

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pilgrim's Pride Corp., :
Petitioner :
v. : No. 790 C.D. 2007
Workers' Compensation Appeal : Submitted: February 8, 2008
Board (Hull), :
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 SENIOR JUDGE KELLEY

FILED: May 14, 2008

Pilgrim's Pride (Employer) petitions for review of an order of the Workers' Compensation Appeal Board (Board), which affirmed the decision of a workers' compensation judge (WCJ) granting the Claim Petition of Jerry Hull (Claimant). We affirm.

On November 24, 2004, Claimant filed a Claim Petition alleging that he sustained lumbar and left leg injuries in the course and scope of his employment on July 28, 2004. Claimant stated that he fell backward and twisted his left leg as he caught himself. In response, Employer filed an answer denying the material allegations contained therein. A hearing on the Claim Petition then ensued.

Before the WCJ, Claimant testified and presented the deposition testimony of Morton J. Rubenstein, M.D., who is board-certified in internal

medicine. Employer presented the testimony of Olga Anderson and the deposition testimony of Dr. John Kline, Jr., M.D., who is board-certified in physical medicine and rehabilitation, pain management, disability and impairment and independent medical evaluations. Based upon the testimony and evidence presented, the WCJ made the following relevant findings.

Claimant testified that he was employed to catch and load live turkeys for transport from farms to Employer's processing plant. Claimant testified that on July 28, 2004, he slipped while on the loader and hurt his back. Claimant testified that he was working with Juan at the time and reported the incident to his crew leader, Jim Sanders. Claimant went to see the company doctor, Dr. Zittle, who referred him to Dr. Rubenstein. Claimant testified that after his injury he tried to work for one night and could not because of the pain. Claimant had pain in his left leg and developed pain in the left side of his back, which continues. Claimant testified that he cannot read and write; he flunked kindergarten and attended school for retarded children. The WCJ found the testimony of Claimant to be credible and persuasive.

Olga Anderson, the human resource manager for Employer, testified that she began working for Employer on November 1, 2004 and was not there when Claimant suffered his July 28, 2004 injury. Ms. Anderson testified that Claimant completed Family and Medical Leave Act forms. Claimant also applied for and was awarded unemployment compensation benefits, which Employer did not appeal. Ms. Anderson testified that Employer relied upon a portion of the unemployment compensation determination findings of fact to determine that Claimant had voluntarily quit. The WCJ rejected Ms. Anderson's testimony finding it not persuasive. The WCJ explained that Ms. Anderson was unable to refute Claimant's testimony. The WCJ further explained that the unemployment compensation notice

of determination explained that Claimant stopped working because of an injury and work limitations, which is consistent with Claimant's testimony.

Dr. Rubenstein, Claimant's treating physician, testified that he first examined Claimant on May 14, 2004 for work stress, which had improved by June 2004. Dr. Rubenstein next examined Claimant on August 2, 2004. Claimant was complaining of left leg pain. Dr. Rubenstein diagnosed Claimant as suffering from left leg discomfort, etiology obscure. Dr. Rubenstein testified that he sent Claimant for a duplex scan to rule out a blood clot; the scan was normal. Claimant developed pain further up his left leg and in his back and Dr. Rubenstein referred Claimant to an orthopedic surgeon and a rheumatologist. An MRI revealed a moderate-sized disc herniation and a central left area of the L5-S1 inner space with mass effect and deformity of the thecal sac as well as a central disc protrusion at the L4-5 level with mild spinal canal stenosis. Dr. Rubenstein testified that his reading of the report was that there was a significant abnormality at the L5-S1 disc level with a moderate-sized disc protrusion with its greatest protrusion to the left side which would correspond to Claimant's left-sided leg symptoms.

Dr. Rubenstein opined that it is clear from the medical evidence that Claimant's left leg pain is due to lumbar disc disease, not muscle strain. Based upon Claimant's job description and the slip at work on July 28, 2004, Dr. Rubenstein opined that Claimant's injury and lumbar disc problems are work-related. Dr. Rubenstein acknowledged that there was some difficulty arriving at the diagnosis because of Claimant's low intelligence and intellectual impairment and because Claimant was a poor historian. However, Dr. Rubenstein found Claimant to be sincere about his pain complaints. The WCJ accepted Dr. Rubenstein's medical opinions as credible and persuasive. The WCJ explained that Dr. Rubenstein was Claimant's treating physician and had the opportunity to examine Claimant before

and after the work injury; Claimant did not have any complaints of leg or back pain when he was examined in May and June of 2004. Dr. Rubenstein's testimony was consistent with Claimant's testimony and with the MRI.

Dr. Kline, Employer's medical expert, testified that he examined Claimant on July 17, 2005. Claimant appeared to be a little bit slow and had difficulty writing and reading. Claimant was pleasant and cooperative during the exam. Dr. Kline testified that based upon Claimant's history and medical records, Claimant may have sustained patellofemoral stress syndrome and left calf pain injury on July 28, 2004. Dr. Kline testified that Claimant's L4-5 disc protrusion was degenerative and the disc herniation at L5-S1 without root impingement was not work-related. Dr. Kline testified that Claimant described an improper mechanism of injury for a disc injury. Dr. Kline acknowledged that Claimant had low back discomfort at the time of his July 17, 2005 examination. The WCJ rejected Dr. Kline's medical opinions as not credible and not persuasive to the extent that they are inconsistent with Claimant's testimony and the credible and persuasive medical opinions of Dr. Rubenstein. The WCJ explained that Dr. Kline only examined Claimant once, almost a year after the work injury. Dr. Kline acknowledged that Claimant was slow and had low back discomfort at the time of his examination. The WCJ specifically rejected Dr. Kline's opinion that the mechanism described by Claimant for the July 28, 2004 injury would not have caused a disc herniation because of Claimant's intellectual impairment and difficulty communicating.

The WCJ ultimately found that Claimant had suffered a work-related injury on July 28, 2004 in the nature of an L4-5 disc protrusion and L5-S1 disc herniation. By order dated June 28, 2006, the WCJ granted Claimant's Claim Petition and awarded Claimant temporary total disability less a credit to Employer for unemployment compensation benefits received by Claimant.

From this decision, Employer filed an appeal with the Board, which affirmed. This appeal now follows.¹ Employer raises the issue of whether the decision of the Board is in error where, contrary to the assertions in the Board's opinion, Claimant's medical expert relied upon a diagnosis of a herniated disc submitted by a rheumatologist that does not specify when such an injury occurred in the formulation of his causation opinion and he, himself, had changed his opinion as to the malady afflicting Claimant and could not specify if an injury occurred at work on July 28, 2004 in the manner alleged.

With respect to a claim petition, the claimant bears the burden of proving that his or her injury arose in the course of employment and was related thereto. Krawchuk v. Philadelphia Electric Co., 497 Pa. 115, 439 A.2d 627 (1981). Generally, if there is no obvious relationship between the disability and the work-related cause, unequivocal medical testimony is required to meet this burden of proof. Lewis v. Commonwealth, 508 Pa. 360, 498 A.2d 800 (1985).

The equivocality of a medical opinion is a question of law and fully reviewable by this court. Carpenter Technology v. Workmen's Compensation Appeal Board (Wisniewski), 600 A.2d 694 (Pa. Cmwlth. 1991). Equivocality is judged upon a review of the entire testimony. Id. In conducting this review, we are mindful of our admonition in Philadelphia College of Osteopathic Medicine v. Workmen's Compensation Appeal Board (Lucas), 465 A.2d 132 (Pa. Cmwlth. 1983),

¹ This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of appeal board procedures, and whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

that to be unequivocal, every word of medical testimony does not have to be certain, positive, and without reservation or semblance of doubt.

It is an established principle that medical testimony is unequivocal if a medical expert testifies, after providing a foundation for the testimony, that, in his or her professional opinion, he or she believes or thinks a fact exists. Shaffer v. Workmen's Compensation Appeal Board (Weis Markets), 667 A.2d 243 (Pa. Cmwlth. 1995), petition for allowance of appeal denied, 544 Pa. 618, 674 A.2d 1079 (1996). Even if a medical expert admits to uncertainty, reservation or lack of information with respect to medical details, the testimony remains unequivocal so long as the expert expresses a belief that, in his or her professional opinion a fact exists. Id. An expert may express an opinion based, in part, upon the reports of others upon which the expert customarily relies in his profession. Westinghouse Electric Corp./CBS v. Workers' Compensation Appeal Board (Burger), 838 A.2d 831 (Pa. Cmwlth. 2003); Pistella v. Workmen's Compensation Appeal Board (Samson Buick Body Shop), 633 A.2d 230 (Pa. Cmwlth. 1993). Medical testimony is equivocal if its value, leaves doubt, is less than positive, or is based upon possibilities. Reinforced Molding Corp. v. Workers' Compensation Appeal Board (Haney), 717 A.2d 1096 (Pa. Cmwlth. 1998), petition for allowance of appeal denied, 568 Pa. 652, 704 A.2d 365 (1999).

Here, Employer argues that the testimony of Claimant's treating physician, Dr. Rubenstein, was equivocal, and is therefore insufficient to support a finding that Claimant's injury is work-related. Employer directs our attention to portions of Dr. Rubenstein's testimony on cross examination where Dr. Rubenstein could not state with certainty that an injury occurred on July 28, 2004 at work. Reproduced Record (R.R.) at 91a. Dr. Rubenstein explained, throughout his testimony, that his uncertainty as to when and how the injury occurred was

attributable to Claimant's inability to provide an articulate history of the injury. Dr. Rubenstein unequivocally testified that Claimant's left leg pain was due to lumbar disc disease. R.R. at 89a. "[I]t is clear now from the medical evidence that his left leg pain is due to lumbar disc disease." Id. "The pain description was or is consistent with the kind of pain one would obtain from a disc injury in the location as described on the MRI report." R.R. at 88a. Dr. Rubenstein testified that his opinion was stated within a reasonable degree of medical certainty and was based upon Claimant's pain description over several visits, the objective MRI findings, information from the consulting physicians, and the nature of Claimant's work. R.R. at 88a, 90a, 91a.

In piecing together the etiology of Claimant's injury, Dr. Rubenstein testified that while Claimant did not relay to him the occurrence of an injury, Claimant did relay to the consulting physicians that his leg and back symptoms appeared after an incident at work when he fell while loading turkeys. R.R. at 89a, 91a. Dr. Rubenstein testified, "certainly his job description suggests that he performed heavy lifting, heavy physical labor, and may have had a slip and fall incident so that to me my medical opinion it seems reasonable to connect up his work and perhaps an injury at work with the lumbar disc problem." R.R. at 89a.

Dr. Rubenstein's testimony is corroborated by the testimony offered by Claimant. Claimant credibly testified that that he slipped and fell at work on July 28, 2004. Claimant also testified that he reported this injury to his supervisor, was examined by the company doctor who directed him to see his family physician, Dr. Rubenstein. Dr. Rubenstein also testified that Claimant did not complain of back or leg pain when he was examined by Dr. Rubenstein in May and June 2004.

A review of Dr. Rubenstein's testimony in its entirety reveals that his testimony did not waiver from causation. While Dr. Rubenstein did admit some

uncertainty as to the nature of the incident at work and the date of its occurrence, Dr. Rubenstein firmly expressed his belief that the Claimant's lumbar injury was caused by work. While conceding he could not be absolutely sure, such measure is not the standard in workers' compensation proceedings. See Philadelphia College. We, therefore, conclude that the WCJ did not err in accepting and relying upon Dr. Rubenstein's unequivocal medical testimony in concluding that Claimant's injury was work-related.

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

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ORDER

AND NOW, this 14th day of May, 2008, the order of the Workers' Compensation Appeal Board, at No. A06-1558, dated March 27, 2007, is hereby AFFIRMED.

JAMES R. KELLEY, Senior Judge