only with regard to Claimant's continuing symptoms and need for treatment. I find it to lack credibility or persuasiveness on all issues relating to causation of his injuries. Significant to this determination is Claimant's repeated denial of any prior problems despite medical records indicating extensive prior treatment to the left shoulder, right knee and back dating back to 1991. Although Claimant testified that he lost no time from work and did not treat prior to his work injury, the medical records suggest he was treating for his right knee and left shoulder during the five-year period he worked for Employer.

WCJ Decision, June 22, 2007, F.F. No. 7 at 6.

According to Claimant, he only worked for Employer for four years and that the last time he was treated for his right knee and left shoulder was prior to his acceptance of a position with Employer. Thus, the WCJ's finding that "the medical records suggest he was treating for his right knee and left shoulder during the five-year period he worked for Employer" was in error. WCJ Decision, F.F. No. 7 at 6. Assuming Claimant's statement is true that he only worked for Employer for four years, the fact remains that Claimant's work injury occurred on April 15, 2004. Dr. Salem, whom the WCJ found credible, testified that medical records from the year 2000, roughly four years earlier, show problems in the right knee and left shoulder with discussions of surgery, injections, and complaints of

pain in these areas. Consequently, the phrasing of the WCJ's F.F. No. 7 does not amount to reversible error.³

Moreover, in Finding of Fact No. 8, the WCJ finds the testimony of Dr. Salem:

more persuasive than the testimony of Dr. Menkowitz or Dr. Ackert. Dr. Salem's testimony is supported by the findings on his physical examination, and with the diagnostic studies of the low back, right knee and left shoulder indicating no acute changes, but only pre-existing degenerative disease.

WCJ Opinion, Finding of Fact No. 8 at 6. Dr. Salem found that Claimant had fully recovered from his work injury as of August 22, 2006. In addition, Dr. Salem determined that Claimant still needed treatment, but that this treatment would not be related to the April 15, 2004, work injury.⁴

³ To the extent Claimant implies that his shoulder and knee surgeries are related to his work injury because he was able to work for Employer without problem for several years notwithstanding his prior treatment, we note that Claimant had the burden to establish causation and amend his injury description to include the injuries that required the surgeries. DeGraw v. Workers' Compensation Appeal Board (Redner's Warehouse Markets, Inc.), 926 A.2d 997 (Pa. Cmwlth. 2007). The WCJ rejected his evidence, in part, because the prior medical records showed problems in these areas. We will not second-guess the WCJ's reasons for his credibility determinations. Dorsey.

⁴ We note that the NCP acknowledged low back and right knee injuries. Dr. Salem found that Claimant's back injuries were not caused by the work incident, but were, instead, a result of a pre-existing degenerative process and arthritis. Dr. Salem conceded, however, that Claimant may have sustained a lumbar strain and transient knee pain as a result of the work incident but was nonetheless fully recovered. Notwithstanding a medical expert's disbelief that a claimant sustained a particular injury at work previously found to be work-related, the expert's testimony can nonetheless support a termination of benefits based on an opinion that the claimant fully recovered from such injury if it, in fact, occurred. Jackson v. Workers' Compensation Appeal Board (Res. for Human Dev.), 877 A.2d 498 (Pa. Cmwlth. 2005); To v. Workers' Compensation Appeal Board (Insaco, Inc.), 819 A.2d 1222 (Pa. Cmwlth. 2003).

Here, the WCJ found the testimony of Dr. Salem credible and persuasive. Credibility issues are for the WCJ to resolve, and not this Court. Universal Cyclops. Consequently, the WCJ did not err in granting Employer's Termination Petition.⁵

Next, Claimant contends that the WCJ was precluded from finding, and the Employer was estopped from arguing, that Claimant's surgeries to his right knee and left shoulder were unrelated to the work injury. Claimant argues that the prior utilization review, dated September 19, 2005, found Claimant's treatment with Dr. Menkowitz for such surgeries reasonable, necessary and related to the work injury.

In Corcoran v. Workers' Compensation Appeal Board (Capital Cities/Times Leader), 725 A.2d 868 (Pa. Cmwlth. 1999), our court determined that the utilization review organization's (URO) role is:

deciding the issue of reasonableness and necessity of medical treatment, and unambiguously exclude from the URO's scope of review the issues of whether medical treatment is causally related to a workplace injury and whether a claimant is disabled. **Questions of causation and disability must be decided by a workers' compensation judge and not by a URO.** (emphasis added).

Id. at 871.

In the present controversy, Employer was not estopped and the WCJ was not precluded from finding that Claimant's surgeries were unrelated to the

⁵ To the extent Claimant contends that a termination of benefits is precluded because Dr. Salem could not explain a free fragment at L5-S1, we point out that the opinion of a medical expert must be viewed as a whole. American Contracting Enters., Inc. v. Workers' Compensation Appeal Board (Hurley), 789 A.2d 391 (Pa. Cmwlth. 2001). Although he could not comment on how long the disc fragment had been there or the significance of it, Dr. Salem never recanted his opinion of full recovery.

work injury. As the URO may find that the treatment provided was indeed reasonable and necessary, it may not determine whether such treatment was work-related. The questions of causation and disability are within the exclusive province of the WCJ, not the URO. Id. The WCJ was correct in determining that the URO findings were irrelevant, as they only addressed the reasonableness and necessity of treatment and not the causal relationship.

Accordingly, we affirm the decision of the Board.

JIM FLAHERTY, Senior Judge

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	:	
Workers' Compensation Appeal	:	
Board (Home Depot USA),	:	
Respondent	:	

ORDER

AND NOW, this 22nd day of October, 2008 the Order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

JIM FLAHERTY, Senior Judge