

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sam Riboldi,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 785 C.D. 2008
	:	SUBMITTED: September 5, 2008
Workers' Compensation Appeal	:	
Board (Stroudsburg Area School	:	
District and PMA Insurance),	:	
Respondents	:	

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

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: December 15, 2008

Sam Riboldi (Claimant) petitions for review of the order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of the Workers' Compensation Judge (WCJ) denying his claim petition. Claimant challenges the WCJ's fact finding and credibility determinations and argues that the Board erred in affirming the conclusion that he failed to prove that he suffered a work-related aggravation of a pre-existing degenerative condition.

Claimant was employed as a custodian by the Stroudsburg Area School District (Employer). In October 2005, Claimant filed a claim petition, averring that he sustained a work-related low back injury on March 10, 2005, which caused total disability beginning on September 6, 2005, and thereafter. In support of his claim petition, Claimant testified and presented the deposition

testimony of his surgeon, Dr. Christopher Lycette, a board eligible neurosurgeon who specializes in complex spinal disorders. In opposition, Employer presented the deposition testimony of Dr. Robert T. O’Leary, who is board-certified in physical medicine and rehabilitation, pain medicine and as an independent medical examiner.

According to Claimant’s testimony, on March 10, 2005, he was working in the school cafeteria folding cafeteria tables. One of the tables did not collapse as expected and when it abruptly stopped moving, Claimant felt something in his back “just go” and then he began to feel pain across his low back and into his legs. Claimant reported the injury the next day and then saw his family doctor for treatment. Claimant’s pain did not resolve and he eventually received steroid injections beginning in late August. However, Claimant had so much pain following the second injection that he did not return to work after September 7, 2005. Notably, Claimant continued to work after the March 10 incident until September 7. According to Claimant, both the doctor who performed the injections and a doctor he saw at Employer’s request following the injections provided him with documentation removing him from work due to his back condition. Several months later, in November, Dr. Lycette performed surgery on Claimant’s back.

Finally, Claimant testified that he had a history of back pain prior to March 10 and an MRI was taken of his spine on March 5, five days before the incident at work.¹ Prior to March 10, Claimant experienced a constant dull ache in

¹ According to Claimant, he injured his back at work in 1997, which disabled him from work for approximately one year. During that time he received workers’ compensation benefits. Thereafter, he periodically experienced back problems depending on the types of jobs he was performing at work. Claimant does not contend that his condition following the March 10 incident is either a recurrence or an aggravation of that prior injury.

his back; after March 10, Claimant's pain radiated into his legs and under his kneecaps.² Claimant has not returned to work in any capacity since September 7, 2005.

Dr. Lycette testified that Claimant had multi-level lumbar stenosis, which led him to perform lumbar decompression surgery, which involved the removal of boney overgrowth and arthritic material from the nerve canal. According to the doctor, the surgery revealed that Claimant's arthritic condition was more severe than he had initially expected. Dr. Lycette last examined Claimant in May of 2006 and, at that time, Claimant reported greater discomfort than previously reported in addition to lower back pain and bilateral leg pain. Dr. Lycette described Claimant's condition as "a combination of lumbar stenosis and degenerative disc disease, [which] causes the back to be susceptible to injury." Reproduced Record (R.R.) at 105a. Dr. Lycette further opined that Claimant was disabled on September 22, 2005, the date he first examined him and has continued to be totally disabled since that time. As to whether Claimant's disability was related to the March 10th incident at work, Dr. Lycette opined: "From his description of the event, it seems quite reasonable that he aggravated a condition that he had had to the point where he was unable to break the cycle of pain that was a result of it." *Id.*

Dr. O'Leary testified, in turn, that he examined Claimant in January 2006 and reviewed Claimant's multiple MRIs taken between 1997 and March 2005, and medical records, including records from Dr. Lycette. According to Dr. O'Leary, Claimant's films pre-dating the March 10 incident demonstrated multi-

² Claimant acknowledged on cross-examination, however, that prior to March 10, 2005, he experienced pain that traveled from his hips to his knees and feet.

level spondylosis, degenerative changes including spinal stenosis and neural foraminal stenosis.³ Dr. O’Leary also noted various other disc conditions that existed prior to 2005, including disc desiccation, facet hypertrophy and disc morphology changes. In addition, Dr. O’Leary found it significant that when Dr. Lycette first examined Claimant, he noted no neurologic abnormalities. According to Dr. O’Leary, if someone sustains a traumatic injury, it is common to find neurologic impairment, such as loss of reflex, dermatomal numbness, focal motor weakness or bowel or bladder changes. He further noted that the surgery was performed at levels of the spine, at which pre-incident MRIs documented degenerative changes. Following his examination and review of medical records, Dr. O’Leary concluded that Claimant suffered from nonwork-related lumbar stenosis and spondylosis. Dr. O’Leary further opined that the medical treatment provided to Claimant after March 10, including the surgery, was not causally related to his work activities.

The WCJ opined that he believed the bulk of Claimant’s testimony but did “not accept as fact the Claimant’s testimony that his condition worsened notably after March 10, 2005 because the Claimant continued to work from March 10, 2005, through September of 2005 without restricting his work activities in any way.” WCJ’s decision at 6-7, Finding of Fact No. 8 (circ. March 22, 2007), R.R. at 30-31a. The WCJ further accepted the opinion of Dr. O’Leary regarding the cause of Claimant’s disability as more credible than that expressed by Dr.

³ Dr. O’Leary described spinal stenosis as a narrowing of the spinal column, and neural foraminal stenosis as a narrowing of the openings where nerve roots “coming off the spinal cord” exit the spinal column. R.R. at 128a.

Lycette.⁴ Based on the aforesaid, the WCJ found that Claimant did not sustain a work-related aggravation of his pre-existing degenerative condition on March 10, 2005. Accordingly, the claim petition was denied. On appeal, the Board affirmed. The present appeal followed.

On appeal, Claimant first contends that the WCJ erred in rejecting his testimony that his condition worsened after March 5, 1990, because he continued to work after that date without restricting his work activities. *See* WCJ's Finding of Fact No. 8, R.R. at 29-30a. According to Claimant, this finding lacks evidentiary support because he testified to the contrary, that is, he specifically testified that he needed assistance performing his job duties. Due to the fact that Claimant has failed to preserve this issue in his petition for review, however, we conclude that the issue has been waived. *See* Pa. R.A.P. 1513(d); *see also Jimoh v. Unemployment Comp. Bd. of Review*, 902 A.2d 608 (Pa. Cmwlth. 2006), *Williams v. Workers' Comp. Appeal Bd. (USX Corp.-Fairless Works)*, 862 A.2d 137 (Pa. Cmwlth. 2004). Therefore, we are bound by the WCJ's finding.⁵

⁴ The WCJ also implied that Dr. Lycette's opinion regarding causation was less than unequivocal.

⁵ Notwithstanding this waiver, upon review of Claimant's testimony, we conclude that there is no merit to this argument. Claimant testified that after the March 10th incident, he continued to work his full shift through the summer. When asked whether he was able to fully perform his job, he answered: "Not really, no." Notes of Testimony of November 30, 2006, at 18, R.R. at 58a. Claimant further testified that his regular duties during that time included scrubbing, stripping and rewaxing floors and when asked whether he had help with that activity, he replied: "Yes, yes. Two other guys with me. . . . I was working [with others]." *Id.* at 19, R.R. at 59a. Thus, Claimant's testimony regarding any self-imposed limitations or limited capability was vague, at best. Moreover, Claimant testified that a physician did not limit his work activities until shortly before he stopped working. The WCJ, as fact finder, was free to reject Claimant's vague testimony regarding his limitations or draw the reasonable inference that modifications to activities were not necessary before he stopped working. Finally, we note that the WCJ observed Claimant's demeanor while testifying. For all these reasons, even if the issue had not been waived, we would not disturb the WCJ's credibility determinations.

Claimant also essentially argues that the Board erred in affirming the conclusion that he failed to meet his burden of proof.⁶ We discern no error in this regard. The WCJ rejected Dr. Lycette’s opinion regarding causation in favor of that expressed by Dr. O’Leary, who opined that Claimant’s lumbar stenosis and spondylosis were not work-related, that Claimant’s medical treatment post-March 10, 2005, was not due to a work injury, that the positive findings documented during Dr. O’Leary’s physical examination of Claimant were not attributable to the March 10th work incident, and that the work incident did not aggravate Claimant’s pre-existing degenerative condition. Dr. O’Leary’s opinion constitutes substantial competent evidence to support the conclusion that Claimant’s physical condition, medical treatment and disability after March 10, 2005, were not work-related. Therefore, once the WCJ rejected Claimant’s medical evidence in favor of Employer’s, Claimant failed to meet his burden of demonstrating that he sustained a work-related injury or work-related aggravation of a pre-existing condition.

Based upon the foregoing, the order of the Board is affirmed.

BONNIE BRIGANCE LEADBETTER,
President Judge

⁶ Claimant actually argues that the finding that he did not meet his burden of proof is not supported by substantial evidence of record.

It is well-settled that a work-related aggravation of a pre-existing condition is an injury within the meaning of the Act. *Vazquez v. Workmen’s Comp. Appeal Bd. (Masonite Corp.)*, 687 A.2d 66 (Pa. Cmwlth. 1996). However, “a claimant with a preexisting, non-work related condition, although disabled from the workplace because of this condition, is not entitled to benefits where the workplace did not cause or aggravate the condition.” *Id.* at 69.

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 Respondents :

ORDER

AND NOW, this 15th day of December, 2008, the order of the Worker's Compensation Appeal Board in the above captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge