IN THE COMMONWEALTH COURT OF PENNSYLVANIA

West Chester Pool & Spas, Inc., Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Donahue), Respondent	:	No. 98 C.D. 2012
	:	Submitted: October 5, 2012

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: October 26, 2012

West Chester Pools & Spas, Inc. (Employer), petitions for review of the order of the Workers' Compensation Appeal Board (Board) affirming the Workers' Compensation Judge's (WCJ's) grant of George Donahue's (Claimant's) review petition and denial of Employer's termination, suspension, and modification petitions because Employer failed to meet its burden of demonstrating that Claimant had fully recovered from his work injury.[1] Finding no error, we affirm.

[1] Section 413 of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §772, provides, in relevant part: "A workers' compensation judge … may, at any time, modify, reinstate, suspend, or terminate a notice of compensation payable … upon

(Footnote continued on next page…)

On November 18, 2008, Claimant was injured while working at a customer's home for Employer. He continued to work without wage loss until January 7, 2009. When he could no longer work because of the walking involved in his job, Claimant began receiving workers' compensation benefits on January 8, 2009. On April 27, 2009, a WCJ issued a decision adopting a stipulation of facts between the parties, which provided that Claimant suffered a right ankle work injury and was entitled to disability benefits; it also said, *inter alia*, that Claimant retained the right to file a future review petition to challenge the injury description.

On June 19, 2009, Employer filed a termination petition which alleged that Claimant had fully recovered from his work injury as of June 10, 2009. Claimant then filed a review petition alleging an incorrect description of his injury, seeking to expand the description to add a right interior talofibular ligament tear, tibial tendon tear, right medial meniscus tear, aggravation of three compartment degenerative changes in the right knee, right ankle joint effusion and synovitis, and aggravation of a right plantar calcaneal spur. Employer subsequently filed a suspension and modification petition alleging that Claimant was offered work at pay equal to or greater than his current average weekly pay but did not return to work.

Before the WCJ, Claimant testified that at the time of his injury, he was a store manager for Employer. He said that on November 18, 2008, while going down the basement steps at a customer's house during a site check, his leg

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(continued…)

petition filed by either party with the department, upon proof that the disability of an injured employe has increased, decreased, recurred, or has temporarily or finally ceased."

went out from under him and he twisted his right ankle and knee. He testified that he immediately notified Employer and went to Frankford Hospital, where he explained to emergency room personnel that his primary concern at that time was his ankle. Claimant testified that Christopher Aland, M.D. (Dr. Aland), who he had previously treated with for a left knee injury, gave Claimant a brace for his right ankle and sent him to therapy for his right knee and ankle. Claimant said he noticed his knee getting worse as therapy progressed. While he had continued working after his injury, he stopped on January 8, 2009, because the pain had progressed to the point that he was unable to fulfill his job duties that involved walking. After some time in physical therapy, Dr. Aland recommended that Claimant have knee surgery. He testified that Leonard A. Brody, M.D. (Dr. Brody), performed right knee surgery on Claimant on September 3, 2009. Claimant testified that after the surgery, he thought his injury was improving, but after some time, "it started going downhill." (Reproduced Record [R.R.], at 38a.) After his pain worsened, Dr. Brody again operated on the knee on January 4, 2010. He said that, at the time of the hearing, he was still experiencing strong pain in his right knee and ankle that caused difficulty walking. He noted that employer offered him his job back on July 9, 2009, but he was unable to work because of the increasing pain.

Claimant acknowledged that he had arthroscopic surgery on his right knee 20 years ago due to a torn ligament, but he returned to work after three days without restriction. He injured his left knee in July, 2007, when he fell at work and tore his meniscus; the left knee injury also required arthroscopic surgery, which was performed by Dr. Aland in January, 2008. Claimant only missed three days of work for the left knee surgery, as well. He said that while he was undergoing treatment for his left knee injury, he had to get injections in his right knee because

he was experiencing a "slight ache," *id.*, at 43a, from overworking the right knee to compensate for the injury to the left, but the pain was never debilitating.

To show that his injuries were related to his work injury, Claimant submitted Dr. Brody's deposition testimony. Dr. Brody testified that when he first examined Claimant on July 15, 2009, he detected synovitis in the right ankle and suspected a medial meniscus tear in the right knee, which was confirmed by Claimant's January, 2009 MRI, causing him to perform arthroscopic knee surgery on Claimant in September, 2009. Dr. Brody said his diagnosis of Claimant was synovitis in the right ankle and symptomatic degenerative joint disease and a medial meniscus tear in the right knee. He further testified that the degenerative changes in Claimant's knee were chronic and preexisted the November 18, 2008 fall, but were asymptomatic. Dr. Brody testified that at Claimant's most recent visit, he determined that the surgery did not give Claimant long-term relief and discussed the possibility of knee replacement surgery.[2] Specifically, it was his opinion that Claimant "did have some preexisting degenerative changes that were asymptomatic, rendered symptomatic at the time of [the November, 2008] incident, and that was the basis for the need of both the surgery [Dr. Brody] did …, as well as the upcoming [knee replacement] surgery." *Id.*, at 141a. He also said Claimant has never returned to his pre-accident condition or level of activity, and in his expert opinion, the November, 2008 fall was the cause of Claimant's right ankle and knee injury.

[2] At the time of Dr. Brody's testimony, only one surgery had been performed when he was deposed on December 9, 2009. The second surgery was performed in January, 2010 and Claimant testified in March, 2010.

In opposition, Employer submitted the deposition testimony of Stanley Askin, M.D. (Dr. Askin), an orthopedic surgeon who performed an independent medical examination on Claimant on June 10, 2009. Dr. Askin testified that he noticed both of Claimant's knees were swollen and had "some medial collateral ligament laxity … [and] slight anterior cruciate ligament laxity," *id.*, at 73a, which indicates osteoarthritis in both knees. Dr. Askin also reviewed an MRI taken shortly after Claimant's injury, and it indicated "a tear of the right anterior talofibular ligament … a tear of the posterior tibial tendon, and implication that there was some fluid at that tendon, and the radiologist concluded from the fluid that there might be a tear … [and] a calcaneal spur." *Id.*, at 75a. He examined an MRI taken several weeks after the fall and said that it indicated osteoarthritis of the right knee. Dr. Askin testified that in his opinion, Claimant had recovered from the ankle sprain because there were no findings to indicate otherwise, and he was capable of returning to work at any capacity as of the date of the examination. He said that, with regard to Claimant's review petition, the description relating to his ankle may have occurred "in the immediate aftermath of having an ankle sprain," *id.*, at 76a, but would not be ongoing. With regard to the changed description for his knee injury, there was no causal relationship between the work injury and the osteoarthritis with which Dr. Askin diagnosed Claimant.

Employer also submitted the records of Dr. Aland, which indicated that Claimant saw Dr. Aland because of right knee pain in November, 2007, and Dr. Aland gave Claimant a steroid injection in both knees in early 2008. Claimant saw Dr. Aland again on December 2, 2008, for the work injury, and based on an x-ray and MRI of his right ankle, Dr. Aland diagnosed Claimant with a right lateral ankle sprain with posterior tibialis tendinopathy and noted that the MRI showed chronic degenerative changes. Claimant again presented to Dr. Aland on

December 29, 2008, for right knee pain, and a January 5, 2009 MRI indicated a torn meniscus and early osteoarthritis.

Based on the testimony and evidence submitted, the WCJ found Claimant to be credible and Dr. Brody to be more credible than Dr. Askin because Dr. Brody treated Claimant for some time and operated on him twice. The WCJ also found that "Claimant's work injury included a tear of the anterior talofibular ligament and posterior tibial tendon of the right ankle (ankle sprain) and right ankle synovitis, as well as a medial meniscus tear, synovitis, and aggravation of pre-existing degenerative joint disease in the right knee." *Id.*, at 218a. Finally, the WCJ found that Employer offered Claimant his previous job, but Claimant was incapable of performing the job, and Claimant has incurred $4,067.21 in medical costs which Employer must reimburse. Based on the findings of fact, the WCJ determined that Claimant met his burden of proving both the knee and ankle injury and that Employer failed to meet its burden of showing full recovery or that Claimant was capable of performing his pre-injury job as of July 16, 2009. The WCJ therefore granted Claimant's review petition and denied Employer's petitions to suspend, modify, or terminate benefits.

Employer appealed to the Board, which affirmed the WCJ's decision. It rejected Employer's contention that the review petition was barred by *res judicata* because the April 27, 2009 stipulation provided that Claimant only had a right ankle injury, but also stated that Claimant had the right to file a future review petition to challenge the injury description. The Board also rejected Employer's argument that Dr. Brody did not testify credibly and competently because he said Claimant did not have any record of a previous right knee injury except the arthroscopic surgery 20 years earlier when, in fact, Claimant had steroid injections

in his right knee a year before the work injury occurred. The Board noted that the injections were for slight knee pain and was not the basis for Dr. Brody's opinion. The Board therefore affirmed the decision of the WCJ. This appeal followed.[3]

On appeal, Employer again argues that Claimant's review petition should have been barred by *res judicata* because Claimant should have included the knee injury when he entered into the earlier stipulation. While Employer concedes that the stipulation allows Claimant to file future review petitions to add other injuries, it contends that the stipulation is final with respect to Claimant's ankle and knee because it accepts an injury to Claimant's right ankle and agrees that Employer would pay for six weeks of physical therapy for Claimant's right knee.

A claimant is barred from amending an injury description if he knew or should have known of injuries or conditions related to the injury and failed to include them in the earlier litigation. *Weney v. Workers' Compensation Appeal Board (Mac Sprinkler Systems, Inc.)*, 960 A.2d 949, 955-56 (Pa. Cmwlth. 2008), *appeal denied*, 601 Pa. 691, 971 A.2d 494 (2009). For *res judicata* to apply, four identities must be present: "(1) identity of the thing sued upon or for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality or capacity of the parties suing or sued." *Id.*, at 954. However, this Court has said that a stipulation of facts is merely an agreement

[3] Our review of a decision of the Board is limited to determining whether errors of law were made, whether constitutional rights were violated or whether the record supports the necessary findings of fact. *Ward v. Workers' Compensation Appeal Board (City of Philadelphia)*, 966 A.2d 1159, 1162 n.4 (Pa. Cmwlth.), *appeal denied*, 603 Pa. 687, 982 A.2d 1229 (2009).

approved by the WCJ and cannot be accorded *res judicata*. *Jefferson Health Services v. Workers' Compensation Appeal Board (PARADIS)* 746 A.2d 1223, 1226 (Pa. Cmwlth.), *appeal denied*, 564 Pa. 698, 764 A.2d 52 (2000).

The stipulation of facts entered into was in lieu of an adversarial proceeding, similar to *Jefferson Health Services*; therefore, *res judicata* is inapplicable. Moreover, Claimant was not prohibited from seeking to amend the injury to include his right knee because there is no such proscription in the plain language of the stipulation. Also, as the Board discussed, Claimant was not actually diagnosed with the right knee injury that required surgery until July 15, 2009, more than two months after the stipulation was issued. Claimant could not litigate an injury that had not yet been diagnosed.

Employer also argues that the WCJ erred in accepting Dr. Brody's testimony as competent and credible because he testified that Claimant's degenerative changes in his right knee were asymptomatic before the work injury occurred while he had received steroid injections in his right knee for slight pain in early 2008. While an opinion that is rendered where the medical professional does not have a complete grasp of the medical situation and/or the work incident can render the proffered opinion incompetent, *Long v. Workers' Compensation Appeal Board (Integrated Health Service, Inc.)*, 852 A.2d 424, 428 (Pa. Cmwlth. 2004), a medical expert's opinion is not rendered incompetent unless it is solely based upon inaccurate or false information. *American Contractor Enterprises v. Workers' Compensation Appeal Board (Hurley)*, 789 A.2d 391, 396 (Pa. Cmwlth. 2001). While he may not have been aware of the injection in Claimant's right knee, Dr. Brody recognized that Claimant had preexisting degenerative changes in his right knee and concluded that the degenerative joint disease was aggravated by the

medial meniscus tear in the right knee, an injury separate and apart from the degenerative joint disease; and the meniscus tear was caused by Claimant's November 18, 2008 fall. Because he recognized that he had degenerative joint disease, his diagnosis was not based solely on any misconception that Claimant had no prior condition. Therefore, the WCJ properly accepted Dr. Brody's testimony as competent.

Accordingly, for the foregoing reasons, we affirm the decision of the Board.

DAN PELLEGRINI, President Judge

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O R D E R

AND NOW, this 26th day of October, 2012, the order of the Workers' Compensation Appeal Board, dated December 30, 2011, is hereby affirmed.

DAN PELLEGRINI, President Judge