

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Steven Galler, :  
 :  
 : Petitioner :  
 :  
 : v. : No. 678 C.D. 2009  
 : SUBMITTED: October 9, 2009  
 :  
 Workers' Compensation Appeal :  
 Board (Ephrata Community :  
 Ambulance Association, Inc.), :  
 Respondent :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE DAN PELLEGRINI, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge**

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
PRESIDENT JUDGE LEADBETTER**

**FILED: February 9, 2010**

Claimant, Steven Galler, petitions for review of the March 17, 2009 order of the Workers' Compensation Appeal Board (Board) that reversed the decision of the Workers' Compensation Judge (WCJ), who had granted Galler's claim petition and petition for approval of a compromise and release, denied his penalty petition and denied the review petition of Employer, Ephrata Community Ambulance Association. The only issue before us is whether the Board erred in overturning the WCJ's determination that Claimant's date of injury was his last

day of work, and therefore that his notice to Employer of the work injury was timely.<sup>1</sup> For the reasons set forth below, we affirm the Board's order.

Claimant worked for Employer as an emergency medical technician (EMT). Claimant filed an October 2001 claim petition for workers' compensation benefits alleging that he suffered back herniations on April 12, 2001, while shoveling mulch on Employer's premises and that he verbally notified Employer of the work injury that day. Although Claimant indicated that he was working for more than one employer at the time of injury (Ephrata Community Hospital, Quarryville Community Ambulance and LEMSA),<sup>2</sup> he named only Employer and Selective Insurance Company as the responsible parties. Claimant requested full disability benefits from July 8, 2001 onwards and the payment of medical bills and counsel fees. Employer denied the allegations of the claim petition and, in February 2002, sought to join other ambulance associations and several hospitals as additional defendants. In support of his claim petition, Claimant testified:

Q. And would you just briefly tell the judge how you believe you injured your back?

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<sup>1</sup> In pertinent part, Section 311 of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 631, provides as follows:

Unless the employer shall have knowledge of the occurrence of the injury, or unless the employe or someone in his behalf, or some of the dependents or someone in their behalf, shall give notice thereof to the employer within twenty-one days after the injury, no compensation shall be due until such notice be given, and, unless such notice be given within one hundred and twenty days after the occurrence of the injury, no compensation shall be allowed.

<sup>2</sup> From the record, it appears that Claimant was referring to Lancaster Emergency Medical Services Association.

A. Outside of normal duties as an EMT running emergency and non-emergency calls, we were doing maintenance around the building. We were laying mulch around the property. Right after that, I noticed my back was hurting. I just mentioned in general to my employer that my back was hurting and I really didn't think much about it. Then I got up one day and it was hurting really bad. I told my employer and then I went to the doctor's after work that day.

....

Q. In the Claim Petition, you allege a specific date that you were injured, do you not?

A. I went to the doctor's on April 12. I don't know the exact date I was injured. My back was hurting and then April 12—

Q. So your testimony would be then it would at least be some time before April 12, on or before April 12, you were shoveling mulch and you injured your back?

A. Yes.

January 17, 2002 Hearing, Notes of Testimony (N.T.) at 4, 8; Reproduced Record (R.R.) at 579a, 583a. Claimant's last day of work for Employer was June 8, 2001. Subsequently, Claimant had surgeries "in the nature of a discectomy and laminectomy at two levels on August 9, 2001, a laminectomy on September 20, 2001, a spinal fusion at two levels in December 2001, another hospitalization for a period from December 29, 2001 as a consequence of complications, and an additional hospitalization for a period from January 14, 2001, as a consequence of more complications. . . ." Finding of Fact No. 28. Blue Cross/Blue Shield paid Claimant's medical expenses and, at some point, advised him to file a workers' compensation claim. The WCJ accepted Claimant's testimony as credible because she had the opportunity to observe his demeanor on numerous occasions.

Claimant also presented the deposition testimony of Marc P. Oliveri, M.D., a board-certified orthopedic surgeon. Dr. Oliveri, whose testimony was found credible by the WCJ, was Claimant's treating physician and surgeon. When Claimant began treating with Dr. Oliveri on July 16, 2001, Claimant gave the doctor a history "attest[ing] that he awakened on one morning with the complaint of back and leg pain in March or April 2001, that the conditions endured for three months since then, and that the claimant worked as an EMT with heavy lifting, bending, and twisting activities." Finding of Fact No. 33. Dr. Oliveri's July 2001 examination revealed that "the claimant had sciatic tension in both lower extremities, reflexes were present, there was a bit of muscle weakness on the right side of the big toe muscle and there was a somewhat diminished lumbar range of motion." Finding of Fact No. 34. The doctor opined that "the claimant's job aggravated the pre-existing degenerative disc disease and that it aggravated or caused the claimant's two lumbar disc herniations at the levels of L-4, L-5, and S-1." Finding of Fact No. 40. Claimant never advised Dr. Oliveri that he suffered a back injury at his work as a result of mulching tasks.

Employer presented no medical evidence, but did offer the testimony of Kevin Wolf, its manager. Mr. Wolf credibly testified that Claimant performed full-time work for Employer in the spring of 2001 and that his work consisted of traditional EMT duties, but for two days of ground maintenance work on or after an April 25, 2001 mulch delivery. Mr. Wolf stated that Claimant gave him updates regarding his back condition in the spring of 2001, but that "September 2001 was the first time that [he] learned that Blue Cross/Blue Shield recommended the claimant's pursuit of the workers' compensation claim and that the claimant alleged an injury with a relationship to claimant's employment with [Employer]."

Finding of Fact No. 25. Because Claimant worked full-time for Employer, the WCJ found that Claimant's performance of his job there, as opposed to his work for the other ambulance entities, contributed the most to his back conditions. In addition, the WCJ found that Claimant worked for Employer on his last day of work, June 8, 2001.

The WCJ found that Claimant's day-to-day performance of his job until June 8, 2001 caused and/or aggravated his back conditions. With regard to notice, the WCJ found that Claimant first learned of the work-relatedness of his back problems on July 16, 2001, when he commenced treatment with Dr. Oliveri. Further, the WCJ concluded that Claimant gave timely notice to Employer of his injury in September 2001, when Claimant advised Mr. Wolf that Claimant's private insurance company had recommended that he pursue a workers' compensation claim.

The Board reversed, noting that "[t]he WCJ appears to have concluded that Claimant's injury was not traumatic in nature, but rather was a cumulative trauma injury." Board's March 17, 2009 Decision at 8. In rejecting the WCJ's determination of an injury date of June 8, 2001, the Board noted that Dr. Oliveri did not specifically testify that Claimant suffered a repetitive or cumulative trauma. In addition, the Board determined that Dr. Oliveri's medical opinion was rendered incompetent by virtue of the doctor's credible testimony that Claimant never told him that the back injury occurred while laying mulch. Accordingly, the Board concluded as follows:

The only conclusion that can be drawn from the competent and credible evidence of record is that Claimant suffered an obvious back injury shoveling mulch for [Employer] sometime on or before April 12, 2001. Indeed, throughout this litigation, he insisted that

he suffered a back injury on or before that date. He credibly testified that he never had any back problems prior to the mulch[-]shoveling incident, he felt pain immediately after the incident, he immediately reported his pain to his supervisor, and shortly thereafter began treatment for his back injury.

*Id.* at 10.

With regard to the issue of notice, the Board agreed with the WCJ that Employer first knew that Claimant had a work-related injury in September 2001.<sup>3</sup> Having found that Claimant's injury was obvious and that he, therefore, knew of the work-related nature of it on April 12th,<sup>4</sup> the Board concluded that Claimant failed to provide Employer with notice of the work-related injury within one hundred twenty days after its occurrence, such that notice was untimely. Consequently, it reversed the WCJ's grant of the claim petition and declined to consider other issues raised by the parties on appeal. Claimant's timely petition for review to this Court followed.

Claimant maintains that the WCJ correctly determined that June 8, 2001, the last day that he worked, was the date of injury based on Dr. Oliveri's testimony that his rigorous duties as an EMT caused and/or aggravated his back problems. Employer argues that because Dr. Oliveri had no knowledge of

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<sup>3</sup> We note that Claimant does not argue on appeal that Employer had notice of his back problems on the day of the mulch spreading and thereafter, and thus should have been aware of the work-relatedness of his injury. Nor does he argue that, on the other hand, if the connection between his work and his injury was not obvious, the time for providing notice should run from July, when the WCJ found Claimant first learned of it in his discussion with Dr. Oliveri. Therefore, we may not address these theories as a basis for reversal.

<sup>4</sup> Notwithstanding the discrepancy as to the mulch delivery date, the WCJ found and both Claimant and Mr. Wolf agreed that Claimant spread mulch on Employer's property sometime during April 2001. Since any date in April would be more than one hundred twenty days before September, the exact date is of no consequence and neither party makes any argument based on the discrepancy.

Claimant's claim that he sustained an injury while shoveling mulch, the doctor's testimony is incompetent as a matter of law and that, therefore, June 8th cannot stand as the date of injury. *See Long v. Workers' Comp. Appeal Bd. (Integrated Health Serv., Inc.)*, 852 A.2d 424 (Pa. Cmwlth. 2004) (medical opinion rendered incompetent when medical professional does not have complete grasp of work incident).

The WCJ concluded that the date of injury was Claimant's last day of work, June 8, 2001, because she accepted Dr. Oliveri's testimony that Claimant's day-to-day work for Employer caused and/or aggravated his back problems. Since there was no incident on Claimant's last day of work, that could be the date of injury only if the injury was of the cumulative trauma variety. The one hundred twenty day notice period for aggravation/cumulative trauma injuries begins to run from the last day of injury, normally the last day that a claimant worked for his employer. *City of Philadelphia v. Workers' Comp. Appeal Bd. (Williams)*, 578 Pa. 207, 851 A.2d 838 (2004). The reason for that rule is that a claimant in such circumstances suffers a daily incremental aggravation of his injury each day that he works rather than an identifiable trauma associated with a particular date or dates.

While Dr. Oliveri did not use the terms "repetitive" or "cumulative" in describing the nature of Claimant's back problems, the omission of such "magic" words is not determinative. We agree with the Board, however, that Dr. Oliveri's testimony is inadequate to establish a cumulative trauma injury. In pertinent part, Dr. Oliveri testified as follows:

A. My opinion to a reasonable degree of medical certainty, the job that he did, the EMT, lifting, bending, twisting certainly contributed to his current symptom complex.

He obviously had degenerative disc disease on his lumbar MRI at L4-5 and 5-1. To my knowledge, prior to early in the year of 2001, he really hadn't had any significant problems.

His job requires a lot of bending, twisting, lifting. It's my opinion that the job either aggravated the preexisting disc disease, which looking at his objective studies, especially the discogram, it correlates with his symptoms.

And also, he has a lumbar disc herniation. He had two of them at L4-5 and 5-1. And I think that the work either aggravated or caused those disc herniations.

....

Q. Your report, however, says, I am unable to state that his job definitely caused the disc herniations, correct?

A. Yes, I stated that. But, certainly, like I stated before, the job that he did do certainly could have aggravated the preexisting disc disease or disc herniations that he had.

....

A. Again, like I stated, *there is no specific incident that he related to us other than he was being an emergency medical technician.* There's no specific incident he related to us of an incident that caused his back pain.

October 29, 2002 Deposition of Dr. Oliveri, N.T. at 17, 32, 37; R.R. at 537a, 552a, 557a (emphasis added).<sup>5</sup>

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<sup>5</sup> While it may be argued that Dr. Oliveri's use of the language "could have aggravated" makes his testimony altogether equivocal, we believe that this change of tone on cross-examination goes to the weight to be given his earlier unequivocal opinion that the back (Footnote continued on next page...)

First, it is not at all clear that Dr. Oliveri was describing a cumulative daily injury rather than some discreet event or events of injury-causing lifting, etc., during the course of Claimant's employment. His focus was on the Claimant's work as the cause of his back problems, not on the time of occurrence. He did not provide any expert testimony on the etiology of Claimant's condition which would suggest a cumulative daily injury rather than a single or episodic trauma.<sup>6</sup> More important, even if his testimony is interpreted as having diagnosed a cumulative trauma disorder, the competency of such a conclusion is fatally undermined by his lack of awareness of the mulch-spreading event immediately preceding Claimant's onset of symptoms.<sup>7</sup> Finally, as we have noted:

[I]t is the province of the WCJ to determine from the evidence whether the work environment caused a new and additional injury each day or instead simply caused the manifestation of symptoms or prevented healing of a prior injury. In the former case, a daily aggravation has occurred and the last date of employment will be the critical "date of injury" for the purpose of determining whether notice was timely given. In the latter case, the critical date for notice purposes will be the actual date of the occurrence or last of the sequence of events which caused the disabling condition.

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**(continued...)**

condition was work-related. However, the question here is not whether Claimant suffered from a work-related injury, but whether the medical testimony established a date of injury after April, 2001.

<sup>6</sup> We also note that there is no evidence in the record as to whether strenuous lifting, etc., was a daily occurrence in Claimant's work, or only occurred from time to time, or the last time such duties were performed.

<sup>7</sup> Somewhat surprisingly, no one asked Dr. Oliveri whether knowledge of the mulch spreading duties on the day of Claimant's first symptoms would have affected his opinion on causation.

*Zurn Indus. v. Workers' Comp. Appeal Bd. (Bottoni)*, 755 A.2d 108, 111 (Pa. Cmwlth. 2000) (footnote omitted) (citations omitted). The evidence here simply did not provide a substantial basis for the WCJ to have found the date of injury to be the last day of employment. Therefore, we must agree with the Board that Claimant failed to meet his burden of establishing compliance with the notice requirement.

For the above reasons, we affirm the Board's order.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

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**ORDER**

AND NOW, this 9th day of February, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby AFFIRMED.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge