IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ober the Rainbow Services, Inc. and State Workers' Insurance Fund,	:	
Petitioners	:	
	:	
v.	:	No. 6 C.D. 2008
	:	SUBMITTED: April 4, 2008
Workers' Compensation Appeal Board (Smith),	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** June 23, 2008

Ober the Rainbow Services, Inc. (employer) and the State Workers' Insurance Fund petition for review of the December 6, 2007 order of the Workers' Compensation Appeal Board (Board) that affirmed the order of Workers' Compensation Judge (WCJ) Williamson granting the petition to review compensation benefits of Mary Ann Smith (claimant). We affirm.

A cleaning technician, claimant injured herself in November 2002 when she slipped and fell after emptying a bucket into a tub. In a January 2003 agreement for compensation payable, employer accepted claimant's right wrist injuries as compensable. In October 2003, employer offered claimant a cleaning technician position which she did not pursue. Employer then filed a modification petition, which WCJ Peckmann denied in a prior proceeding based on the 2004

testimony of claimant and board-certified orthopedic surgeon Dr. Lance Yarus that claimant was unable to perform the position.

In September 2005, claimant filed the petition to review compensation benefits at issue, seeking to add neck injuries. WCJ Williamson accepted the 2005/2006 testimony of claimant and Dr. Yarus that claimant's cervical complaints were causally related to the November 2002 work injury and, accordingly, directed that the description of injury be amended to include "herniated disc at C6-7 with radiculopathy." The Board affirmed and employer's timely petition for review to this court followed.

The two issues on appeal are 1) whether claimant was barred by the decision and record in the prior proceeding from seeking to amend her injury description to include neck injuries; and 2) whether the WCJ issued a reasoned decision under Section 422(a) of the Workers' Compensation Act.[1] A claimant's burden when seeking to add an additional injury is the same as when pursuing a claim petition. *Jeanes Hosp. v. Workers' Comp. Appeal Bd. (Hass)*, 582 Pa. 405, 872 A.2d 159 (2005). A claimant must establish the work-relatedness of the condition by unequivocal medical testimony, unless the relationship is obvious. *Jeanette Dist. Mem. Hosp. v. Workmen's Comp. Appeal Bd. (Mesich)*, 668 A.2d 249 (Pa. Cmwlth. 1995).

We note that "collateral estoppel acts to foreclose relitigation in a subsequent action of an issue of fact or law that was actually litigated and was necessary to a prior final judgment." *PMA Ins. Group v. Workmen's Comp. Appeal Bd. (Kelley)*, 665 A.2d 538, 541 (Pa. Cmwlth. 1995) (citation omitted). The four conditions that must be met in order for collateral estoppel to apply are

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 834.

that "(1) the legal or factual issues are identical; (2) they were actually litigated; (3) they were essential to the judgment; (4) and they were material to the adjudication." *Id*. at 541 (citation omitted).

Employer maintains that claimant could have and should have litigated any issues concerning her neck in the prior proceeding because her physical condition, symptoms and the extent of her injuries were all at issue when the first WCJ considered whether she was physically capable of performing the proffered position. Employer points out that both claimant and Dr. Yarus were aware of claimant's neck problems at that time. Thus, it argues that WCJ Williamson should have precluded claimant from adding neck injuries to her accepted work injuries.

In an interrelated competency argument, employer cites *Newcomer v. Workmen's Compensation Appeal Board (Ward Trucking Corp.)*, 547 Pa. 639, 692 A.2d 1062 (1997), in support of its argument that Dr. Yarus's recent testimony was not competent because it was inconsistent with both his prior testimony and that of claimant denying any connection between cervical problems and the work injury and limiting that work injury to the right wrist. In *Newcomer*, the Supreme Court concluded that the doctor's essential testimony was incompetent because it was not supported by either the medical record or the factual history of the work accident, but instead based solely on the claimant's personal opinion as to causation. Employer, therefore, argues that like the situation in *Newcomer*, the present case involves shifting testimony that should have lead to a conclusion that Dr. Yarus's testimony was incompetent.

In support of its position, employer cites the prior testimony of claimant and Dr. Yarus. In August 2004, claimant testified that she experienced

symptoms in her right wrist at the time of her November 2002 fall at work. She stated that her ongoing symptoms at the time of the August 2004 hearing included "[c]ramping, burning up my arm, up into my shoulder when I try to use it with any everyday normal activities." August 24, 2004, Hearing, N.T. 10; R.R. 34a. When WCJ Peckmann asked her if she had any other problems, she replied "no."

Employer also emphasizes the prior testimony of Dr. Yarus:

> A. I first met [claimant] February 26 of 2003. She presented with low back pain and neck pain, which she had for a number of years. I also treated her for her wrist complaints, and that began April 9th of 2003.
>
> . . . .
>
> A. . . . Her complaint at the time she presented was pain that was persisting. She had numbness and tingling in the hand and indicated she had not had any evaluation for nerve impingement. . . .
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> . . . .
>
> Q. And doctor, at that time based upon the history provided to you, the physical examination, your review of the diagnostic studies and the records, did you have an opinion as to the diagnosis of Miss Smith's condition?
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> . . . .
>
> A. The diagnosis was consistent with the hand pain, stiffness and the de Quervain's which is called tenosynovitis at the radial styloid. I thought she had carpal tunnel symptoms that were exacerbated and a strain and sprain of the carpometacarpal joint of the hand on the right.
>
> Q. And at that time, Doctor, did you have an impression as to whether those conditions were causally related to the reported work injury in this case?
>
> . . . .
>
> A. I believe that this was part of the work injury that she had sustained involving the right wrist.

August 11, 2004 Deposition of Dr. Yarus, N.T. 7, 9; R.R. 7a, 9a. In addition, employer emphasizes that portion of Dr. Yarus's testimony on cross-examination

where he agreed that the cervical spine did not have any relationship to the hand injury. *Id.*, N.T. 21; R.R. 21a.

Employer contrasts the testimony of claimant and Dr. Yarus before the first WCJ with their testimony before WCJ Williamson. Employer observes that claimant in the subsequent proceeding stated that she had experienced symptoms in her neck and back from the time of the November 2002 work injury. When asked why she failed to mention that pain in the prior proceeding, employer notes that claimant responded that she did not remember why.

As for the testimony of Dr. Yarus, employer contrasts the doctor's prior testimony that claimant's neck problems were not related to her wrist injuries with his more recent testimony that, as far back as 2004, he had already associated the cervical problems with the work injury. Employer emphasizes that Dr. Yarus attempted to reconcile any apparent inconsistencies between his two sets of testimony by stating that he meant only that the wrist is not directly anatomically connected to the neck and that nobody during his previous testimony directly asked him to render an opinion as to claimant's neck problems.

In response, claimant asserts that, contrary to employer's representation, the pertinent question at this stage is not whether any issue concerning her neck problems should have been litigated, but whether it actually was litigated. She points out that the issue that actually was litigated and that was properly before the first WCJ was whether she could perform the proffered job given her accepted right-wrist injuries.

Further, claimant argues that *Newcomer* is distinguishable from the present case. She maintains that the piecemeal manner in which employer has presented her testimony and that of Dr. Yarus is misleading in the sense that all of

the testimony must be considered in the context in which it was given. She notes that some of her prior testimony was in response to questions as to what happened and what hurt on the day of her 2002 injury and that other testimony was in response to questions as to status of her symptoms at the time of the 2004 hearing. She points out that it is not surprising that her descriptions of her symptoms in 2002 and 2004 are not identical because it was the subsequent failure of those symptoms to subside that compelled her to return to Dr. Yarus. In keeping with the fact that she had problems in addition to her wrist, claimant notes WCJ Williamson's finding of fact number six stating that her most *acute* problem after the November 2002 injury was with her right wrist. Claimant further notes that WCJ Williamson found that Dr. Yarus explained his rationale for connecting her cervical problems with the original work injury by noting that "[w]hen she presented in February of 2003, she had global complaints, nothing that was specific, until we started looking, after the wrist resolved somewhat, at the actual complaints that she was having in the neck." WCJ's Williamson's Finding of Fact No. 32. More specifically in that regard, Dr. Yarus testified as follows in the review petition proceeding:

> I solved the problem in her wrist, but she was still having problems in the upper extremity. I'm relying on her ability to tell me what's going on.
>
> It's almost like veterinary medicine. . . . And I'm looking at the cervical spine and I'm saying why does she still have complaints when things are normal. The true picture is is [sic] that she has radiculopathy that's causing her wrist pain and her hand to be symptomatic.
>
> So I said in my [prior] testimony, which I think is entirely accurate, that the hand or wrist let's say has nothing to do with the cervical spine in—in the sense that de Quervain's doesn't translate to cervical spine problems and vice versa.

. . . .

> The wrist has nothing to do with the cervical spine. Both in my opinion were caused by this specific incident. But there's no causal relationship between de Quervain's and disc pathology in the cervical spine.

May 24, 2006 Deposition of Dr. Yarus, N.T. 21-23; R.R. 103-05a.

We agree that WCJ Williamson did not err in adding "herniated disc at C6-7 with radiculopathy" to the accepted injuries. What the first WCJ determined was the issue of whether claimant was physically capable of performing the October 2003 cleaning technician position in light of her then acknowledged work-related right wrist injury. A thorough examination of the prior testimony of claimant and Dr. Yarus reveals that many of the passages were riddled with such time-limiting phrases as "at that time," "at this point" and "current symptoms." In essence, their respective testimony represents time-sensitive snapshots of their understanding of claimant's condition and/or symptoms at stated intervals.

In addition, notwithstanding testimony at the first proceeding concerning claimant's neck problems, the question of whether those problems were work-related simply was not before the WCJ. Moreover, as Dr. Yarus testified, although he was aware of claimant's cervical problems at that time, he did not pursue them as being work-related until after he was unable to resolve claimant's wrist problems. There was an evolution of treatment, surgeries and tests done on claimant in an effort to alleviate her symptoms and to identify the origin of her ongoing physical problems. It is understandable that this progression could lead to Dr. Yarus's subsequent conclusion that claimant's cervical problems were related

to the original work injury.[2] *See Campbell v. Workers' Comp. Appeal Bd. (Antietam Valley Animal Hosp.)*, 705 A.2d 503 (Pa. Cmwlth. 1998) (diagnosis of *all* medical conditions arising as a natural consequence from work injury not always possible.) Thus, we reject employer's argument that claimant in the prior proceeding somehow waived her right to add neck problems at a subsequent date.

As for employer's assertion that the witnesses' shifting testimony caused Dr. Yarus's testimony to be incompetent, we agree with the Board that the present case is distinguishable from *Newcomer*. Dr. Yarus in his testimony noted that, at the time claimant began treatment with him, she complained of neck pain. Although he initially did not connect that pain with the work-related injury, he was able to correlate the C6-7 disc injury revealed in the subsequent MRI with her radiating symptoms. In addition, claimant testified that she did not include her neck problems in the prior description of her injuries because everyone was focusing on the wrist pain as the accepted work injury. The WCJ accepted this testimony as credible and he is the final arbiter over questions of credibility and evidentiary weight. *Hills Dep't Store No. 59 v. Workmen's Comp. Appeal Bd. (McMullen)*, 646 A.2d 1272 (Pa. Cmwlth. 1994). We turn now to employer's argument that WCJ Williamson did not issue a reasoned decision.

"[W]hen faced with conflicting evidence, the [WCJ] must adequately explain the reasons for rejecting or discrediting competent evidence." 77 P.S. § 834. Employer contends that WCJ Williamson failed to comply with this requirement because he failed to reconcile the two sets of testimony. However, as

[2] As the Board noted in its decision, the fact that a medical witness revises his opinion after reviewing further information does not render his opinion incompetent. *Fye v. Workers' Comp. Appeal Bd. (Super Moche)*, 762 A.2d 428 (Pa. Cmwlth. 2000). We would worry more about a physician who refused to ponder and explore the source of a patient's ongoing medical issues.

claimant points out, WCJ Williamson personally observed her testify and found her to be credible. *Daniels v. Workers' Comp. Appeal Bd. (Tristate Transp.)*, 574 Pa. 61, 77, 828 A.2d 1043, 1053 (2003) (where the WCJ has seen the witness testify and assessed her demeanor, "a mere conclusion as to which witness was deemed credible, in the absence of some special circumstance, could be sufficient to render the decision adequately 'reasoned.'") As for the medical testimony, the WCJ set forth specific findings in which he analyzed the testimony of employer's physician, Dr. Peppelman, and compared it to the more credible and persuasive testimony of Dr. Yarus in order to illustrate which portions of Peppelman's testimony were rejected or discredited and the reasons therefore. Thus, we conclude that the reasoned decision requirement was met.

Accordingly, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 23rd day of June, 2008, 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