IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Peter Stanakis, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Com. of PA/SCI - Mahanoy), Respondent	:	No. 944 C.D. 2008
	:	Submitted: August 29, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: October 9, 2008

Peter Stanakis (Claimant) petitions for review from the order of the Workers' Compensation Appeal Board (Board) which affirmed the WCJ's denial of Claimant's review petition, grant of the termination petition of Commonwealth of Pennsylvania, State Correctional Institution-Mahanoy (Employer), and determination that Employer's contest was reasonable.

Claimant worked as a food service instructor with Employer. On October 15, 2004, Claimant suffered an injury in the course and scope of his employment when he slipped on either grease or water. On October 29, 2004, Employer issued a notice of compensation payable and acknowledged Claimant's injury as "upper back strain." Notice of Compensation Payable, October 29, 2004, at 1; Reproduced Record (R.R.) at 50. Claimant was paid temporary total disability benefits.

Claimant eventually underwent posterior fusion at L4-5 and L5-S1. The surgery did not relieve pain in Claimant's low back. On June 26, 2006, Employer petitioned to terminate benefits and alleged that Claimant fully recovered from his work-related injury as of May 16, 2006. On August 7, 2006, Claimant petitioned to review benefits and alleged "The injury is listed as a sprain/strain. The damage is a disk injury and status post fusion and recognition is requested." Petition to Review Compensation Benefits, August 7, 2006, at 1; R.R. at 3. The WCJ consolidated both petitions.

At hearing, Claimant described his injury:

> I was walking. . . there was either grease and [sic] water spilled. I went up in the air. I never went down. My feet came down in the ground and my right foot came down hard, and I felt this burning sensation up and down my back. . . . [I]t took me about five minutes to get my act together, but I continued to work for about an hour.

Notes of Testimony, August 3, 2006, (N.T.) at 9; R.R. at 15.

On cross-examination, Claimant admitted that while at home in his kitchen on October 27, 2004, his "knees buckled in the kitchen, and all I did was lurch forward and I hit my back. I never fell down. . . . [M]y head hit of [sic] the point of the cupboard, and I had a cut on my head." N.T. at 21; R.R. at 27. The last time he testified, Claimant described his condition: "I still have difficulty sleeping. I have mild depression. My mobility is hampered. I don't have much balance. . . . In my lower back and down . . . both legs, [I have pain] . . . . I have numbness partially down my right [leg] and down to about mid-shin on my left." Notes of Testimony, February 6, 2007, at 9; R.R. at 82.

Claimant presented the deposition testimony of his treating physician, Robert W. Mauthe, M.D. (Dr. Mauthe), board-certified in physical medicine and rehabilitation, electromyography, independent medical examination, and pain management. Dr. Mauthe first treated Claimant on November 14, 2005. At that time, Dr. Mauthe did not have Claimant's medical records to aid him in rendering an opinion as to causation. Deposition of Robert W. Mauthe, M.D., November 28, 2006, (Dr. Mauthe Deposition) at 11; R.R. at 152. Dr. Mauthe testified that based on the information available to him, Claimant's surgery was a direct result of his work-related injury. Dr. Mauthe Deposition at 18; R.R. at 159. Dr. Mauthe opined that it was unlikely that Claimant would ever return to his pre-injury status. Dr. Mauthe Deposition at 20; R.R. at 161. On cross-examination, Dr. Mauthe admitted that he was unaware that Claimant did not strike the ground when he suffered the work-related injury. Dr. Mauthe Deposition at 27; R.R. at 168. Dr. Mauthe further admitted that Claimant never told him of the incident in Claimant's kitchen. Dr. Mauthe Deposition at 29; R.R. at 170. With respect to whether this incident had any bearing on his earlier opinions on causation, Dr. Mauthe admitted "I think it could be a contributing factor." Dr. Mauthe Deposition at 33; R.R. at 174.

Employer presented the deposition testimony of John Nolan, M.D. (Dr. Nolan), a board-certified orthopedic surgeon. Dr. Nolan examined Claimant on August 23, 2005, and May 16, 2006. Dr. Nolan took a history and reviewed medical records. After the August 23, 2005, examination, Dr. Nolan diagnosed Claimant with a mid to upper back strain which had resolved. He also diagnosed Claimant with degenerative disc disease in his lower back and a small disc herniation at L3-4. Dr. Nolan believed that Claimant could return to his time of

injury job. Deposition of John Nolan, M.D., February 6, 2007, (Dr. Nolan Deposition) at 15-16; R.R. at 101-102.

After the May 16, 2006, examination, Dr. Nolan diagnosed Claimant with significant degenerative disc disease. Dr. Nolan Deposition at 19-20; R.R. at 105-106. Dr. Nolan determined:

> to the degree that he had low back symptomatology and possibly symptoms of either a radiculopathy or a spinal stenosis or even a cauda equine syndrome, that it would be a combination of preexisting disease plus whatever may have occurred on the 27th and did not appear to be in any way related to his work-related injury.

Dr. Nolan Deposition at 21; R.R. at 107. Dr. Nolan explained that the initial reports of the injury indicated no injury to the lumbar spine. Dr. Nolan Deposition at 28-29; R.R. at 114-115. He further opined that the fusion surgery had nothing to do with Claimant's work-related injury. Dr. Nolan testified within a reasonable degree of medical certainty that Claimant was fully recovered from the October 15, 2004, work-related injury. Dr. Nolan Deposition at 30; R.R. at 116.

The WCJ granted the termination petition, denied the review petition, and determined that Claimant was not entitled to an award of counsel fees for unreasonable contest. The WCJ found Claimant credible to the extent that his testimony was consistent with the testimony and medical opinions of Dr. Nolan. The WCJ made the following relevant findings of fact:

> 18. This Workers' Compensation Judge has carefully reviewed all of the testimony and evidence presented in this matter. Based upon such review, this Judge hereby accepts the testimony and medical opinions of Dr. Nolan relating to the nature of the work-related injury sustained

by the claimant on October 15, 2004, as competent, credible, and worthy of belief, for the reasons articulated by him at the time of his deposition. Further, to the extent that Dr. Mauthe rendered a medical opinion that the claimant sustained an injury to his lower back as a result of his work-related injury of October 15, 2004, and that his subsequent surgery upon his lumbar spine was causally related to his work-related injury, this Judge hereby rejects his said medical opinions as lacking credibility, for the following reasons:

a. At the time of his deposition on November 28, 2006, Dr. Mauthe acknowledged that he had not had the opportunity to review the medical records and reports from the claimant's early medical treatment following his work-related injury, in particular, the hospital records from the emergency room of The Pottsville Hospital and the medical records of Dr. Richard Gilbert.

b. Although Dr. Mauthe testified that he did have the opportunity to review the MRI study of the claimant's lumbar spine and the other diagnostic studies undergone by him, he was unable to testify and render a medical opinion that the claimant sustained any specific injury or abnormality to his lumbar spine as a result of his work-related injury of October 15, 2004.

c. Based upon a careful review of his deposition, it is apparent that Dr. Mauthe based his medical opinion relating to the causation of the claimant's complaints and symptoms in his lower back and lower extremities to a significant extent upon his impression that the claimant fell to the floor at the time of his work-related injury of October 15, 2004. However, it is equally apparent from the claimant's testimony before this Judge that he did not fall to the floor at the time of his work-related injury. Therefore, this Judge hereby finds and concludes that Dr. Mauthe based his medical opinion relating to the causation of the claimant's complaints and symptoms in his lower back and lower extremities upon an inaccurate history of the manner of the occurrence of his work-related injury of October 15, 2004.

d. Based upon a careful review of the testimony of Dr. Nolan, as well as the documents attached to his deposition, it is apparent that when the claimant reported to the emergency room of The Pottsville Hospital on October 15, 2004, he was complaining only of pain in his middle to upper back between his shoulder blades, and not in his lower back or lower extremities, and that he did not complain of any pain specifically in his lower back until more than ten days following his work-related injury.

Accordingly, then, based upon the competent and credible testimony and medical opinions of Dr. Nolan, this Judge hereby further finds as a fact that the claimant did not sustain the injury to his lower back, or any aggravation of the pre-existing condition of his lower back, at the time of, or as a result of his work-related injury of October 15, 2004. Therefore, based upon these findings, this Judge hereby further finds and concludes that the claimant is not entitled to an amendment to the description of his work-related injury in this matter.

19. This Workers' Compensation Judge has also carefully reviewed the remaining medical testimony and evidence presented in this matter. Based upon such review, this Judge hereby accepts the testimony and medical opinions of Dr. Nolan relating to the claimant's recovery from his work-related injury of October 15, 2004, and his ability to return to work based upon that injury, as competent, credible, and worthy of belief, for the reasons articulated by him at the time of his deposition. Further, based upon a careful review of the deposition of Dr. Mauthe, this Judge does not believe that Dr. Mauthe disputed the testimony and medical opinion of Dr. Nolan that the claimant has made full recovery from his work-related injury in the nature of a strain of his middle or upper back.

Accordingly, then, based upon the uncontradicted testimony and medical opinions of Dr. Nolan, this Judge hereby finds as a fact that as of a date not later than May 16, 2006, the claimant had made a full recovery from his work-related injury of October 15, 2004, and that his

> ongoing complaints and symptoms at that time and thereafter were not causally related to his said work-related injury, but rather to the pre-existing degenerative condition of his lumbar spine and his injury to his lower back at home on October 27, 2004. Therefore, based upon these findings, this Judge hereby further finds and concludes that the employer is entitled to a termination of the claimant's workers' compensation wage loss benefits and medical expenses in this matter as of May 16, 2006.

WCJ's Decision, Findings of Fact Nos. 18-19 at 5-7; R.R. at 205-207.

Claimant appealed to the Board which affirmed.

Claimant contends that the WCJ erred when he denied the review petition because Dr. Nolan's testimony actually supported his position that the notice of compensation payable was incorrect, that the WCJ erred when he did not award litigation costs when Claimant established that the review petition was incorrect, and that the WCJ erred when he granted the termination petition because the evidence relied on by the WCJ did not support the conclusion that Claimant fully recovered.[1]

A claimant seeking to review the description of an injury and to include additional injuries must file a review petition within three years of the date of the most recent payment of compensation. Westinghouse Electric Corp/CBS v. Workers' Compensation Appeal Board (Korach), 584 Pa. 411, 883 A.2d 579 (2005). A review petition is appropriate where the claimant seeks to amend a

[1] 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).

notice of compensation payable to reflect further injuries and functions as a claim petition. Id. When such a petition is filed the WCJ must treat the respective burdens of the parties as if the review petition were an original claim petition. Id. Here, it was Claimant's burden to establish by substantial competent medical evidence that the disc injury and status post fusion arose as a direct result of his work-related injury.

Claimant asserts that the testimony of Employer's medical witness, Dr. Nolan, established that Claimant suffered a work-related low back injury which resulted in the fusion surgery. With respect to the low back, Dr. Nolan stated that the condition was "a combination of preexisting disease plus whatever may have occurred on the 27th and did not appear to be in any way related to his work-related injury [which occurred on October 15, twelve days earlier]." Dr. Nolan Deposition at 21; R.R. at 107. Dr. Nolan never testified that the work-related injury and the low back problems were related. Claimant failed to meet his burden to establish that the low back disc injury was related to the work injury.[2]

[2] Claimant's own medical witness, Dr. Mauthe, did testify that the disc condition was related to the work-related injury. However, Dr. Mauthe was not found credible. The WCJ, as the ultimate finder of fact in workers' compensation cases, has exclusive province over questions of credibility and evidentiary weight, and is free to accept or reject the testimony of any witness, including a medical 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). This Court will not disturb a WCJ's findings when those findings are supported by substantial evidence. Nevin Trucking v. Workmen's Compensation Appeal Board (Murdock), 667 A.2d 262 (Pa. Cmwlth. 1995). Although Claimant does refer to Dr. Mauthe's opinion in the argument section of his brief, Claimant failed to preserve the issue because he did not raise it in his Statement of Questions Involved. See Pa.R.A.P. 2116. Assuming arguendo that he did preserve the issue, this Court will not reweigh the WCJ's credibility determinations.

Claimant next contends that the WCJ erred when he denied the termination petition.

The employer bears the burden of proof in a termination proceeding to establish that the work injury has ceased. In a case where the claimant complains of continued pain, this burden is met if an employer's medical expert unequivocally testifies that it is his opinion, within a reasonable degree of medical certainty that the claimant is fully recovered, can return to work without restrictions and that there are no objective medical findings which either substantiate the claims of pain or connect them to the work injury. Udvari v. Workmen's Compensation Appeal Board (USAir, Inc.), 550 Pa. 319, 327, 705 A.2d 1290, 1293 (1997).

Here, Dr. Nolan unequivocally testified that Claimant fully recovered from his original work-related injury. Again, Claimant attacks the WCJ's credibility determinations.[3]

Accordingly, this Court affirms.

BERNARD L. McGINLEY, Judge

[3] Claimant also contends that the WCJ erred when he failed to award litigation costs under Section 440 of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §996, because Claimant successfully established that the notice of compensation was materially incorrect. Because Claimant did not succeed in his review petition, Claimant is not entitled to an award of litigation costs under Section 440.

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Respondent	:	

O R D E R

AND NOW, this 9th day of October, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge