

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Roy Swank, :  
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 Petitioner :  
 :  
 v. :  
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 Workers' Compensation Appeal :  
 Board (Temple University), : No. 73 C.D. 2010  
 Respondent : Submitted: July 16, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McGINLEY

FILED: October 28, 2010

Roy Swank (Claimant) petitions for review of the order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of the Workers' Compensation Judge (WCJ) that denied Claimant's review petition and granted the termination petition of Temple University (Employer).

Claimant worked as a locksmith for Employer. He sustained a work-related injury on January 13, 2004, while repairing a door. On February 13, 2004, Employer issued a notice of compensation payable (NCP) which listed the work injury as "NECK, R [Right] SHOULDER, R [Right] ARM STRAIN." Notice of Compensation Payable, February 13, 2004, at 1; Reproduced Record (R.R.) at 1a.

On May 26, 2005, Employer petitioned to terminate/suspend benefits on the basis that Claimant was fully recovered and able to return to unrestricted work. On August 14, 2005, Claimant sought review and alleged that the notice of

compensation payable contained an incorrect description of his injury. The WCJ consolidated the petitions.

Employer presented the deposition testimony of Neil Kahanovitz, M.D. (Dr. Kahanovitz), a board-certified orthopedic surgeon. Dr. Kahanovitz examined Claimant on July 8, 2004, and on May 5, 2005. Dr. Kahanovitz took a history and reviewed medical records. After the July 8, 2004, examination, Dr. Kahanovitz diagnosed Claimant with an aggravation of a pre-existing neck injury and C4-5 disc herniation. Deposition of Neil Kahanovitz, M.D., September 8, 2005, (Dr. Kahanovitz Deposition) at 16-17; R.R. at 26a-27a. After he received an additional MRI, Dr. Kahanovitz determined that any abnormality at C4-5 was unrelated to the January 13, 2004, work-related injury. Dr. Kahanovitz Deposition at 17-18; R.R. at 27a-28a.

With respect to the May 5, 2005, examination, Dr. Kahanovitz took a history and reviewed a surveillance video of Claimant which showed him riding a motorcycle. Dr. Kahanovitz Deposition at 21; R.R. at 31a. Dr. Kahanovitz opined that the videotape was

completely inconsistent with what he had stated to me during the history portion of the exam. He noted that he was unable to spray paint a chair and within three hours had to lie down because he could not even put on a second coat. The patient [Claimant] noted that his normal activities about the house were severely restricted, which was completely inconsistent with what I saw on the surveillance video which showed someone who was holding up and pushing and dragging a very large Harley Davidson motorcycle out of the garage and riding this for very long periods on highways and streets. Vibration such as with a motorcycle or truck is prone to

increase back and neck pain, so it is highly inconsistent as he was able to do this for long periods of time with no evidence of any discomfort on his face or inability to hold up the bike or help a young female ride the motorcycle with what he claimed was his activity level on a daily basis.

Dr. Kahanovitz Deposition at 22; R.R. at 32a.

Dr. Kahanovitz testified that Claimant was fully recovered from his work-related injury based on the physical examination, the lack of any objective abnormality, Claimant's calluses, the information in the surveillance video, that Claimant was exaggerating his symptoms, and the examination showed no evidence of any residual symptomatology based on his cervical strain and possible C4-5 disc bulge. Dr. Kahanovitz Deposition at 24; R.R. at 34a. Dr. Kahanovitz further testified within a reasonable degree of medical certainty that the NCP accurately described Claimant's work-related injury. Dr. Kahanovitz Deposition at 24; R.R. at 34a.<sup>1</sup>

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<sup>1</sup> Employer presented the deposition testimony of Joseph Rebar (Rebar), a private investigator with U.S. Detectives. Rebar conducted surveillance of Claimant on November 6 and 7, 2004, and videotaped Claimant. Deposition of Joseph Rebar, October 13, 2005, (Rebar Deposition) at 7-8; R.R. at 112a-113a. Employer presented the deposition testimony of Christian Moore, vice president of operations for U.S. Detectives, who testified regarding the surveillance of Claimant, the training given to the company's investigators, and the procedures for conducting surveillance.

Thomas F. Johnston (Johnston), director of workers' compensation and absence manager for Employer and previously the manager of workers' compensation, testified that Claimant applied for long-term disability benefits which were denied. Johnston also testified with respect to Claimant's discharge from employment due to his failure to provide Employer with a doctor's note concerning physical restrictions unrelated to the January 13, 2004, work-related injury.

**(Footnote continued on next page...)**

Claimant presented the deposition testimony of F. Todd Wetzel, M.D. (Dr. Wetzel), a board-certified orthopedic surgeon and Claimant's treating physician since January 29, 2004. Initially, Dr. Wetzel diagnosed Claimant with C4-5 disc herniation caused by the January 13, 2004, work-related injury. Deposition of F. Todd Wetzel, M.D., May 1, 2006, (Dr. Wetzel Deposition) at 13; R.R. at 359a. Dr. Wetzel opined that the description of the injury listed on the NCP was incorrect because it did not list a disc herniation. Dr. Wetzel Deposition at 16; R.R. at 362a. Dr. Wetzel saw Claimant on June 8, 2004, and informed him that if Claimant wanted to consider a C4-5 discectomy and fusion, he would continue to see him but if not he "would recommend his care be centered with people who are . . . more inclined toward long-term functional conservative care, such as physical medicine, rehabilitation or occupational health. That's the recommendation I sent back to occupational health." Dr. Wetzel Deposition at 20; R.R. at 366a.

Dr. Wetzel next examined Claimant on April 4, 2006. Dr. Wetzel determined that Claimant had not fully recovered from his work-related injury based on Claimant's complaints and the findings on his physical examination. Dr. Wetzel Deposition at 23; R.R. at 369a. On cross-examination, Dr. Wetzel admitted

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**(continued...)**

Sharon Boyle (Boyle), director of labor and employee relations for Employer, testified regarding Claimant's discharge and his grievance hearing which she conducted.

Employer presented the deposition testimony of Anthony Acevedo (Acevedo), custodian of records for IDT American Corporation (IDT). IDT provided local and long distance telephone service to Claimant.

that he had no opinion on Claimant's functional limitations. Dr. Wetzel Deposition at 29-30; R.R. at 375a-376a.

Claimant presented the deposition testimony of Janice Carbonaro (Carbonaro), the claims adjuster for Skyball, the third party administrator for Employer. Carbonaro initially investigated Claimant's claim and issued the notice of compensation payable. Carbonaro admitted that Dr. Wetzel stated on a January 29, 2004, evaluation that Claimant had a herniated disc, but she failed to indicate that on the notice of compensation payable. Deposition of Janice Carbonaro, June 19, 2006, (Carbonaro Deposition) at 11-12; R.R. at 466a-467a. On cross-examination, Carbonaro stated that Claimant had a previous work-related herniated disc, so she did not list a herniated disc on the notice of compensation payable because she was not sure of the specific injury to the neck. Carbonaro Deposition at 36-37; R.R. at 491a-492a.

Claimant testified regarding the occurrence of his injury and his discharge. Claimant could not ride his motorcycle for long after he suffered the work-related injury because he "started getting the cramp and discomfort" in his shoulder. Notes of Testimony, July 12, 2006, (N.T. 7/12/06) at 22-23; R.R. at 518a-519a. He explained that his 1999 Harley-Davidson was virtually "vibration proof." N.T. 7/12/06 at 24; R.R. at 520a. Claimant did not believe he was fully recovered from his work-related injury because he continued to have shoulder pain

which was exacerbated by “[l]ifting and doing anything overhead and repetitive motion type of things.” N.T. 7/12/06 at 28; R.R. at 524a.<sup>2</sup>

The WCJ granted Employer’s termination petition as of May 5, 2005, dismissed the suspension petition as moot, and denied and dismissed Claimant’s review petition. The WCJ made the following relevant factual findings:

17. I have reviewed the testimony of Employer’s medical expert, Neil Kahanovitz, M.D., and find it to be credible and persuasive. The Judge finds Dr. Kahanovitz’s testimony to be credible and persuasive because: he is a board-certified orthopedic surgeon; he performed two thorough examination [sic] of Claimant on July 8, 2004, and May 5, 2005, he found Claimant to be completely recovered from the January 13, 2004, work injury and able to return to his pre-injury job duties without restrictions; he noted that Claimant’s motorcycling activities as depicted on the surveillance videotape as ‘highly inconsistent’ with his subjective complaints,, he found evidence that Claimant had been working with his hands for a long period of time, further contradicting his subjective complaints; he found that Claimant was a smoker and was not actively treating; he noted that Claimant refused to undergo a selective nerve root block injection or FCE<sup>[3]</sup> as recommended; he noted that Claimant failed to disclose his prior work-and non-work related injury history; and despite finding of a disc abnormality at the C4-5 level, he noted a lack of abnormality at the C4-5 level, he noted a lack of objective findings on examination and signs of symptom magnification.

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<sup>2</sup> Claimant presented the deposition testimony of Maurice Crosby (Crosby), business manager of Local 835, International Union of Operative Engineers, Claimant’s union. Crosby testified regarding the events concerning Claimant’s discharge.

<sup>3</sup> “FCE” is an abbreviation for Functional Capacity Evaluation.

23. I have reviewed the testimony of Dr. Wetzel, Claimant's medical expert, and find it to lack credibility, and therefore, rejects same. I reject Dr. Wetzel's testimony because: he admitted to a gap in treatment of Claimant from June 8, 2004, to April 4, 2006; he saw Claimant on April 4, 2006, solely due to the pending litigation; he admitted that Claimant failed to undergo a selective nerve root block injection or an FCE recommended back in that learning Claimant was able to ride his motorcycle around would 'quite possibly' affect his opinions regarding Claimant's conditions; despite his diagnosis of a C4-5 disc herniation, he never recommended surgery because it was not that serious; he admitted that Claimant's smoking would slow down the recuperation process; and he never received Dr. Pierson's progress notes indicating that Claimant had degenerative disc disease.

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26. I have reviewed the testimony of Janice Carbonaro, Claimant's fact witness and find it to be credible and persuasive. I find [sic] Ms. Carbonaro's testimony credible and persuasive because: she is the Claims Adjuster for Employer's third-party administrator and has handled Claimant's two work injury claims; she explained that she based her working on the NCP for the January 13, 2004, work injury solely on the information received from Employer's Occupational Health as of February 13, 2004, which did not include Dr. Wetzel's reports; she did not put any specifics into the NCP since she was not sure of the specific work-related injury on March 19, 2002; she verified that Claimant waited until June 15, 2006, to undergo an FCE; she scheduled surveillance on Claimant in June of 2004 based upon information she received regarding his dress and appearance from Occupational Health; she provided the surveillance videotape of Claimant's Employer IME Coordinator to review by Dr. Kahanovitz; and never saw Dr. Rushton's note until after Claimant's termination.

27. I reviewed Claimant's testimony and find Claimant's testimony to lack credibility, and therefore, reject the same. I reject Claimant's testimony because: he admitted to a large treatment gap with Dr. Wetzel

between June of 2004 and April of 2006, when he returned only due to the pending litigation; he is not currently treating with anyone or undergoing therapy; he has failed to undergo the selective nerve root blockage injections recommended by Dr. Wetzel in May of 2004; he waited until June of 2006 to undergo an FCE; smokes cigarettes; his applications [sic] for LTD benefits was denied; he is able to drive; visits his father in Wildwood and performs his activities of daily living; he has not bothered looking for work anywhere despite his admission that he is depicted on Employer's surveillance videotape riding his motorcycle around South Jersey, Philadelphia, including the Toys for Tots ride, he admitted receiving Mr. Johnston's June 21, 2005, job offer letter and July 21, 2005, termination letter; he did not attend his July 8, 2005, appointment with Dr. Rushton because he received a doctor's note in the mail before that, he never asked Dr. Balduini for a note in June of 2005; and despite claiming that he faxed the note to Employer on July 22, 2005, he admitted to telling Mr. Crosby that he did not have the note and on that date he had sent it to his counsel before that date [sic].

WCJ's Decision, May 21, 2007, (Decision), Findings of Fact Nos. 17, 23, 26-27 at 18-21; R.R. at 603a-606a. The WCJ also found Moor, Rebar, Johnston, and Boyle credible. The WCJ rejected the testimony of Crosby and Acevedo.

Claimant appealed to the Board<sup>4</sup> which affirmed.

Claimant contends that the Board committed an error of law when it affirmed the WCJ's decision which failed to make findings of fact relating to the review petition, where the WCJ failed to provide an explanation for rejecting the uncontroverted testimony that Claimant sustained a cervical herniation as a result

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<sup>4</sup> The Board remanded for a certification of the record. Once the WCJ certified the record, the Board reviewed the appeal.



of his work injury, where the WCJ failed to provide an accurate recitation of the testimony of record, and where an employee of Employer testified that Claimant sustained a cervical herniation as a result of his work-related injury.<sup>5</sup>

Initially, Claimant contends that the Board erred when it affirmed the WCJ's decision because the WCJ failed to make findings of fact related to the review petition. According to Claimant, the Board erred when it determined that the WCJ's reasons for rejecting Claimant's medical evidence on the termination petition was sufficient to explain his conclusion that Claimant failed to shoulder his burden on the review petition.

Section 413(a) of the Workers' Compensation Act (Act)<sup>6</sup> permits a WCJ to modify an agreement that is in any material way incorrect. A party seeking to amend a notice of compensation payable has the burden of proving that a material mistake of fact or law was made at the time the notice of compensation payable was issued. Birmingham Fire Insurance Company v. Workmen's Compensation Appeal Board (Kennedy), 657 A.2d 96 (Pa. Cmwlth. 1995).

Therefore, Claimant had the burden of proving that the listed description in the NCP was incorrect and should be amended to include a herniated disc at C4-5. Claimant attempted to do so through the testimony of Dr. Wetzel. In

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<sup>5</sup> This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

<sup>6</sup> Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §771.

his findings the WCJ stated that Claimant presented the testimony of Dr. Wetzel in support of the review petition and in opposition of the termination petition. The WCJ found in Finding of Fact No. 13.d. that Dr. Wetzel diagnosed Claimant with a C4-5 disc herniation sustained as a result of the January 13, 2004, work-related injury. However, in Finding of Fact No. 23, the WCJ explicitly rejected the testimony of Dr. Wetzel for reasons germane to the review petition: “that learning Claimant was able to ride his motorcycle around would ‘quite possibly’ affect his opinions regarding Claimant’s conditions; despite his diagnosis of a C4-5 disc herniation, he never recommended surgery because it was not that serious; . . . and he never received Dr. Pierson’s progress notes indicated that Claimant had degenerative disc disease.” Decision, Finding of Fact No. 23 at 19; R.R. at 604a. In order to prove that the C4-5 disc herniation was the result of the January 13, 2004, work-related injury, Claimant had to rely on the medical testimony of Dr. Wetzel. Again, Dr. Wetzel’s testimony was rejected and, the WCJ fully explained his reasons for doing so.<sup>7</sup>

Claimant next contends that the Board erred when it affirmed the WCJ’s decision because the WCJ failed to explain why he rejected uncontroverted testimony from Dr. Wetzel that Claimant sustained a cervical herniation as a result of his work-related injury. Claimant argues that Dr. Kahanovitz’s testimony does not contradict the testimony of Dr. Wetzel. A review of Dr. Kahanovitz’s

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<sup>7</sup> In workers’ compensation cases, the WCJ is the ultimate finder of fact, has exclusive province over questions of credibility and evidentiary weight, and is free to accept or reject the testimony of any witness, in whole or in part. General Electric Co. v. Workmen’s Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 529 Pa. 626, 600 A.2d 541 (1991).

testimony reveals that Dr. Kahanovitz's medical opinion differed from that of Dr. Wetzel. While Dr. Kahanovitz may have referred to a C4-5 disc bulge, Dr. Kahanovitz testified within a reasonable degree of medical certainty that the NCP accurately described Claimant's work-related injury. Dr. Kahanovitz Deposition at 24; R.R. at 34a. Such medical evidence directly contradicted that of Dr. Wetzel. The Board did not err when it affirmed the WCJ.

Claimant next contends that the Board erred when it affirmed the WCJ's decision because the decision failed to provide an accurate recitation of the testimony of record. Claimant argues that the WCJ misstated Carbonaro's testimony that she determined the nature of the work injury based upon records from Employer's Occupational Health and not Dr. Wetzel's records. Claimant asserts that a review of Carbonaro's testimony indicates that she received a report from Dr. Wetzel on February 2, 2004, regarding a January 29, 2004, evaluation of Claimant in which Dr. Wetzel stated that Claimant had a herniated disc as a result of the work-related injury. Claimant also asserts that the WCJ found in Finding of Fact No. 15(a) that Carbonaro "based the wording in the NCP solely on the information she had received from Employer's Occupational Health as of February 13, 2004", when Carbonaro actually testified that none of the records indicated that Claimant suffered strains.

With respect to this issue, the Board stated:

We believe that this evidence goes to the factual circumstances surrounding the issuance of the NCP but ultimately, the nature of Claimant's work injury is a medical conclusion. To that end, the WCJ rejected Dr. Wetzel's opinion and Dr. Kahanovitz credibly testified

that a neck, shoulder and right arm strain was an accurate description of the work injury. . . . This determination was, in fact, dispositive.” (Footnote omitted).

Board Opinion, December 23, 2009, (Opinion) at 11; R.R. at 625a. This Court agrees.<sup>8</sup> Regardless, any inconsistency in the WCJ’s findings did not affect the outcome.

Finally, Claimant contends that the Board erred “in affirming the Workers’ Compensation Judge’s decision in which an employee of the Defendant [Employer] testified as a medical expert that Claimant had sustained a cervical herniation as a result of his work related injury.” Claimant’s Brief at 12. Dr. Wetzel was a professor of orthopedic surgery and neurosurgery at Temple University (Claimant’s Employer) when he treated Claimant and, later, when he testified on his behalf. Claimant asserts that because Dr. Wetzel was an employee of Employer, his statements constituted an admission attributable to Employer.

The Board dismissed this argument because Claimant cited “no authority for this assertion.” Opinion at 9; R.R. at 623a. Similarly, in his brief to this Court, Claimant fails to cite any statute, rule, or case law. In any event Dr. Wetzel testified in his capacity as a treating physician not as an employee of Employer. Claimant’s position is baseless.

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<sup>8</sup> Claimant asserts that there are other “misstatements” of the record but declined to indicate what they are.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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	:
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	:
v.	:
	:
Workers' Compensation Appeal	:
Board (Temple University),	: No. 73 C.D. 2010
Respondent	:

**ORDER**

AND NOW, this 28th day of October, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

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BERNARD L. MCGINLEY, Judge