

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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JERE MARTIN	:	
Petitioner	:	
	:	WCAB NO. A99-3815
v.	:	
	:	
WORKERS' COMPENSATION APPEAL BOARD	:	
(RED ROSE TRANSIT AUTHORITY)	:	
Respondents	:	

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APPEAL FROM THE ORDER OF THE WORKERS'  
COMPENSATION APPEAL BOARD DATED DECEMBER 7, 2000,  
WCAB NO. A99-3815, UPON PETITION TO REVIEW

REPLY BRIEF OF PETITIONER  
JERE MARTIN

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Attorney for Petitioner  
JERE MARTIN

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STATEMENT OF THE QUESTION INVOLVED

- A. UNDER THE PENNSYLVANIA WORKERS' COMPENSATION ACT ("THE ACT"), SHOULD THE COMMONWEALTH COURT AFFIRM THE OPINION OF THE WORKERS' COMPENSATION APPEAL BOARD ("WCAB") AFFIRMING THE DECISION OF THE WORKERS' COMPENSATION JUDGE ("WCJ") THAT THE PETITIONER'S ADHESIVE CAPSULITIS OF THE RIGHT SHOULDER WAS WORK-RELATED WHEN THE WCJ'S DECISION IS SUPPORTED BY UNEQUIVOCAL MEDICAL TESTIMONY THAT THE WCJ SPECIFICALLY FOUND AS CREDIBLE?

(Suggested Answer: Yes)

- B. UNDER THE ACT, SHOULD THIS COURT AFFIRM THE OPINION OF THE WCAB AFFIRMING THE DECISION OF THE WCJ FINDING THAT THE RESPONDENT IS LIABLE FOR ALL REASONABLE AND NECESSARY MEDICAL EXPENSES WHEN THE WCJ CLEARLY FOUND THAT THE RESPONDENT IS LIABLE FOR THE PETITIONER'S WORK-RELATED INJURY?

(Suggested Answer: Yes)

- C. UNDER THE ACT, SHOULD THIS COURT REVERSE THE OPINION OF THE WCAB AFFIRMING THE DECISION OF THE WCJ SUSPENDING THE PETITIONER'S BENEFITS AS OF THE DATE ON WHICH HE BECAME DISABLED DUE TO A NON-WORK RELATED CONDITION WHEN THERE HAS BEEN NO FINDING THAT THE PETITIONER'S WORK-RELATED INJURY HAD HEALED TO THE POINT WHERE THE PETITIONER WAS ABLE TO RETURN TO HIS PRE-INJURY POSITION AS A BUS DRIVER?

(Suggested Answer: Yes)

## SCOPE OF REVIEW AND STANDARD OF REVIEW

This Court's standard of review is limited to determining whether there has been a violation of Constitutional rights, errors of law were committed, violations of appeal board procedure occurred or whether necessary findings of fact are supported by substantial evidence. City of Philadelphia v. W.C.A.B. (Candito), 734 A.2d 73, 75 (Pa. Cmwlth. 1999).

## STATEMENT OF THE CASE

The Petitioner, Jere Martin, submitted his brief in support of his appeal from the opinion of the WCAB. The Respondent, Red Rose Transit, has submitted its brief in response to the Petitioner's brief, and in support of its own appeal from the WCAB's opinion.

In its brief, the Respondent has challenged the Decision of the WCJ based on its allegation that the testimony of Dr. Timothy Tymon was equivocal and incompetent as a matter of law. Additionally, the Respondent argues that the Decision of the WCJ that certain medical expenses were reasonable and necessary was unsupported by substantial evidence. The Respondent further argues that the Decision of the WCJ to suspend the Petitioner's benefits based on the disability of the Petitioner due to a non-work related injury was supported by substantial evidence.

The Petitioner now submits this Reply Brief to answer the Respondent's arguments.

## SUMMARY OF THE ARGUMENT

The testimony of Dr. Tymon that the Petitioner's adhesive capsulitis of the right shoulder was triggered by the work-related automobile accident is unequivocal as a matter of law. Dr. Tymon provided an adequate foundation for his professional opinion, and stated his opinion. The fact that the Petitioner is a diabetic and is prone to such injuries does not defeat the unequivocal nature of Dr. Tymon's testimony. An injury is compensable regardless of prior condition.

Once the WCJ found that the Respondent was liable for the work-related injury, the Respondent had an absolute duty to pay for all reasonable and necessary medical expenses. Under the Act, all medical bills must be submitted to the employer. The employer then has thirty days to pay the bills, or contest the reasonableness or necessity of the treatment through the utilization process. Until the utilization process has been invoked, the WCJ does not have subject matter jurisdiction to determine whether specific medical expenses are reasonable or necessary.

The Respondent has attempted to frame the issue on which the Petitioner appealed as whether the WCJ's decision to suspend benefits as of October 23, 1997 was supported by substantial evidence. However, the Petitioner's argument is that the WCJ erred as a matter of law in suspending benefits based on a disability due to a non-work related condition without first finding that all physical limitations from the work-related injury ceased. Furthermore, although under federal regulations the Petitioner is unable to drive a bus, this has not rendered the Petitioner totally disabled. Accordingly, pursuant to the procedures under the Act, the Respondent is required to first show a change in physical condition with respect to the

work-related injury and then job availability before benefits can be suspended. Because the Respondent did not accomplish this, the WCJ's decision to suspend benefits was an error of law.

## ARGUMENT

A. DR. TIMOTHY TYMON PRESENTED UNEQUIVOCAL MEDICAL TESTIMONY THAT THE WCJ SPECIFICALLY ACCEPTED AS COMPETENT AND CREDIBLE.

Whether medical testimony is equivocal is a question of law subject to plenary review. Terek v. W.C.A.B. (Somerset Welding & Steel, Inc.), 542 Pa. 453, 456, 668 A.2d 131, 132 (1995). It is erroneous to base a conclusion that medical testimony is equivocal on a single phrase extracted from a deposition. Id. at 456-57, 668 A.2d at 133. Rather, the medical testimony must be considered in its entirety. Id. at 457, 668 A.2d at 133; Ohm v. W.C.A.B. (Caloric Corp.), 663 A.2d 883, 886 (Pa. Cmwlth. 1995). Answers given in cross-examination do not, as a matter of law, destroy the effectiveness of previous opinions expressed by a physician. Hannigan v. W.C.A.B. (Asplundh Tree Expert Co.), 616 A.2d 764 (Pa. Cmwlth. 1992).

The Commonwealth Court has expanded on the definition of “unequivocal” as it pertains to workers’ compensation matters:

The term “unequivocal medical testimony” is a shorthand term lawyers and courts have devised and used for the rule of the common law, brought over to the field of workmen’s compensation, to the effect that one contending that a condition of disability is the result of injury arising in the course of employment must, unless the disability is clearly the result of a work injury, produce the expert medical testimony that the claimant’s condition in the expert’s professional opinion did come from the work experience. . . . It is not sufficient for the medical witness to testify that the claimant’s condition might have been or probably was the result of the claimant’s work. However, it is not absolutely essential that the expert say “that it is my professional opinion” and it is sufficient for the expert to say, “I think” or “I believe” as the assertion of his opinion. . . . Certainly it is not the law, as it has sometimes been argued, that every utterance which escapes the lips of a medical witness on a medical subject, must be certain, positive, and without reservation, exception, or peradventure of a doubt. We repeat, that as to facts which a claimant must prove by medical evidence, it is sufficient that his medical expert, after providing a foundation, testify that in his professional opinion or that

he believes or that he thinks the facts exist. The claimant has, in such event, produced competent evidence of the facts which, if accepted by the factfinder will support an award, even if the medical witness admits to uncertainty, reservation, doubt or lack of information with respect to medical and scientific details; so long as the witness does not recant the opinion or belief first expressed.

Philadelphia College of Osteopathic Medicine v. W.C.A.B. (Lucas), 465 A.2d 132, 134-35 (Pa. Cmwlth. 1983).

In this instance, Dr. Timothy Tymon first provided a sufficient foundation. Dr. Tymon began treating Mr. Martin for the current work-related injury on December 19, 1997. (RR16(A)). Dr. Tymon learned of the work-related automobile accident of September 12, 1996, and of the gradual onset of limited mobility and pain to the right shoulder. (RR17(A)). At that time, Dr. Tymon diagnosed Mr. Martin with adhesive capsulitis of the right shoulder. (RR18(A)). He examined Mr. Martin again on January 9, 1998, and continued to adhere to his diagnosis of adhesive capsulitis. (RR19(A)). Dr. Tymon then explained his belief as to the cause of the condition:

Well, as you know, when we make an opinion, we have to base this on our physical findings, also the history given to us by the patient. But based on the history and physical findings during my evaluation, I felt that he had developed an adhesive capsulitis of the shoulder. And by history, the triggering event was the accident which has was involved in in 1996.

(RR20-21(A)). Thus, Dr. Tymon developed a base of knowledge through his examinations, and Mr. Martin's recitation of his medical history. Based on this knowledge, Dr. Tymon formed a conclusion that was within his medical competence. Therefore, as a matter of law, this testimony qualifies as unequivocal medical testimony as defined by Philadelphia College of Osteopathic Medicine, 465 A.2d at 134-35.

The Respondent has expressed a concern over the words "triggering event." A common

usage of the word trigger is as a verb meaning “to initiate.” Meriam-Webster’s Collegiate Dictionary (visited January 7, 2001) <<http://www.m-w.com/cgi-bin/dictionary>>. Therefore, Dr. Tymon’s use of the word in the gerund form signifies that the work-related automobile accident was the event that initiated Mr. Martin’s adhesive capsulitis of the right shoulder. Therefore, this testimony clearly reflects Dr. Tymon’s professional opinion that the work-related accident caused the right shoulder problem.

Dr. Tymon also acknowledged that the adhesive capsulitis was related to Mr. Martin’s diabetes. (RR27(A)). Dr. Tymon explained his understanding of why people with diabetes are prone to develop adhesive capsulitis:

Again, nobody knows for sure. The theory is that people with diabetes, of course, have poor control of their blood sugars. And patients with long-standing high blood sugar, it causes chemical change or reaction in the proteins of the body. And the theory is that these proteins then cause stiffness of joints. And the shoulder is one of the joints that’s most commonly affected, although the fact that you can get stiffness of all your joints or just selectively some joints such as the fingers, wrists and hands. But it’s very common for diabetics to also develop the frozen shoulder also.

(RR27(A)). Thus, the Respondent argues that it should not be responsible for a work-injury when a prior medical condition has left the Petitioner prone to such injuries. Pursuant to Section 301(c)(1) of the Act, however, an injury meeting these requirements is compensable under the Act, **regardless of a previous condition.** 77 P.S. §411(1). The employer takes the employee as he or she comes. Pawlosky v. W.C.A.B., 514 Pa. 450, 525 A.2d 1204, 1209 (1987). Thus, the fact that Mr. Martin is diabetic, and that his diabetes left him prone to this type of injury in no way defeats the compensability of the injury.

The Respondent is essentially challenging a specific credibility determination made by the WCJ. Judge Dlin found Dr. Tymon’s testimony that Mr. Martin had right shoulder adhesive

capsulitis and that the adhesive capsulitis was work-related to be credible. (WCJ's Finding of Fact No. 16). The determination of credibility is within the sole province of the WCJ, and cannot be disturbed on appeal. See Sherrod v. W.C.A.B. (Thoroughgood, Inc.), 666 A.2d 383, 385 (Pa. Cmwlth. 1995); Northwestern Hosp. v. W.C.A.B. (Turiano), 578 A.2d 83, 85 (Pa. Cmwlth. 1990). The Respondent's argument, therefore, must fail.

The failure of the Respondent to analyze Dr. Tymon's **testimony** in its brief only serves to highlight the fact that the Respondent is attempting to have this court reweigh the WCJ's credibility determinations. Throughout the Respondent's brief, the Respondent relies on an excerpt from a report authored by Dr. Tymon, and dated July 10, 1998. Respondent's Br. 7-8, 14-15. Such out-of-court statement should be used to assess the credibility of Dr. Tymon as a witness. See Pa.R.E. 801, cmt. Indeed, the evidence of Dr. Tymon's medical opinions should be considered in its entirety. Terek, 542 Pa. At 457, 668 A.2d at 133; Ohm, 663 A.2d at 886.

An analysis of the excerpt quoted by the Respondent supports the award of compensation in this case. Dr. Tymon notes that the cause of the disability is "multi-factorial," and that "[p]eople with diabetes are prone to developing adhesive capsulitis . . . ." (RR219(A)). Nonetheless, the motor vehicle accident was the triggering event. (RR20-21(A); RR219(A)). This Court has recently interpreted the Act to provide that an employer is liable for a claimant's disability when that disability is caused by a combination of work-related and non-work related factors, if the work-related factors was a substantial contributing factor to the disability, regardless of whether the claimant was susceptible to a specific injury due to a pre-existing condition. See Miller v. Bethlehem City Council, 760 A.2d 446, 451-52 (Pa. Cmwlth. 2000) (citing City of Philadelphia v. W.C.A.B. (Cronin), 706 A.2d 377 (Pa. Cmwlth. 1998); Povanda v.

W.C.A.B. (Giant Eagle Markets, Inc.), 605 A.2d 478 (Pa. Cmwlth.), petition for allowance of appeal denied, 533 Pa. 603, 617 A.2d 1276 (1992); Miller v. W.C.A.B. (Pocono Hosp.), 539 A.2d 18 (Pa. Cmwlth. 1988)). This rule of law speaks directly to the instant case. As Dr. Tymon testified, the cause of the disability is multi-factorial. While the pre-existing condition left the Petitioner susceptible to the injury, the triggering event was the motor vehicle accident. Dr. Tymon specifically testified that the work-related motor vehicle accident was a substantial contributing factor to the Petitioner's disability. (RR21(A)). Therefore, as a whole, the testimony of Dr. Tymon, which was specifically accepted as credible by Judge Dlin, supports Judge Dlin's conclusion that the disability due to the adhesive capsulitis was work-related. Accordingly, Judge Dlin's Decision in this regard is supported by substantial evidence from the record as a whole.

B. BECAUSE THE WCJ FOUND THE RESPONDENT LIABLE FOR THE WORK-RELATED INJURY, THE RESPONDENT HAS AN ABSOLUTE LEGAL DUTY TO PAY FOR ALL REASONABLE AND NECESSARY MEDICAL EXPENSES.

The employer is liable under the Act to pay for all reasonable medical expenses as and when needed. Section 306(f.1)(1)(i), 77 P.S. § 531(1)(i). Once an employer has been deemed liable for a work-related injury, the employer must pay for all reasonable and necessary medical treatment resulting from that injury. See Topps Chewing Gum v. W.C.A.B. (Wickizer), 710 A.2d 1256, 1260 (Pa. Cmwlth. 1998); Stonebraker v. W.C.A.B. (Seven Springs Farm, Inc.), 641 A.2d 655, 658 (Pa. Cmwlth. 1994) (citing Thomas v. W.C.A.B. (School Dist. of Philadelphia), 621 A.2d 1192, 1196 (Pa. Cmwlth. 1993)). This duty to pay medical expenses is "absolute." Listino v. W.C.A.B. (INA Life Ins. Co.), 659 A.2d 45, 47 (Pa. Cmwlth. 1995).

The procedure for the payment of medical expenses is set forth under the Act. The

medical provider must first submit medical bills and records to the employer. The employer then has thirty (30) days after the receipt of the medical bills to make payment, unless the employer disputes the reasonableness or necessity of the treatment. Section 306(f.1)(5), 77 P.S. § 531(5). The procedures for contesting the reasonableness or necessity of the medical treatment are set forth in utilization review process. Section 306(f.1)(6), 77 P.S. § 531(6). Because all disputes concerning the reasonableness or necessity of medical treatment must be resolved through the utilization review process, the WCJ does not have subject matter jurisdiction to determine whether the treatment was reasonable or necessary until the process has been utilized. See Zuver v. W.C.A.B. (Browning Ferris Indus. of Pa., Inc.), 755 A.2d 112, 114 (Pa. Cmwlth. 2000).

In this instance, the Respondent has been deemed liable for the Petitioner's work-related injury. Judge Dlin specifically found Dr. Tymon's testimony that the adhesive capsulitis was work-related to be credible. (WCJ's Finding of Fact No. 16). As discussed above, Dr. Tymon's testimony is unequivocal, and sufficient to support Judge Dlin's findings. Accordingly, substantial evidence from the record supports the WCJ's finding that the Respondent is liable for the work-related injury. Thus, under the Act, the Respondent's absolute obligation to pay for all reasonable and necessary medical expenses attaches.

The question the Respondent appears to raise here is whether the specific medical expenses were reasonable and necessary. At this stage in the proceeding, the WCJ does not have the jurisdiction to render such a decision. Rather, once the WCJ has found liability for the work injury, medical bills are submitted to the employer. The employer then has thirty days in which either it must pay the medical bills, or dispute the reasonableness or necessity of the

medical treatment through the utilization review process. Because the Respondent has not pursued a dispute over the reasonableness or necessity of the medical treatment, the Respondent cannot now raise this issue on appeal.

C. THE WCJ'S CONCLUSION TO CEASE THE PETITIONER'S BENEFITS AS OF OCTOBER 23, 1997 IS ERRONEOUS AS A MATTER OF LAW.

In its brief, the Respondent has attempted to frame the issue as whether the WCJ's Decision was supported by substantial evidence. The Petitioner's argument, however, is that the WCJ erroneously interpreted and applied Pennsylvania law. The WCJ's Decision that "[t]he claimant's disability ended on October 23, 1997, when he became insulin dependent" was a conclusion of law. (WCJ's Conclusion of Law No. 3). It was based on the erroneous interpretation of Pennsylvania law that once a non-work related condition renders a claimant disabled, the claimant's entitlement to compensation ceases. This interpretation is clearly at ends with the decisions of this court.

This Court has had the opportunity to speak on this issue:

[W]e recently held that in a termination proceeding where restrictions are placed upon a claimant, but it is established that those restrictions are not causally related to the work injury, the employer is entitled to a termination **so long as the medical expert has testified that the claimant is fully recovered from the work-related injury.**

Saville v. W.C.A.B. (Pathmark Stores, Inc.), 756 A.2d 1214, 1218 (Pa. Cmwlth. 2000) (emphasis added). Thus, it is clearly the law of this jurisdiction that before workers' compensation benefits can be terminated or suspended based on the existence of a disability due to a non-work related injury, there must first be a finding that the disability due to the work-related injury has ceased. See Saville, 756 A.2d at 1218; USX Corp. v. W.C.A.B. (Hems), 647 A.2d 605,

606-07 (Pa. Cmwlth. 1994); Columbo v. W.C.A.B. (Hofmann Indus., Inc.), 638 A.2d 477, 479-80 (Pa. Cmwlth. 1994); Carpentertown Coal & Coke Co. v. W.C.A.B. (Seybert), 623 A.2d 955, 957 (Pa. Cmwlth. 1993); Sheehan v. W.C.A.B. (Supermarkets General), 600 A.2d 633, 635-36 (Pa. Cmwlth. 1991), petition for allowance of appeal denied, 530 Pa. 663, 609 A.2d 170 (1992). Even in the unique situation of Schneider, Inc. v. W.C.A.B. (Bey), 560 Pa. 608, 747 A.2d 845 (2000), evidence had been presented demonstrating that the claimant's work-related injury had resolved to the point where the claimant was able to return to sedentary or light-duty work. 560 Pa. 608, 747 A.2d at 846.

The Respondent has argued that a suspension of benefits was appropriate because the non-work related condition rendered the Petitioner totally disabled. There is absolutely no evidence on the record to support this assertion. Rather, federal regulations provide that a person who is insulin dependent cannot drive a bus. See 49 C.F.R. § 391.41. This does not inhibit the Petitioner from performing any other type of work activity. Indeed, people with insulin dependent diabetes can and do lead productive lives. It is very possible, then, that even with the insulin dependent diabetes, once the Petitioner's work-related disability is shown to have dissipated or ceased altogether, that the Petitioner could work in any other position with the Respondent except driving a bus.

Furthermore, under the 1996 Amendments, if the employer has a specific job vacancy that the claimant is capable of performing, the employer shall offer the job to the claimant. Section 306(b), 77 P.S. § 512. When the insurer receives medical evidence that the claimant is capable of returning to work in any capacity, the insurer must provide prompt written notice on a form prescribed by the department. Section 306(b)(3), 77 P.S. § 512(3). This form must state:

(1) the nature of the claimant's physical condition or change of condition; (2) that the claimant has an obligation to look for available work; (3) proof of available employment opportunities may jeopardize the claimant's right to receive benefits; and (4) that the claimant has a right to consult with an attorney. Id.

Assuming, *arguendo*, that the physical limitations due to the Petitioner's work-related disability had been shown to have ceased, at the very least, before benefits were suspended, the Respondent should have been required to show either job availability or the offer of a position that the Petitioner was capable of performing. The Respondent here offered no such evidence. Accordingly, the suspension of benefits based on the existence of a non-work related disability, without a finding that the Petitioner's work-related disability has ceased, and without evidence of job availability, was an error of law.

#### CONCLUSION

For the above stated reasons, the Petitioner Jere Martin respectfully requests that this Court affirm the decision of the WCAB that affirmed the WCJ's finding that the Petitioner's adhesive capsulitis of the right shoulder was work-related. The Petitioner also respectfully requests that the decision of the WCAB affirming the decision of the WCJ that the Respondent is liable for all reasonable and necessary medical expenses be affirmed. Finally, the Petitioner respectfully requests that the decision of the WCAB affirming the WCJ's decision suspending be reversed, and the matter remanded for further proceedings.

Respectfully submitted,

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Attorney for Petitioner, JERE MARTIN