

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Corey Winter, :
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 Petitioner :
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 v. : No. 803 C.D. 2008
 : Submitted: July 18, 2008
 Workers' Compensation Appeal Board :
 (Peruzzi Auto Group), :
 Respondent :

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER

FILED: October 23, 2008

Corey Winter seeks review of an order of the Workers' Compensation Appeal Board (Board) affirming the decision of a Workers' Compensation Judge (WCJ) to deny and dismiss Winter's claim petition. Winter claims error in that the medical witness for Peruzzi Auto Group (Employer) did not sign the report on which he relied and could not say whether or in what time frame he reviewed it; the WCJ found Winter's medical expert's testimony not credible although medical records supported a relation between the original injury and later ankle injury; and it was undisputed that he suffered a compensable injury on December 5, 2005.

Winter testified that he worked for Employer as a collision repair technician, repairing and replacing damaged parts of wrecked vehicles, which involved heavy lifting and climbing. On December 5, 2005, while standing on a frame and working on a car, he slipped and fell and landed on his right leg. Winter reported the incident to the shop manager, Robert Shabe, who sent Winter to Industrial Healthcare Center where he was seen by Dr. Bonner. He was kept off

work for two days and then returned to full duty. Winter testified that he had bruising from his kneecap to his toes and that for the next two months he left work early almost every day. On Saturday January 28, 2006, with his leg still sore and swollen, he was walking on a grassy trail when his right ankle rolled over and he fell. He saw Dr. Bonner on Monday and was directed to return to work.

At the end of the week he saw another physician on the panel list, Dr. Roman, who removed him from work, sent him for an MRI and referred him to Dr. Christopher Aland. Dr. Aland kept Winter out of work, gave him crutches and ordered a removable cast for his ankle. On April 15 Dr. Aland released Winter to full duty, with a restriction of fifteen-minute breaks every two hours. He worked at that level until May 1, 2006 when he resigned; shortly thereafter he was to start work with an auto body shop. On cross-examination Winter specified that the area that he hit when he fell was the lower part of his right shin, on the inside of his leg. He received no treatment between December 7, 2005 and January 30, 2006, and he worked in his regular capacity and was paid his normal earnings, although he stated that it took him longer to complete work. He was hunting when he rolled his ankle, and he experienced an immediate, sharp pain and had to limp to his car.

Dr. Aland, who is board-certified in orthopedic surgery, testified that he first saw Winter on February 8, 2006. Winter provided a history of injuring his ankle at work three to four weeks earlier, falling and jamming his ankle and developing pain, swelling and bruising, although the doctor later learned that it was actually December 5, 2005 when he was injured at work. Dr. Aland reviewed an MRI and diagnosed Winter's condition as a strain/sprain of the posterior tibial tendon, consisting of partial tearing, with a non-displaced fracture or injury to the bone as a secondary diagnosis.

On cross-examination Dr. Aland acknowledged that after he treated Winter he saw records from Industrial Healthcare indicating Winter's fall on December 5 and landing on his right leg with complaints of leg pain and four centimeter square bruising on the lower medial aspect of the leg, with significant pain and swelling and a laceration on this part of the leg, which is above the ankle. At that time there was full range of motion in the ankle. Winter did not tell Dr. Aland that he twisted or rolled his ankle on January 28, 2006 while hunting on a grassy trail and felt an immediate sharp pain and had to limp back to his car. Dr. Aland anticipated releasing Winter to full duty without restrictions at a visit scheduled for June 16, 2006, but he did not appear.

Employer presented Holly Schwab, a payroll coordinator, who stated that Winter returned after his December 2005 injury to full duty capacity. In a chart she prepared of efficiency ratings of the technicians, Winter had the highest or second highest efficiency during the weeks between the first injury and the beginning of February. She stated that his slight decrease in earnings in that period was the same for all employees due to the holidays. Shabe testified that when Winter returned to work in December he continued his normal full duty job; he never told Shabe that he could not perform a particular job because of his leg injury and he did not have to leave early. When he worked with the fifteen-minute break restriction, Winter could still perform all required physical maneuvering. Winter testified in rebuttal that his new job involved lighter work.

Employer presented the medical testimony of L. Richard Trabulsi, M.D., board-certified in orthopedic surgery, who evaluated Winter on August 4, 2006. He testified, among other things, that Winter related to him the December 5, 2005 incident of striking his leg and that he related another incident on January 28,

2006 when his right ankle rolled and he fell to the ground while hunting squirrels. The Industrial Healthcare records regarding the December injury identify bruising, swelling and laceration to the leg, not the ankle, and an x-ray was taken of the leg. That assessment included an evaluation of the ankle, which was normal, with no swelling and a full range of motion. On January 30 the history was a twisting of the ankle, and an x-ray was taken of the ankle. The diagnosis was right ankle sprain. Dr. Roman's records contain a history of the December injury but not the January incident. In January there was swelling and pain, bruising and tenderness to different parts of Winter's ankle and severe restriction of range of motion. In Dr. Trabulsi's evaluation in August 2006, the ankle was normal.

Dr. Trabulsi opined that Winter suffered a contusion of the right leg in the work incident of December 5, 2005 and a sprain of the right ankle with an undisplaced fracture of the posterior malleolus of the right distal tibia in the January 2006 hunting incident. He disagreed with Dr. Aland that there was a tear of the posterior tibial tendon because that was not shown on the MRI. Dr. Trabulsi stated that if the sprain and fracture had occurred in December, Winter would not have been able to work full duty as a frame shop technician.

The WCJ found Winter not credible based upon observations of his demeanor, the accepted medical evidence and Employer's fact witnesses. Winter's description of his December 2005 injury was rejected in its entirety, and his assertion that his 2006 disability was due to the December injury was undermined by his returning to full duty work after that injury, with no medical treatment, for almost two months until he injured his ankle in the hunting incident. The WCJ found that Winter purposefully misled Dr. Roman and Dr. Aland concerning the two incidents, and he found the testimony of Dr. Aland not credible. The WCJ

rejected the opinion that Winter's 2006 disability was attributable to the 2005 injury based upon the inaccurate history that Winter provided to Dr. Aland and the doctor's inaccurate view that the ankle injury was due to the December incident.

Based on observation of demeanor, the WCJ credited the testimony of Schwab and Shabe and accepted their testimony over Winter's where there was conflict. The WCJ overruled Winter's objection to the testimony of Dr. Trabulsi for his reliance on his own unsigned medical report. He credited the testimony of Dr. Trabulsi that Winter's disability was attributable to his separate, non-work-related injury in January 2006, which was corroborated by medical records. The WCJ concluded that Winter failed to show through substantial, competent evidence that he suffered a work-related injury in December 2005 that caused loss in earning power or that he incurred medical bills related to that injury.

On Winter's appeal, the Board concluded that with the rejection of the testimony provided by Winter and Dr. Aland for credibility reasons, Winter's claim petition failed as a matter of law without consideration of the testimony of any of Employer's witnesses. The Board further ruled that the WCJ did not err in accepting Dr. Trabulsi's testimony based on his own unsigned report, reasoning that medical witnesses may rely on reports of others that are not in evidence but that the witness customarily relies upon in his profession in giving his opinion. The Court's review of the Board's order is limited to determining whether there was a constitutional violation or an error of law, whether any practice or procedure of the Board was not followed and whether the necessary findings of fact are supported by substantial evidence. *Higgins v. Workers' Compensation Appeal Board (City of Philadelphia)*, 854 A.2d 1002 (Pa. Cmwlth. 2004).

Deviating from the order of his statement of questions, Winter first argues that the Board erred in affirming the decision of the WCJ where it was undisputed that Winter suffered a compensable injury when he fell on December 5, 2005. He acknowledges that in a claim proceeding the claimant bears the burden of proving all necessary elements to support an award. *See Inglis House v. Workmen's Compensation Appeal Board (Reedy)*, 535 Pa. 135, 634 A.2d 592 (1993). Winter maintains that Employer admitted at the first hearing that a compensable injury occurred, noting that Employer's counsel acknowledged that medical benefits were paid under the first notice of denial, which was issued instead of a medical-only notice of compensation payable, for the month of December and into January. The WCJ also expressly refers to a work-related injury on December 5, 2005 in various findings and in Conclusion of Law No. 2.

Employer responds in part III of its argument that the record reflects that medical benefits were paid in connection with the December 5, 2005 injury; therefore, any medical bills for which payment is sought are for treatment after the January 28, 2006 injury. The claim petition was brought for ongoing temporary partial and total disability, but the WCJ determined that Winter had failed to show that he suffered any loss of earnings beyond the two days he was off after the December 2005 injury or that he had outstanding medical bills related thereto. The Court agrees with the Board's explanation that under the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§1 - 1041.4, 2501 - 2708, an injury is compensable only where it results in disability, which means a loss of earning power. *Bissland v. Workmen's Compensation Appeal Board (Boyertown Auto Works)*, 638 A.2d 493 (Pa. Cmwlth. 1994). Winter's argument

ignores this basic point. Employer did not admit a compensable injury by admitting to payment of bills for Winter's December 2005 injury.

Next Winter contends that the Board erred in upholding the WCJ's overruling of Winter's objection to Dr. Trabulsi's testimony. Dr. Trabulsi testified from a report from his office, but he admitted that he had no independent recollection of Winter, that he relied entirely on the report in testifying, that he did not know how long it was after he dictated the report when it was transcribed or who transcribed it and that it was not signed but stamped with his signature. Pa. R.E. 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Section 422(c) of the Act, 77 P.S. §835, prohibits introduction of a medical report where the compensation at issue exceeds fifty-two weeks and the party against whom it is offered objects. Hearsay evidence that is properly objected to is not competent to support a finding. *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Cmwlth, 1976). A medical witness may express an opinion based in part on the reports of others upon which the expert customarily relies, *see Pistella v. Workmen's Compensation Appeal Board (Samson Buick Body Shop)*, 633 A.2d 230 (Pa. Cmwlth. 1993), but Dr. Trabulsi's reliance on his report should have been ruled inadmissible hearsay.

Employer points out in part I of its argument that Dr. Trabulsi testified that he dictates IME reports immediately after examinations and that they are typed generally by one transcriptionist and issued seven to ten days later. He reviewed this one as soon as it was done and confirmed that it was his report. Moreover, Dr. Aland was prepared to release Winter to unrestricted full duty on June 16, 2006. Therefore, the strongest case Winter can make is for some disability through

that date, which is a period less than fifty-two weeks. Employer is correct that where the claimant offers no medical evidence to put more than fifty-two weeks of disability at issue, the prohibition of Section 422(c) does not apply. *See Budd Co. v. Workers' Compensation Appeal Board (Kan)*, 858 A.2d 170 (Pa. Cmwlth. 2004). The doctor's testimony authenticated the report, which qualified as an admissible certificate by a health care provider within the meaning of Section 422(c).

Last, Winter challenges the WCJ's finding that Dr. Aland was not credible where his testimony that Winter's subsequent ankle injury was related to the original leg injury was supported by the medical records, and there was no evidence that Winter had problems with his legs or ankles before the December 2005 incident. He asserts that after the December incident he had a series of incidents where his ankle turned, causing him to lose balance, and that the January incident was the worst. Injuries unrelated to a claimant's work are compensable if a claimant proves that the resulting disability was so immediately and directly connected with the prior work injury that the first accident was the proximate predisposing cause of the disability. *GTE Sylvania v. Workmen's Compensation Appeal Board (Lydon)*, 458 A.2d 1050 (Pa. Cmwlth. 1983). Dr. Aland testified that the bruising and discoloration and the falling from a height as described in Dr. Bonner's notes were consistent with the injuries of non-displaced fracture and sprained or torn tendon. These were not at first casted, braced or diagnosed, and Winter continued to roll his ankle. The WCJ rejected Dr. Aland's testimony on the basis of the incomplete history, but Dr. Aland testified that before giving testimony he had the opportunity to review records of Dr. Roman and Dr. Bonner, and they did not change his opinion.

Employer stresses the authority of a WCJ to accept or to reject the testimony of any witness, including a medical witness, in whole or in part. *Hills Dep't Store # 59 v. Workmen's Compensation Appeal Board (McMullen)*, 646 A.2d 1272 (Pa. Cmwlth. 1994). The WCJ extensively summarized the testimony of Dr. Aland and set forth bases for rejecting it. The Court observes that under *Daniels v. Workers' Compensation Appeal Board (Tristate Transp.)*, 574 Pa. 61, 828 A.2d 1043 (2003), a WCJ's credibility determination based on demeanor as to live testimony (as to Winter, e.g.) needs no further explanation, but as to deposition testimony, the WCJ must provide some explanation. Contrary to Winter's argument, Dr. Aland did not testify that the December injury predisposed Winter to the January injury, which disabled him; rather, he stated that the ankle injury occurred in December and went undetected. The WCJ rejected this as contrary to the medical and work records. Fully within his authority, the WCJ credited the opinion of Dr. Trabulsi that the ankle injury occurred in January. Accordingly, the Court affirms the decision of the Board.

DORIS A. SMITH-RIBNER, Judge

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Petitioner	:	
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v.	:	No. 803 C.D. 2008
	:	
Workers' Compensation Appeal Board	:	
(Peruzzi Auto Group),	:	
Respondent	:	

ORDER

AND NOW, this 23rd day of October, 2008, the order of the Workers' Compensation Appeal Board is affirmed.

DORIS A. SMITH-RIBNER, Judge