IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| H. David Gibson, Petitioner | : | |
| v. | : | No. 653 C.D. 2007 |
| | : | Argued: February 12, 2008 |
| Workers' Compensation Appeal Board (Mulach Steel Corporation), Respondent | : | |

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN FILED: March 19, 2008

H. David Gibson (Claimant) petitions for review of the March 12, 2007, order of the Workers' Compensation Appeal Board (WCAB), which affirmed the March 29, 2005, order of a workers' compensation judge (WCJ) denying Claimant's review petition, review medical petition and penalty petition.[1] We affirm.

In 1983, while working for Mulach Steel Corporation (Employer), Claimant sustained an injury to his lower back. Employer issued a notice of compensation payable (NCP) describing Claimant's work injury as "low back

[1] We note that, in the March 29, 2005, decision, the WCJ adopted the proposed order and conclusions of law submitted by Mulach Steel Corporation (Employer). The WCJ also adopted the proposed findings of fact submitted by Employer, but, in several unnumbered paragraphs, the WCJ identified a few exceptions and made a few additions to the numbered findings.

sprain." (Findings of Fact, No. 5.) Employer issued a corrected NCP in 1995, describing the work injury as a "lumbosacral strain." (Findings of Fact, No. 5.)

In 1997, Claimant filed a petition to review his medical bills, seeking payment for treatment he received at two physical therapy centers. (Findings of Fact, No. 1.) In 1998, Claimant filed a penalty petition, seeking the imposition of penalties against Employer for the non-payment of medical bills. (Findings of Fact, No. 1.) In 2001, a WCJ denied the review medical petition but granted the penalty petition in part. In 2002, the WCAB upheld the WCJ's decision, but Claimant filed a petition for remand asserting that the corrected NCP had not been made part of the record before the WCJ; as a result, the WCAB vacated and remanded for further proceedings based on the injury described in the corrected NCP, i.e., lumbosacral strain. (Findings of Fact, Nos. 2, 5.)

While the WCJ's 2001 decision was before the WCAB, Claimant filed a petition with the WCJ to review the NCP, seeking to amend the description of the work injury to include: herniated discs; the sprain, strain, tearing and disruption of anterior and posterior pelvic ligaments; sacral instability; vertebral instability; dura matter sprain; and advanced degenerative arthritis. (Findings of Fact, No. 3.) Claimant also filed a second penalty petition, seeking the imposition of penalties against Employer for filing a corrected NCP without providing a copy to Claimant. (Findings of Fact, No. 3.)

On remand, the WCJ reviewed a multitude of evidence, including much that had been offered during the initial proceedings.[2] Relevant here, Anna Mathew, M.D., testified on behalf of Employer that, based on her examinations of Claimant and a review of his medical records: (1) Claimant's work injury was a lumbosacral strain; (2) Claimant's disc herniations at L4-L5 and L5-S1 could be related to the work injury or could be degenerative in nature; (3) Claimant does not suffer from sacroiliac joint instability; and (4) there are different opinions in the medical community as to whether instability can even occur in the sacroiliac joint. (Findings of Fact, Nos. 63-64.)

Donald McGraw, M.D., testified on behalf of Employer that, based on his review of Claimant's medical records: (1) Claimant's work injury was a lumbosacral strain/sprain; (2) physicians use the terms "lumbosacral strain," "lumbosacral sprain," "low back strain" and "low back sprain" interchangeably; (3) Claimant did not suffer herniated discs as a result of the work injury; (4) Claimant does not suffer from sacroiliac joint instability; and (5) a diagnosis of lumbosacral strain does not include a sacroiliac joint injury. (Findings of Fact, Nos. 68-72.)

[2] In addition to his exhibits, Claimant offered his own testimony and the testimony of Gary Gruen, M.D., Milton Klein, M.D., Russell Portency, M.D., John Upledger, D.O., Marcee Skeddle, P.T., Kathleen Rauterkus, Jody Lombardo and Sophronia Smith. Employer offered the deposition testimony of Anna Mathew, M.D., and Donald McGraw, M.D. Employer also offered the deposition of Christopher Lamperski, M.D., Claimant's expert, whom Employer had deposed as on cross. (Findings of Fact, No. 4.)

After considering the evidence, the WCJ accepted the testimony of Dr. McGraw in its entirety. (Findings of Fact, No. 88.) The WCJ accepted the testimony of Dr. Mathew, except to the extent it could be interpreted as opining that Claimant suffered herniated discs as a result of the work injury. (Findings of Fact, No. 89.) Therefore, the WCJ dismissed Claimant's petition to amend the description of the work injury in the NCP. The WCJ also dismissed Claimant's petition to review medical bills for treatment unrelated to the lumbosacral strain.

With respect to the penalty petition for non-payment of medical bills, the WCJ awarded penalties for the late payment of bills for treatment at The Regional Physical Therapy Center and the Physical Therapy Center of Bethel Park. (Findings of Fact, No. 96.) With respect to the penalty petition for Employer's alleged failure to provide Claimant with a copy of the corrected NCP, the WCJ declined to award a penalty because Claimant could have requested a copy from the Bureau of Workers' Compensation. (Findings of Fact, No. 98.)

Finally, on remand, Claimant argued that Employer's insurer paid a bill from The Therapy Massage Center that already had been paid to create the impression that either Claimant or The Therapy Massage Center was double billing. (Findings of Fact, No. 81.) However, based on the credible testimony of insurer claims adjuster Jody Lombardo, the WCJ found that the insurer's payment was a mistake and that the insurer was not attempting to impugn the credibility of Claimant by accusing him or The Therapy Massage Clinic of double billing.

(Findings of Fact, Nos. 39, 42, 99.) Claimant appealed to the WCAB, which affirmed. Now, Claimant petitions this court for review.[3]

## I. Expert Medical Testimony

Claimant first argues that the WCJ erred in failing to amend the NCP to include sacroiliac joint instability. Claimant contends that the WCJ, in finding that a lumbosacral strain does not include joint instability, relied on incompetent, inconsistent and equivocal medical testimony. We disagree.

Medical evidence is unequivocal as long as the medical expert, after providing a foundation, testifies that in his or her professional opinion he or she believes or thinks the facts exist. *Cerro Metal Products Company v. Workers' Compensation Appeal Board (Plewa)*, 855 A.2d 932 (Pa. Cmwlth. 2004), *appeal denied*, 582 Pa. 678, 868 A.2d 1202 (2005). Even if the witness admits to uncertainty, reservation, doubt or lack of information with respect to scientific or medical details, as long as the witness does not recant the opinion first expressed, the evidence is unequivocal. *Id.*

### A. Dr. McGraw's Testimony

Dr. McGraw testified that: (1) the pain from a lumbosacral strain could extend to the sacroiliac joint, (R.R. VI at 2850a); and (2) he supposes that

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

the term "low back" could include the sacroiliac joint by extension, (R.R. VI at 2862a). Claimant interprets this testimony to mean that Claimant's lumbosacral strain extended to the ligaments or tendons of the sacrum and sacroiliac joint; thus, Claimant argues that Employer cannot deny that Claimant's lumbosacral strain includes sacroiliac joint instability. (Claimant's brief at 23.)

However, Dr. McGraw clarified his testimony as follows:

> Q. Now, you indicated that the description of the injury that we're talking about as a lumbosacral strain or sprain could include a strain or sprain of the ligaments of the SI joint area; is that correct?
>
> A. Not the lumbosacral strain/sprain. You know, that, when I was talking about that I was referring to someone having back pain and it could by extension go into that area, but when you're talking about a lumbosacral strain/sprain, it is strictly that, it's a strain/sprain of the lumbosacral area and does not involve the SI joint.
>
> Q. Okay. Well, I believe that you earlier testified that it … could include the ligaments of the [SI joint], and I asked you specifically about the sacrum where it attaches to the pelvis and the ligaments holding that and you indicated that it could include that.
>
> A. Right. But that's not going to lead to an instability. That's a different diagnosis.
>
> Q. And we do agree that there are ligaments that hold the sacrum in place?
>
> A. Right.
>
> Q. And if those ligaments are torn or disrupted or stretched, that would constitute either a sprain or a strain?

A. Right.

Q. And those ligaments would be included in the description of the lumbosacral area?

A. If you were going to generically talk about it, it's possible. That's not generally – that would be narrowed down in the evaluation of a person with back complaints. Now, we would end up with the … diagnosis and treatment of that individual focusing on the lumbosacral area or, conversely, on the sacroiliac area, if that was an area of more focus. Generically you would approach it to include that, but in the end you're going to come up with one conclusion as I did, and that was a lumbosacral strain/sprain which did not include the SI joints.

Q. So all the other testimony that the lumbosacral as a generic term includes everything now doesn't include the SI joint area, the sacrum?

A. You're misinterpreting what I've been saying. What I have said is that that's a part of the lower back area that you would evaluate in the case of someone who has been injured or comes in with a complaint, and, ultimately, you're going to narrow that down, and in the case of [Claimant] it's been narrowed down and that narrowing includes only the lumbosacral musculature and ligaments and does not include the SI joints in terms of what I have defined as what he sustained as an injury and that's what I've maintained throughout.

Q. I have to admit I'm confused because … I thought we spent a considerable amount of time trying to narrow down the definition of lumbosacral and my understanding of all your testimony was that it is a generic term that encompasses the lumbar area, the sacral area, the muscles, tendons, ligaments, the structures in that area and it's just a generic term.

A. It's generic, but it's also what is used to define a clinical injury and to make a diagnosis and that diagnosis excludes the SI joint. If you're going to deal with the SI joint you're going to make that as a separate diagnosis,

> maybe an additional one, but it's not all encompassing. When you ultimately make a diagnosis and treatment recommendations, it's not all encompassing to use that terminology.

(R.R. VI at 2917a-19a.) In other words, Dr. McGraw made clear that "lumbosacral strain" and "sacroiliac joint instability" are distinct diagnoses.

Dr. McGraw also testified that Claimant should have recovered from the soft tissue lumbosacral strain within six months; Claimant asserts that this testimony is incompetent because it is inconsistent with Dr. Mathew's testimony that Claimant had low back pain related to his lumbosacral strain in 1995, twelve years after the 1983 work injury. (Claimant's brief at 24-26.) It is true that Dr. McGraw did not agree with Dr. Mathew in this regard, (*see* R.R. VI at 2882a); however, that does not render Dr. McGraw's testimony incompetent.[4]

Dr. McGraw further testified that he saw no evidence of a herniated disc; Claimant argues that this testimony is incompetent because it is inconsistent with Dr. Mathew's testimony that Claimant could have herniated discs related to

[4] Indeed, Claimant acknowledges that the so-called "Mudano Rule," which provides that a party introducing contradictory testimony renders the testimony incompetent, does not apply to workers' compensation cases. (Claimant's brief at 27-28) (citing *General Electric Company v. Workmen's Compensation Appeal Board (Porretto)*, 434 A.2d 841 (Pa. Cmwlth. 1981).

Claimant also argues that the WCJ's failure to discuss the disagreement between Dr. McGraw and Dr. Mathew means that the WCJ did not issue a reasoned decision. However, the question before the WCJ was not whether Claimant is fully recovered from the work injury, but whether to amend the description of the work injury and order the payment of medical bills related to the expanded injury. The disagreement between Dr. McGraw and Dr. Mathew on the issue is irrelevant.

his work injury. (Claimant's brief at 26-27.) Again, the fact that Dr. McGraw disagreed with Dr. Mathew in this regard, (*see* R.R. VI at 2844a-46a), does not render Dr. McGraw's testimony incompetent.[5]

### B. Dr. Mathew's Testimony

Claimant argues that Dr. Mathew's testimony regarding sacroiliac joint instability is equivocal and, thus, cannot support the finding that Claimant does not suffer from work-related sacroiliac joint instability.[6]

Dr. Mathew testified that sacroiliac joint instability is a "hypothesis" because it cannot be demonstrated with any kind of diagnostic studies. (R.R. II at 996a, 1046a.) When Dr. Mathew examined Claimant, she performed a sacroiliac compression test, and Claimant complained of increased pain. (R.R. II at 1048a.) Dr. Mathew explained that she did not necessarily consider that to be a positive test for sacroiliac joint dysfunction.

> A. …. I have been fooled in my examinations over the years because when I thought it was an SI it turned out to be a disk problem, so these are not very sensitive

[5] Claimant argues that the WCJ failed to issue a reasoned decision because the WCJ did not address this disagreement. However, the WCJ **did** address the disagreement, interpreting Dr. Mathew's diagnosis to include disc pathology related to a degenerative process and rejected Dr. Mathew's testimony to the extent that it could be interpreted otherwise. (*See* Findings of Fact, No. 89.)

[6] We note that the WCJ did not specifically rely on Dr. Mathew's testimony to find that Claimant does not suffer from work-related sacroiliac joint instability. As long as Dr. McGraw's testimony in this regard is competent, it does not matter that Dr. Mathew's testimony might be incompetent.

> or specific tests. They give you an idea … but it could also be wrong. … [E]specially when there are other findings of decreased range of motion or other areas of pain … you have to look at all of the history, the physical examination and the response in order to make a diagnosis of SI because it is not a very hard diagnosis, it's a soft diagnosis, and there are no hard evidences that such a problem exists….

(R.R. II at 1049a.)

> A. …. Because we cannot demonstrate … SI dysfunction [with] any kind of tests that show that there is really an abnormality there … any type of conclusion that there is instability is pure speculation….

(R.R. II at 1055a.)

> Q. …. You're not sure what SI dysfunction is or if it even exists?
>
> A. Me personally?
>
> Q. Correct.
>
> A. I don't think anybody knows. It depends which hypothesis you … view as being compatible with … any patient's symptoms.

(R.R. II at 1074a.)

This testimony establishes that Dr. Mathew tests patients for sacroiliac joint dysfunction and that she tested Claimant for the condition. However, Dr. Mathew did not diagnose Claimant with sacroiliac joint dysfunction because of

Claimant's other complaints. Dr. Mathew explained how difficult it is for a doctor to make a diagnosis of sacroiliac joint dysfunction, but her testimony in that regard does not render her testimony regarding Claimant equivocal.

## II. Equitable Estoppel

Claimant next argues that the WCJ erred in failing to conclude that Employer was equitably estopped from denying that Claimant's lumbosacral strain includes herniated discs. We disagree.

> Equitable estoppel arises in the workers' compensation arena when an employer, "by [its] … admissions …, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts."

*Westinghouse Electric Corporation/CBS v. Workers' Compensation Appeal Board (Korach)*, 584 Pa. 411, 422, 883 A.2d 579, 586 (2005) (citations omitted).

This court has held that the payment of medical bills does not constitute an admission of liability on behalf of the employer, i.e., an employer is not estopped from denying liability for a medical condition based on its payment of bills for treatment of that condition. *Bailey v. Workers' Compensation Appeal Board (ABEX Corporation)*, 717 A.2d 17 (Pa. Cmwlth. 1998). This court has explained that, since the early days of workers' compensation, insurers have been liberal in paying medical bills beyond those required by statute in order to minimize their future liability; this practice benefits injured employees, and

penalizing insurers for making voluntary payments would discourage their continuing such a practice. *Id.*

Evidently recognizing this court's holding in *Bailey*, Claimant states in his brief that he is not basing his equitable estoppel argument on Employer's payment of medical bills. (Claimant's brief at 35.) Claimant asserts that, because Employer's **claim records** show that Employer accepted a herniated disc as part of the work injury, Employer is estopped from denying liability for herniated disc treatments.[7] *Id.*

Although the description of the work injury in an NCP constitutes an admission regarding the nature of a work injury, **employer records that contradict an NCP do not constitute an admission** regarding the nature of the work injury. *See Westinghouse* (stating that an NCP is a voluntary admission by the employer). Even if employer records could be such an admission, Claimant points to no evidence indicating: (1) how or when Claimant became aware of Employer's records; (2) that Employer's records **alone**, i.e., apart from the payment of medical bills, induced Claimant to believe Employer would pay for his herniated disc treatments; (3) that Employer's intention in keeping records appearing to accept a herniated disc work injury was to induce Claimant to believe that Employer would pay for future treatment; or (4) that Employer was culpably negligent in keeping records that, despite the NCP, induced Claimant to believe

[7] Some of the records summarized in Claimant's brief indicate only that there **might** be a herniated disc, or that another individual or doctor **believes** there is a herniated disc. (Claimant's brief at 34-35.)

that Employer would pay for all herniated disc treatment.[8] Thus, there is no basis here for application of equitable estoppel.

## III. Corrected NCP

Claimant argues that the WCJ erred in failing to impose a penalty upon Employer for failure to provide the **WCJ** with a copy of the corrected NCP. We disagree.

Initially, we note that the WCJ addressed whether to impose a penalty for failure to provide **Claimant** with a copy of the corrected NCP. Claimant now argues that this is not the issue. (Claimant's brief at 37.) For Claimant, the issue is whether Employer failed to provide the **WCJ** with a copy of the corrected NCP.[9]

The penalty petition asserts that Employer's failure to provide the WCJ with a copy of the corrected NCP constitutes a violation of sections 1102(1)

[8] Claimant argues that, in failing to address the fact that Employer's records show a herniated disc as part of the work injury, the WCJ failed to issue a reasoned decision. However, as indicated above, Employer's records would not serve as a basis for equitable estoppel. Absent evidence that Claimant was aware of those records and that the records alone induced Claimant to believe that Employer would pay for herniated disc treatments, there was no need for the WCJ to address the content of Employer's records.

[9] We note that Claimant's penalty petition alleges that Employer failed to provide **Claimant and the WCJ** with a copy of the corrected NCP. (R.R. I at 82a.) Thus, the WCJ did address an issue that was raised by Claimant in the penalty petition. Moreover, as indicated below, the WCJ found that the description of the work injury in the original NCP was not different than the description of the work injury in the corrected NCP; thus, the fact that the WCJ did not address Employer's failure to provide the WCJ with a copy of the corrected NCP is immaterial.

and 1102(8) of the Workers' Compensation Act (Act).[10] (R.R. at 80a.) In his brief, however, Claimant argues only that Employer's failure violated section 1102(8) of the Act. (Claimant's brief at 42.) Thus, Claimant no longer contends that Employer's failure to provide the WCJ with a copy of the corrected NCP violates section 1102(1) of the Act.

Section 1102(8) of the Act states that a person commits an offense if the person: "[m]akes … any knowingly false or fraudulent statement with regard to entitlement to benefits with the intent to discourage an injured worker from claiming benefits or pursuing a claim." 77 P.S. §1039.2(8). Here, the corrected NCP changed the description of the work injury from "low back sprain" to "lumbosacral strain." The WCJ found as follows:

> This [WCJ] finds as a fact that the terms "lumbosacral strain" and "low back sprain" are interchangeable as used by the medical community. This [WCJ] further notes that Dr. McGraw and Dr. Mathew, in the depositions submitted to this [WCJ] in connection with the first Decision in this case, both described the injury as lumbosacral strain/sprain, and this [WCJ] relied upon

[10] Act of June 2, 1915, P.L. 736, added by section 20 of the act of July 2, 1993, *as amended*, 77 P.S. §§1039.2(1) and 1039.2(8). Section 1102(1) of the Act states, in pertinent part, that a person commits an offense if the person:

> [k]nowingly and with the intent to defraud a State … government agency … presents … to the government agency a document that contains false, incomplete or misleading information concerning any fact or thing material to the agency's determination in approving or disapproving a workers' compensation … action which is required or filed in response to an agency's request.

77 P.S. §1039.2(1).

> that testimony in finding the treatment from [certain physical therapy centers] as not being related to the work injury. Further this [WCJ] notes that at the hearing held on February 25, 1999, she was advised by counsel for [Employer] that the [NCP] described the injury as "low back sprain," but that a very short time later, this [WCJ], after having been advised of the injury description, described the injury as a "lumbosacral strain."

(Findings of Fact, No. 92.) In other words, the WCJ found that there was no false or fraudulent statement in the description of the work injury in the original NCP. Based on this finding, there was no violation of section 1102(8) of the Act. Thus, the WCJ did not err in failing to impose a penalty for a violation of that section.

## IV. Double Billing

Finally, Claimant argues that the WCJ erred in failing to refer for investigation a payment made by Employer's insurer to create the impression that Claimant or his healthcare provider was double billing. Claimant contends that the insurer's actions violated section 1102(8) of the Act. However, the WCJ believed the testimony of Jody Lombardo, the insurer's claims adjuster, who indicated that the insurer's payment was simply a mistake and that there was no intent to create an impression that Claimant or his healthcare provider was double billing. (Findings of Fact, No. 99.) To the extent that Claimant implies that Lombardo's testimony does not support the WCJ's finding, we disagree. (*See* R.R. V at 2455a, 2479a, 2485a, 2497a-99a, 2502a, 2507a).

Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Judge

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| Workers' Compensation Appeal Board (Mulach Steel Corporation), Respondent | : | |

O R D E R

AND NOW, this 19th day of March, 2008, the order of the Workers' Compensation Appeal Board, dated March 12, 2007, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Judge