

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Shuker, :
Petitioner :
 :
v. : No. 92 C.D. 2014
 : Submitted: July 11, 2014
Workers' Compensation Appeal :
Board (XTL, Inc.), :
Respondent :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT¹

FILED: December 31, 2014

William Shuker (Claimant) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) denying his claim for the loss of use of his left leg for the stated reason that Claimant's medical evidence did not establish that his loss of use was permanent. In doing so, the Board reversed the decision of the Workers' Compensation Judge (WCJ). We affirm.

On August 20, 2002, while working for XTL, Inc. (Employer), Claimant's foot became caught in a conveyor belt. This twisted his left leg. Employer issued a Notice of Compensation Payable (NCP) describing the injury as a left knee sprain and accepting liability for total disability benefits. Claimant

¹ The case was reassigned to this author on September 24, 2014.

underwent several surgeries, the last of which removed the patella from his left knee.

In February 2008, Claimant filed a review petition seeking to add a low back injury to the NCP. Claimant alleged that his altered gait, caused by his work injury, in turn caused him to develop this back injury. In March 2009, the WCJ granted the review petition and added a low back injury to the NCP.

Claimant then filed the instant review petition seeking benefits for a “permanent specific loss” of his left leg. Reproduced Record at 11a (R.R. ____).² Employer filed an answer denying that Claimant suffered a specific loss. The petition was assigned to a WCJ who held a hearing at which both parties appeared.

Before the WCJ, Claimant testified that he cannot do anything with his left leg because it is “completely atrophied” and lacks strength. R.R. 39a. He cannot extend his leg, and he must use his hands to bend his leg at the knee. Claimant needs a large brace on his left leg in order to walk. Claimant’s doctor has recommended a knee replacement. Claimant testified that he did not believe his leg would improve with this surgery.

In support of his specific loss claim, Claimant presented the deposition of William C. Murphy, D.O., a physician specializing in rehabilitation medicine and physical therapy. Dr. Murphy last saw Claimant on May 6, 2008. Dr. Murphy was actually deposed in June 2008, but this related to Claimant’s review petition to add a low back injury to the NCP; much of Dr. Murphy’s testimony addresses Claimant’s low back. Employer objected to the submission of

² A benefit for a loss of a body part does not require an amputation. It can be granted where the claimant has suffered a loss of the use of the body part if the “*loss of use is permanent and for all practical intents and purposes.*” *Jacobi v. Workers’ Compensation Appeal Board (Wawa, Inc.)*, 942 A.2d 263, 269 (Pa. Cmwlth. 2008) (emphasis added).

Dr. Murphy's testimony in support of the specific loss claim, but the WCJ overruled the objection.

Dr. Murphy testified that Claimant experienced multiple patellar dislocations following his work injury until his patella was finally surgically removed in March 2005. Dr. Murphy characterized Claimant's "left knee injury" as "permanent." Notes of Testimony, June 2, 2008, at 43 (N.T. ___); R.R. 63a. The patellectomy has left Claimant with chronic knee pain and swelling, as well as significant atrophy and weakness in his left leg. Because Claimant's knee is unstable, he cannot extend his leg forward. Dr. Murphy opined that without the brace, Claimant lacks normal functional use of his left leg. He testified that the prognosis for Claimant's left knee is poor and that Claimant needs a knee replacement. N.T. 21-22; R.R. 57a-58a. However, Dr. Murphy has also recommended that Claimant postpone the knee replacement because of his age, *i.e.*, 29 years. Dr. Murphy explained that Claimant will outlive the life of the knee replacement, which is typically 10 to 15 years. Claimant could have a second knee replacement, but Dr. Murphy described this procedure as "much more difficult." N.T. 43; R.R. 63a. Dr. Murphy did not further discuss the knee replacement because he does not do that type of surgery.

The WCJ awarded a specific loss benefit, finding that Dr. Murphy's credible testimony established that Claimant had lost the "use of the left leg ... for all practical intents and purposes" and that "Claimant's left leg condition is permanent." WCJ Decision, June 16, 2011, at 6; Finding of Fact No. 20. Employer appealed, and the Board reversed. It held that Dr. Murphy's testimony did not establish that Claimant's *loss of use* is permanent, which is a requirement for a specific loss award. The Board also noted that Dr. Murphy opined that

Claimant needs knee replacement surgery, which indicates it is “possible” that Claimant’s function “may” improve with this surgery. Board Adjudication at 3. Claimant then petitioned for this Court’s review.³

On appeal, Claimant raises two issues for our consideration. First, Claimant argues that the Board erred in reversing the WCJ’s decision on the grounds that Claimant’s loss of use is not permanent, when Employer never raised the issue of permanency. Second, Claimant asserts that the Board erred by effectively revising the WCJ’s finding that Dr. Murphy’s testimony was credible.

Turning to Claimant’s first issue, he argues that the Board erred in reversing the WCJ’s specific loss award based on an issue Employer never raised, namely, whether the loss of use of Claimant’s left leg was permanent. Claimant asserts that by failing to raise this issue in its appeal from the WCJ’s decision, Employer waived it. The gravamen of Claimant’s argument is that because the word “permanent” did not appear in Employer’s appeal documents, the permanency of the specific loss was not an issue that the Board could consider.

A regulation of the Department of Labor and Industry requires the party appealing a WCJ’s decision to the Board to use an appeal form that sets forth a “statement of the particular grounds upon which the appeal is based.” 34 Pa. Code §111.11(a)(2).⁴ The regulation further cautions that “[g]eneral allegations

³ This Court’s review of an order of the Board is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether Board procedures were violated, whether constitutional rights were violated or an error of law was committed. *Cytemp Specialty Steel v. Workers’ Compensation Appeal Board (Crisman)*, 39 A.3d 1028, 1033 n.6 (Pa. Cmwlth. 2012).

⁴ The regulation states as follows:

- (a) An appeal or cross appeal shall be filed with the Board on a form provided by the Board. All references to forms mean paper forms or an electronic format

(Footnote continued on the next page . . .)

which do not specifically bring to the attention of the Board the issues decided are insufficient.” *Id.* Issues not properly raised on appeal to the Board are waived. *Williams v. Workmen’s Compensation Appeal Board (Green Construction Co.)*, 687 A.2d 428, 430-31 (Pa. Cmwlth. 1997).

Employer filled out the Board’s appeal form listing the numbers of all findings of fact and conclusions of law with which it disagreed, namely, Findings of Fact 3, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21, and Conclusions of Law 3 and 4. These include the finding of fact wherein the WCJ found that Dr. Murphy’s testimony established the loss of use of Claimant’s left leg (Finding of Fact 20) and the conclusion of law wherein the WCJ concluded that Claimant met his burden of proving a permanent loss of use (Conclusion of Law 3). Employer also included a written statement of the reason for its appeal, which explained, *inter alia*, that Employer was challenging whether Dr. Murphy’s testimony was “sufficient to support a petition for specific loss” and whether Dr. Murphy’s testimony was “substantial competent evidence” that could support the WCJ’s decision.” R.R. 23a.⁵

(continued . . .)

prescribed by the Board and published in the *Pennsylvania Bulletin* or the Department’s web site located at www.dli.state.pa.us. All forms must contain the following information:

(2) A statement of the particular grounds upon which the appeal is based, including reference to the specific findings of fact which are challenged and the errors of the law which are alleged. General allegations which do not specifically bring to the attention of the Board the issues decided are insufficient.

34 Pa. Code §111.11(a)(2).

⁵ Employer’s appeal form stated, in relevant part, as follows:

(Footnote continued on the next page . . .)

Claimant likens Employer's appeal form to the one deemed insufficient by this Court in *Jonathan Sheppard Stables v. Workers' Compensation Appeal Board (Wyatt)*, 739 A.2d 1084 (Pa. Cmwlth. 1999). In that case, the WCJ granted a claim petition for total disability benefits and also for specific loss benefits due to disfigurement. The employer's appeal form listed the numbers of the findings of fact and conclusions of law it was challenging, but it did not include a written statement of alleged errors. This Court held that the employer had "failed to raise any of [its] claims of error with any degree of specificity in its appeal to the Board" in violation of 34 Pa. Code §111.11(a)(2). *Jonathan Sheppard Stables*, 739 A.2d at 1089.

We reject Claimant's assertion that Employer's appeal form to the Board was deficient. In addition to listing the findings of fact and conclusions of law it challenged, Employer's written statement explained its position that Dr. Murphy's testimony was neither "sufficient" nor "substantial competent evidence"

(continued . . .)

Employer alleges that the WCJ erred as a matter of law in her determination that the transcript of [C]laimant's medical expert Dr. Murphy taken on June 2, 2008, in a petition to expand a notice of compensation payable to include a back component, was sufficient to support a petition for specific loss effective November 6, 2009 to an acknowledged left leg/knee injury. The 6/2/08 deposition testimony of Dr. Murphy, [C]laimant's treating physician, was previously noticed in earlier litigation with another employer's office only on the subject of expansion of the original NCP to include a back component. There was no unity of issue in the 6/2/08 deposition of Dr. Murphy and therefore could not support a petition for specific loss filed on November 6, 2009 more than 17 months later. Under these circumstances the [WCJ's] decision does not constitute a reasoned decision nor is it supported by substantial competent evidence.

R.R. 23a.

to support the WCJ's grant of specific loss benefits. The fact that Employer did not use the word "permanent" in its appeal form is of no moment.

A claimant seeking to establish a compensable loss of use must establish two main elements, *i.e.*, that the loss of use is permanent and for all practical intents and purposes, as we discuss in detail below. After receiving Employer's appeal form, the Board framed Employer's issue as follows: "[Employer] argues that the opinion of Claimant's medical expert is not sufficient to support a specific loss award." R.R. 27a; Board Adjudication at 2. This led the Board to review Dr. Murphy's testimony and conclude that it was, indeed, insufficient because Dr. Murphy did not opine that Claimant's loss of use was permanent.⁶ In short, Employer challenged the WCJ's decision with sufficient specificity, and the Board did not err in addressing the issue as it did.⁷

Next, Claimant argues that the Board effectively rewrote Dr. Murphy's credited opinion that Claimant's left leg injury is permanent. Claimant asserts that Dr. Murphy testified that "Claimant's loss of use was permanent." Claimant's Brief at 18. Employer responds that Dr. Murphy did not opine that Claimant's loss of use was permanent but, at most, that his work injury was permanent.

⁶ The Board explained that based on its disposition of the matter, it was not addressing Employer's argument that the WCJ should not have accepted Dr. Murphy's deposition into evidence because it was taken in connection with earlier completed litigation.

⁷ Claimant also argues that Employer waived the issue of permanency of the specific loss because Employer did not appeal the WCJ's March 2009 decision and order adding a back injury to the NCP wherein the WCJ found the same deposition testimony of Dr. Murphy credible. Claimant is mistaken. The litigation of the review petition to add a back injury to the NCP did not involve a specific loss of the left leg, and the WCJ made no findings regarding specific loss in the 2009 Decision. Thus, there was nothing involving specific loss for Employer to appeal at that time.

A specific loss is “the permanent loss of use of an injured body part for all practical intents and purposes.” *Jacobi v. Workers’ Compensation Appeal Board (Wawa, Inc.)*, 942 A.2d 263, 264 n.1 (Pa. Cmwlth. 2008) (quoting *Schemmer v. Workers’ Compensation Appeal Board (U.S. Steel)*, 833 A.2d 276, 279 n.5 (Pa. Cmwlth. 2003)). In a specific loss claim, the claimant must present medical evidence that the loss of use is permanent, and for all practical intents and purposes. *Id.* at 269. Because an injury is not the same as the specific loss of a body part, an employer may accept liability for the former and deny the latter. *City of Butler v. Workers’ Compensation Appeal Board (Botsis)*, 708 A.2d 1306, 1309 (Pa. Cmwlth. 1998).

In sum, in a specific loss case, it is the loss of use that must be permanent, not the injury. Further, the permanent loss of use must be proven through medical evidence. The WCJ, and Claimant, conflate the concept of permanent injury with permanent loss of use.

The WCJ is the sole arbiter of witness credibility and the weight to be afforded the evidence.⁸ However, the fact that the WCJ found Dr. Murphy credible is not dispositive. Dr. Murphy testified that Claimant presently has a loss of the use of his left leg and that his left knee injury is permanent. Dr. Murphy did not opine that this loss of use is permanent. On the contrary, Dr. Murphy testified that Claimant’s prognosis is poor “as it stands” and that Claimant needs to undergo knee replacement surgery. N.T. 21-22; R.R. 57a-58a. Surgery to reduce pain or the need for medication is not surgery that is relevant to whether a loss of use is permanent. *See Miller v. Workers’ Compensation Appeal Board (Wal-Mart)*, 44

⁸ *O’Donnell v. Workers’ Compensation Appeal Board (United Parcel Service)*, 831 A.2d 784, 789 (Pa. Cmwlth. 2003).

A.3d 726, 735 (Pa. Cmwlth. 2012). However, Dr. Murphy did not testify that the knee replacement he recommends would be done for palliative purposes. In fact, Dr. Murphy did not offer any opinion on the purpose or likely outcome of a knee replacement, a procedure he does not perform.⁹ This omission is fatal to Claimant's specific loss claim. Claimant bore the burden of proving through medical evidence that his loss of use of a body part is permanent. He did not do so. Should Claimant's knee replacement surgery fail to restore function, Claimant might then have a basis to seek specific loss benefits.¹⁰

Accordingly, the order of the Board is affirmed.

MARY HANNAH LEAVITT, Judge

⁹ Dr. Murphy's deposition was taken for the purpose of the 2008 review petition, which added a back injury to the NCP.

¹⁰ Claimant's testimony that his leg would not improve with surgery is irrelevant because he needed to prove permanency through medical evidence. *Jacobi*, 942 A.2d at 269.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Shuker,	:
Petitioner	:
	:
v.	: No. 92 C.D. 2014
	:
Workers' Compensation Appeal	:
Board (XTL, Inc.),	:
Respondent	:

ORDER

AND NOW, this 31st day of December, 2014, the order of the Workers' Compensation Appeal Board dated January 14, 2014, in the above captioned matter is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge

tubercle alignment procedure on November 17, 2003. On August 6, 2004, Claimant underwent another patellar realignment procedure. In March of 2005, Claimant underwent a fourth surgery, a patellectomy, where his patella was removed. Dr. Murphy's Deposition at 11-13; R.R. at 55a. Dr. Murphy offered that despite four separate procedures on Claimant's left knee, Claimant remained quite symptomatic. Dr. Murphy stated:

He [Claimant] has significant weakness of his left leg, particularly with the motion of extending his leg or bringing his knee out forward.

He [Claimant] has a significant amount of atrophy of his left leg. And his leg buckles because of the weakness. As such, he has had to use a left knee brace for stability of his left leg. And he needs this brace for safe functional ambulation.

....

When I saw Mr. Shuker [Claimant] on 5/17/07, he told me that he still had a number of complaints, including left knee pain and left leg weakness. He noted that he needed a brace for his left knee because of instability, and this was an ongoing need....

[H]e did have instability of his left knee and inability to extend his left knee actively because of quadriceps atrophy and weakness. He had tenderness along the joint lines of the left knee. And it was noted that he had chronic swelling of his left knee or a chronic effusion.

Dr. Murphy's Deposition at 13-16; R.R. at 55a-56a.

Dr. Murphy concluded that Claimant "has ongoing dysfunction of the left knee....Claimant has **lost the use of his left leg** from an unassisted standpoint...**he does not have the ability to use his left leg in a**

normal functional way without the use of an orthosis or a brace.” Dr. Murphy Deposition at 21-23; R.R. at 57a-58a. (Emphasis added.)

The WCJ determined that Claimant was credible and convincing as to the occurrence of the incident of August 20, 2002, the surgeries to his knee and the low back pain that has developed over time since his employment incident. The WCJ found Dr. Murphy’s testimony was credible and established:

...[T]hat the Claimant’s left leg condition is permanent. Based on Dr. Murphy’s testimony about the **Claimant’s lack of any functional use of the left leg, loss of use of the left leg and for all practical and [sic] intents and purposes** as of November 6, 2009, in accordance with the averments in the Claimant’s Petition. (emphasis added.)

WCJ’s Decision and Order, June 16, 2011, Findings of Fact No. 20; R.R. at 20a.

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*, 600 A.2d 541 (Pa. 1991). The Board was without authority to disturb a WCJ’s finding because those findings were supported by substantial evidence.¹ *Nevin Trucking v.*

¹ Substantial evidence is such relevant evidence as a reasonable person might accept as adequate to support a

Workmen's Compensation Appeal Board (Murdock), 667 A.2d 262 (Pa. Cmwlth. 1995).

Therefore, I would reverse the Board.²

BERNARD L. MCGINLEY, Judge

conclusion. In performing a substantial evidence analysis, this court must view the evidence in a light most favorable to the party who prevailed before the factfinder. Moreover, we are to draw all reasonable inferences which are deducible from the evidence in support of the factfinder's decision in favor of that prevailing party.

Waldameer Park, Inc. v. Workers' Comp. Appeal Bd. (Morrison), 819 A.2d 164, 168 (Pa. Cmwlth. 2003) (citations omitted).

² The Majority noted that Dr. Murphy opined that Claimant will need knee replacement surgery, which indicated that it is "possible" that Claimant's function "may" improve, Board Adjudication at 3, Dr. Murphy determined that Claimant was not a candidate and explained:

[Dr. Murphy]: I would encourage [Claimant] to not have [knee replacement surgery], if he can tolerate his present situation, due to the fact that he will outlive that knee replacement and require a revision surgery in the normal course of his lifetime. The second surgery is much more difficult....

....
[Claimant's Counsel]: Doctor, is the claimant's left knee injury permanent?

[Dr. Murphy]: It's permanent.

Dr. Murphy Deposition at 42-43; R.R. at 63a.