IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stevens Painton Corporation and Zurich Insurance Company, Petitioners	:	
v.	:	No. 52 C.D. 2014
	:	SUBMITTED: July 11, 2014
Workers' Compensation Appeal Board (Blackwell), Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE LEADBETTER **FILED: March 24, 2015**

Stevens Painton Corporation and Zurich Insurance Company (collectively, Petitioners) petition this court for review of the order of the Workers' Compensation Appeal Board, which affirmed a decision of the Workers' Compensation Judge (WCJ) amending the Notice of Compensation Payable (NCP) and reinstating workers' compensation benefits of Walter Blackwell (Claimant). After review, we affirm.

Claimant was employed by Stevens Painton Corporation (Employer) as a laborer. Claimant was injured on May 30, 2008, and suffered a radial head fracture of his right arm. Employer filed a medical-only NCP on July 11, 2008,

accepting a fractured right radial head/right arm as a compensable injury. Following surgery on his right elbow, Claimant returned to modified-duty work with some wage loss until he was terminated from his employment on March 5, 2009, after an argument with his supervisor over his paycheck. Thereafter, he obtained work with various companies through his union hall.[1] Finally, in 2011, Claimant filed a claim petition, alleging wage loss from May 30, 2008, and ongoing as a result of work-related injuries in the nature of a right elbow fracture and left hand/wrist carpal tunnel syndrome from overuse due to his inability to use his right arm. Claimant also filed a penalty petition, alleging Employer failed to timely pay partial disability benefits. Employer filed answers denying all allegations.

At the hearing before the WCJ,[2] Claimant testified that his work as a laborer for Employer usually involved performing heavy physical tasks such as lifting up to 200 pounds. Claimant testified that his injury occurred when he slipped and fell backwards with his right arm fully extended, breaking his fall. Claimant testified that he continued working after the injury,[3] until he was referred

[1] The WCJ found that the work Claimant performed post-termination included, "packing coke ovens, completing concrete walkways, drywall demolition down to the stud, spraying gravel for a parking garage . . . running a jackhammer, scraping and shoveling in [a steel mill] . . . and many other demolition activities." WCJ's Decision (circulated May 18, 2012), Finding of Fact No. 9D.

[2] The WCJ determined that the claim petition should be amended to a petition to review compensation benefits and petition to reinstate compensation benefits. *See* WCJ's Finding of Fact No. 2. The WCJ also consolidated for decision, the penalty petition Claimant filed at the conclusion of the litigation.

[3] Based on the records of Employer's medical expert, Dr. Oriente A. DiTano, M.D., the WCJ found that on the day Claimant was injured, he actually wrapped his injured arm with duct tape and continued working that day and for 35 additional days, until the ongoing pain caused Claimant to get an MRI, which showed the right radial head fracture. *See* WCJ's Finding of Fact No. 11A.

to Dr. Thomas Hughes, who performed surgery on his right elbow on September 5, 2008. He returned to modified duty, restricted to no repetitive use of his right arm and no heavy lifting. Despite these restrictions, however, Claimant stated that he was asked to perform repetitive tasks with both arms and that because he "didn't have the power" in his right arm, his left arm would "take over all the activities of [the right]." Hearing of May 17, 2011, Notes of Testimony (N.T.) at 20; Claimant's February 2, 2012 Deposition at 17. Claimant denied having any symptoms in his left arm prior to May 30, 2008, when he suffered the work-related injury to his right elbow. Approximately five months after his right elbow surgery, Claimant started having pain in his left arm because he was overusing it because he could not use his right arm. The post-termination work from the union hall involved heavy, repetitious duties, which he performed because he "need[ed] to eat." Claimant's Feb. 2, 2012 Deposition at 5. Claimant continued to perform these tasks in spite of the pain because he was afraid of being laid-off. Claimant testified that he had pain in his left arm, as well as numbness, pain, and swelling in his left hand.

With respect to his termination, Claimant testified that when he got his paycheck from the superintendent, James Huston, on March 5, 2009, it was short again, and so he asked Huston, "why you keep F-ing with my paycheck?" Hearing of May 17, 2011, N.T. at 23. Claimant explained that his check had been short on six separate occasions, most recently $300, and that he had telephoned Mary Ann Andrews, Employer's workers' compensation administrator, numerous times to complain and ask her why his pay "was less than what it was supposed to be when they told me that I would go to therapy and get paid for [it]." *Id.* at 36. Claimant admitted he was told by Ms. Andrews that his language was abusive and

that if he continued to speak to her in that way, he would be terminated, although he denied cursing to Ms. Andrews.

Claimant also presented the deposition testimony of Dr. Glenn A. Buterbaugh, M.D., the orthopedic specialist who treated his left hand/wrist injuries. Dr. Buterbaugh first examined Claimant on January 17, 2011, and also reviewed numerous medical records, including the reports and records relating to Claimant's right elbow surgery and post-operative care, as well as functional capacity evaluations. Dr. Buterbaugh's physical examination of Claimant's left hand showed swelling, muscle atrophy to the thumb and evidence of a pinched nerve. Claimant had a positive Tinel's and Phalen's sign. Dr. Buterbaugh testified that X-rays showed evidence of degenerative changes in the wrist as well as carpal tunnel syndrome. Dr. Buterbaugh diagnosed left hand weakness and left carpal tunnel syndrome with degenerative joint disease. Dr. Buterbaugh opined that Claimant's prognosis as to his left hand was fair due to severe carpal tunnel syndrome, although he believed Claimant could benefit from release surgery. Dr. Buterbaugh also opined that Claimant's prognosis for the right arm was poor and that it was at maximum medical improvement. It was Dr. Buterbaugh's opinion that Claimant was limited to sedentary duty with regard to both arms, and that even if Claimant had surgery on his left wrist, he would still limit Claimant to sedentary duty. While Dr. Buterbaugh did not have specific information on Claimant's post-surgery job duties, he relied upon Claimant's report of overcompensation. He testified that Claimant's complaints were reflected in his findings. Specifically, Dr. Buterbaugh noted that the thenar atrophy finding in Claimant's left hand was the result of nerve damage and that the X-rays showed severe arthritic degenerative

changes in his left wrist that became symptomatic following the work-related injury to Claimant's right hand in 2008. Dr. Buterbaugh opined:

> Now, certainly I don't believe the carpal tunnel was caused by overuse of his left arm, but certainly the carpal tunnel and the wrist arthritis was aggravated by the increased use of his left arm because he was unable to use the right arm because of his broken elbow.

Deposition of Dr. Buterbaugh, September 28, 2011, at 13. Dr. Buterbaugh further explained on cross-examination:

> [B]ased on his history, and certainly it would be consistent that with the limited use he has of his right arm that his left hand with increased use would be – those two medical problems, his severe carpal tunnel and his left wrist arthritis would be aggravated by overuse.

Id. at 21. Dr. Buterbaugh then repeated that it was his opinion that "the overuse of his left hand aggravated the carpal tunnel and aggravated the wrist arthritis." *Id.* at 23. With respect to the aggravation of Claimant's left wrist arthritis, Dr. Buterbaugh explained that he doesn't normally operate on wrist arthritis "unless it's symptomatic" so if the aggravation took Claimant "from being asymptomatic to symptomatic, then sure, then the aggravation caused the need for surgery." *Id.* Dr. Buterbaugh testified that all of his opinions were rendered within a reasonable degree of medical certainty. *Id.* at 13.

Employer presented the testimony of James Huston, its civil superintendent, as well as its Safety Director, John Matysiak. Mr. Huston's responsibilities include supervising the foreman, arranging for the proper material and scheduling the men at the job site to get the job done. Mr. Huston was aware of Claimant's original work injury and that he returned to work in a modified

position, which initially consisted of paperwork, sweeping the office, and eventually involved directing traffic as a flagger at a busy railroad crossing that ran through the job site. Huston testified that Claimant's job performance was satisfactory and the only issue was Claimant missing time to attend physical therapy. As for the incident in March 2009 for which Claimant was terminated, Huston testified that after he handed Claimant his paycheck, Claimant followed him into the trailer to complain that the amount of the check was incorrect. Huston stated that he told Claimant that the problem would be corrected. Claimant left the trailer and walked outside, where he then made a loud profanity-laced phone call. Huston testified that Claimant came back into the trailer, "stomped up" behind him, yelling and using profanity. Huston testified that Claimant was "trying to intimidate me, you know, kind of puffed up and, you know, as he was yelling." Hearing of September 27, 2011, N.T. at 19. After he told Claimant to calm down and leave or he would have security remove him from the job site, Claimant complied and left the trailer. Huston admitted on cross-examination that he did not immediately terminate Claimant despite feeling intimidated by him and despite having authority to do so. Huston agreed that while Claimant was agitated, he never physically touched him nor did he verbally threaten him.

Employer's safety director, John Matysiak, testified that he, Claimant's doctor and Employer's operations person, Huston, were all involved in determining the types of activities or duties Claimant would perform when he was on modified duty. Matysiak testified that the only problem after Claimant returned to this modified position was the fact that he missed time due to physical therapy. Matysiak testified that Employer decided that it would no longer permit Claimant to attend physical therapy during work hours because Claimant "abused" the

privilege. *Id.* at 52. Matysiak explained that it was a "scheduling nightmare" for operations because there were "no notifications" of when Claimant would be attending physical therapy and what time he would report to the job site. *Id.* Matysiak acknowledged that while there was no policy requiring injured employees to go to physical therapy after work hours, he stated that it was a "fluid program" and that Employer has "the option of doing that." *Id.* at 53.

Employer also offered into evidence three independent medical evaluation (IME) reports and the deposition of Oriente A. DiTano, M.D. Dr. DiTano noted that following the injury in May 2008 and for approximately 35 more days, Claimant kept working with continuous right elbow pain until an MRI revealed the right radial head fracture. Claimant eventually had surgery and then began physical therapy. The first IME of April 1, 2009, noted that Claimant was cooperative, primarily complained of weakness, and the examination did not reveal symptom magnification. Opining that Claimant had reached maximum medical improvement, Dr. DiTano limited Claimant to light duty with no lifting over 20 pounds, and further opined that Claimant could not return to work as a laborer. At the second IME almost a year later, Dr. DiTano found that while Claimant's grip strength improved, he was limited to the same work restrictions, which he deemed permanent. At the third IME, Dr. DiTano noted that Claimant's bilateral arm complaints were diffuse from shoulder to fingertips on both sides. Dr. DiTano's examination also revealed that Claimant had left carpal tunnel syndrome and left wrist arthritis, in addition to being status post right elbow surgery. Dr. DiTano disagreed with Dr. Buterbaugh's overuse analysis based on his understanding of the job duties Claimant was performing. Specifically, he testified that it was his understanding that Claimant "has not worked more than light duty, no lifting more

than twenty pounds. And actually, my understanding is he hasn't really worked that much." Dr. DiTano's October 19, 2011 Deposition at 38. However, when asked on cross-examination if his opinion would change if Claimant had performed more laborious jobs, Dr. DiTano conceded that if Claimant was thrust into an extra heavy-weight job, it could have caused or aggravated his carpal tunnel syndrome. Dr. DiTano opined that the original work-related injury did not cause the development of Claimant's carpal tunnel syndrome and he did not believe that Claimant's limitations in his right arm were sufficiently significant to cause his left hand/wrist problems.

The WCJ found that Claimant had met his burden of establishing an injury in the nature of a work-related aggravation of underlying left wrist arthritis and aggravation of left carpal tunnel syndrome, finding credible and persuasive the opinions and testimony of Claimant's treating physician, Dr. Buterbaugh. *See* WCJ's Finding of Fact No. 12D. The WCJ credited the Claimant's testimony about his job duties and found that, "for the [Employer] and on subsequent job sites [claimant] was using both hands and arms attempting to perform heavy duty work in excess of his doctor's work restrictions. *None* of the defense witnesses really knew *what* work he was performing and I find the claimant's account credible and fact." *Id.* at No. 12C (emphasis in original). With respect to his termination from employment, the WCJ found that while Claimant's behavior was boorish, it was understandable given his testimony that his pay was docked while he attended physical therapy for his work-related injury; thus, his conduct did not rise to the level of bad faith warranting the loss of workers' compensation benefits. The WCJ granted both the review petition and the reinstatement petition, and denied the penalty petition.

Petitioners appealed the decision to the Board, which affirmed the WCJ's decision. The Board determined that the WCJ did not err in finding that Claimant's conduct did not rise to the level of bad faith warranting the loss of indemnity benefits. The Board also determined that the WCJ correctly concluded, based on the credible testimony of Claimant's medical expert, Claimant met his burden of proving that he sustained a work-related aggravation of his underlying left wrist arthritis and left carpal tunnel syndrome. Petitioners have now appealed to this court.

The issues presented for review are whether the Board erred in concluding that Claimant met his burden of proving his entitlement to amend the description of his work-related injury to include the overuse injury to his left hand/wrist; whether Dr. Buterbaugh's testimony supports a finding of an overuse injury when he did not examine Claimant's right ulnar nerve and was unaware of Claimant's specific job duties; and whether the Board erred in awarding Claimant benefits and in requiring Employer to prove job availability despite finding that Claimant was terminated for willful misconduct.

A WCJ may amend an NCP if it is materially incorrect or if the disability status of the injured employee has changed. *Jeanes Hosp. v. Workers' Comp. Appeal Bd. (Hass),* 872 A.2d 159, 167 (Pa. 2005). Where claimants seek to amend the NCP based on subsequently arising medical conditions related to the original injury, *i.e.*, a consequential condition, "the burden rests with claimants to establish the existence of additional compensable injuries giving rise to corrective amendments, regardless of the procedural context in which the amendments are asserted." *Cinram Mfg., Inc. v. Workers' Comp. Appeal Bd. (Hill),* 975 A.2d 577 582 (Pa. 2009). Where no reasonable nexus or obvious relationship exists between

the injury described in a NCP and a subsequently alleged physical condition, claimant bears the burden of establishing the work-relatedness of the condition before an employer will bear the burden of disproving any continuing disability related to that subsequently alleged condition. *City of Phila. v. Workers' Comp. Appeal Bd. (Fluek),* 898 A.2d 15, 21 (Pa. Cmwlth. 2006).

Turning now to the matter before us, Petitioners argue that the Board erred in finding that Dr. Buterbaugh credibly established that Claimant had an "overuse" injury of his left wrist/hand due to his right arm injury. In particular, Petitioners aver that Dr. Buterbaugh testified that he never examined Claimant's right ulnar nerve, which they contend is "the injury subject to these proceedings" and that he also testified that he "was not aware of Claimant's occupations." Petitioners' Brief at 21.[4] According to Petitioners, Dr. Buterbaugh's testimony was incompetent and thus cannot support the description of additional injuries of aggravation of underlying left wrist arthritis and aggravation of left carpal tunnel syndrome that Claimant sought to add to the NCP. We disagree.

Dr. Buterbaugh acknowledged that while he did not have specific information on the job duties Claimant performed following his return to work, he relied on what Claimant told him he did and on Claimant's report of overcompensation. Dr. Buterbaugh found Claimant's complaints were consistent with his findings after examination and review, and opined that Claimant's left wrist carpal tunnel syndrome and left wrist arthritis were aggravated by the increased use of his left arm because he was unable to use his right arm following the work-related injury.

[4] The NCP filed and dated July 11, 2008, describes the accepted injury as "right arm/[f]ractured right radial head." Hearing of May 17, 2011, Bureau Exhibit 1.

The WCJ made the following findings of fact:

> I find completely credible . . . the claimant's account of the physical, repetitious work performed and the physical difficulty he experienced at the various job sites as a direct result of the weakness in his right arm, resulting in overcompensation in the use of his left arm.
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> . . . .
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> I find credible, persuasive . . . the report, opinions and testimony of the claimant's treating physician, Dr. Buterbaugh. Where they conflict with that of Dr. DiTano, the latter is rejected as less persuasive. Having found the claimant completely credible regarding his extensive testimony about his job duties, Dr. Buterbaugh's reliance upon that account strengthens his conclusion that the claimant aggravated his underlying degenerative arthritis in his left wrist; and developed left CTS due to increased use of his left hand due to his right arm injury. His opinions are buttressed by his own diagnostic studies and personal examination that confirmed those findings. I particularly note that the doctor was candid on direct regarding the necessity of the proposed surgery. It was only when pressed on cross-examination that he established its causal relationship to the subject work injury.

WCJ's Finding of Fact Nos. 9C and 12D. Because he relied on Claimant's credited testimony regarding Claimant's job duties and physical symptoms, as well as his own findings, Dr. Buterbaugh's testimony was not incompetent. Petitioners' argument goes only to the weight of Dr. Buterbaugh's opinion, which was a matter for the WCJ to determine. Thus, Claimant met his burden to amend the NCP for additional injuries in the nature of aggravation of his left wrist arthritis and aggravation of his left carpal tunnel syndrome. Accordingly, we find no error in this regard.

Next, we turn to Petitioners' argument that, despite finding that Claimant was terminated for intemperate behavior, the Board erred by requiring Employer to prove that the light-duty job continued to be available to Claimant. In making this argument, Petitioners seize on one line in the WCJ's findings to suggest that she placed a burden on Employer to show *both* job availability *and* that Claimant's termination was for his own misconduct. We do not read the WCJ's opinion to so hold, nor did the Board. Rather, both the WCJ and the Board applied the proper standard that the employer must demonstrate that suitable work was available *or* would have been available but for circumstances which merit allocation of the consequences of the discharge to claimant, such as the claimant's lack of good faith. *See Virgo v. Workers' Comp. Appeal Bd. (County of Lehigh-Cedarbrook)*, 890 A.2d 13, 18 (Pa. Cmwlth. 2005).

In setting forth her reasoning, the WCJ stated:

> This is a worker who was injured, only stayed home long enough to recuperate from surgery, returned and (eventually) performed work beyond his physical restrictions and developed additional injuries as a result. His natural human response was to "explode" upon his belief that his [pay]check had been unfairly shorted and in a substantial amount. The claimant's reaction is understandable in considering paychecks were docked for time spent in physical therapy, to help him recuperate and return to his pre-injury work capability. I am *not* excusing his boorish behavior; but in this instance under these facts, I am finding he should be excused.

WCJ's Finding of Fact No. 12A.

The WCJ, after making her credibility determinations and weighing all of the evidence presented, determined that Claimant's provoked and isolated outburst did not evidence a "lack of good faith" so as to allocate the consequences of his discharge to him. *See Stevens v. Workers' Comp. Appeal Bd. (Consol. Coal*

Co.), 760 A.2d 369, 377 (Pa. 2000); *Second Breath v. Workers' Comp. Appeal Bd. (Gurski)*, 799 A.2d 892, 900 (Pa. Cmwlth. 2002); *Champion v. Workers' Comp. Appeal Bd. (Glasgow, Inc.)*, 753 A.2d 337, 340 (Pa. Cmwlth. 2000).

Accordingly, the WCJ properly amended the NCP and granted Claimant's reinstatement petition, and we discern no error in this regard. For all of the foregoing reasons, we affirm the order of the Board.

BONNIE BRIGANCE LEADBETTER,
Judge

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O R D E R

AND NOW, this 24th day of March, 2015, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby AFFIRMED.

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BONNIE BRIGANCE LEADBETTER,
Judge