

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

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

BRIEF OF PETITION
JERE MARTIN

Attorney for Petitioner
JERE MARTIN

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS.....	i
TABLE OF CITATIONS	ii
ORDER IN QUESTION.....	1
PROPOSED ORDER.....	1
STATEMENT OF THE QUESTION INVOLVED	2
STATEMENT OF JURISDICTION.....	3
SCOPE OF REVIEW/STANDARD OF REVIEW	4
STATEMENT OF THE CASE.....	5
SUMMARY OF THE ARGUMENT	10
ARGUMENT.....	11
CONCLUSION.....	16
WORKERS’ COMPENSATION JUDGE’S DECISION.....	Appendix A
WORKERS’ COMPENSATION APPEAL BOARD	Appendix B

TABLE OF CITATIONS

CASES:	PAGE
<u>Bethenergy Mines, Inc. v. W.C.A.B. (Skirpan)</u> , 531 Pa. 287, 612 A.2d 434 (1992).	11
<u>Carpentertown Coal & Coke Co. v. W.C.A.B. (Seybert)</u> , 623 A.2d 955 (Pa. Cmwlt. 1993).	12-13
<u>City of Philadelphia v. W.C.A.B (Candito)</u> , 734 A.2d 73 (Pa.Cmwlt. 1999).....	4, 11
<u>Columbo v. W.C.A.B. (Hofmann Indus., Inc.)</u> , 638 A.2d 477 (Pa. Cmwlt. 1994).....	12-13
<u>Inglis House v. W.C.A.B. (Reedy)</u> , 535 Pa. 135, 634 A.2d 592 (1993).....	14-15
<u>Innovative Spaces v. W.C.A.B. (DeAngelis)</u> , 646 A.2d 51 (Pa. Cmwlt. 1994).	14-15
<u>Kachinski v. W.C.A.B. (Skirpan)</u> , 516 Pa. 240, 532 A.2d 374 (1987).....	11
<u>Landmark Constructors, Inc. v. W.C.A.B. (Costello)</u> , 560 Pa. 618, 747 A.2d 850 (2000).....	11
<u>Schneider, Inc. v. W.C.A.B. (Bey)</u> , 560 Pa. 608, 747 A.2d 845 (2000).....	13-14
<u>Sheehan v. W.C.A.B. (Supermarkets General)</u> , 600 A.2d 633 (Pa. Cmwlt. 1991), <u>petition for allowance of appeal denied</u> , 530 Pa. 663, 609 A.2d 170 (1992).	13
<u>USX Corp. v. W.C.A.B. (Hems)</u> , 647 A.2d 605 (Pa. Cmwlt. 1994).	12-13
 STATUTES:	
2 Pa. C.S.A. § 702.....	3
42 Pa. C.S.A. § 763(a)(1).....	3
42 Pa. C.S.A. § 5105(a)(2).....	3
77 P.S. § 512(2).	11

ORDER IN QUESTION

The Order in question in the Order of the Workers' Compensation Appeal Board (hereinafter "WCAB") dated December 7, 2000, and docketed at A99-3815 which affirmed the Decision and Order of the Honorable Geoffrey Dlin (hereinafter "WCJ"), which granted the Claim Petition filed against Red Rose Transit Authority for a closed period from September 15, 1997 to October 22, 1997.

PROPOSED ORDER

"The appeal of the Petitioner is GRANTED and the decision by the Workers' Compensation Appeal Board affirming the decision of the Workers' Compensation Judge to end benefits as of October 22, 1997 is REVERSED."

STATEMENT OF THE QUESTION INVOLVED

A. Under the Pennsylvania Workers' Compensation Act ("the act"), did the WCAB err as a matter of law in affirming the decision of the WCJ to end the claimant's benefits as of October 22, 1997 when the WCJ made no finding that the Claimant's work-related injury had healed to the point where the Claimant could return to his pre-injury position?

(Suggested Answer: Yes.)

STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter through Section 702 Of the Administrative Agency Law, 2 Pa. C.S.A. § 702, and through Section 763(a)(1) and 5105(a)(2) of the Judicial Code, as amended. 42 Pa. C.S.A. § 763(a)(1) and 5105(a)(2).

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.Cmwlt. 1999).

STATEMENT OF THE CASE

The Petitioner, Jere Martin, was employed as a bus operator for Red Rose Transit Authority (“Respondent”). On September 12, 1996, Mr. Martin was driving his bus when an automobile failed to stop at a stop sign and collided with Mr. Martin’s front right wheel. (Claimant, N.T., p. 14). Mr. Martin testified that he was “shaken up” and “stiff” following the accident, and felt soreness in his right shoulder that evening. (Claimant, N.T., pp. 7, 15).

On the day after the accident, Mr. Martin began treating with a panel physician at St. Joseph’s Hospital Work Connection. To treat the right shoulder injury, the doctor prescribed Darvocet. The doctor would only release Mr. Martin to an office/clerical position for several weeks after the accident. (Claimant, N.T., p. 16). Mr. Martin was referred to a physical therapist, and restricted from driving in any capacity. (Claimant, N.T., p. 16). On particularly bad days, Mr. Martin testified that the pain would travel from his shoulder down to his arm. (Claimant, N.T., p. 17).

Mr. Martin eventually returned to his position of bus operator in November 1996. However, he was still receiving physical therapy for his right shoulder at the time. (Claimant, N.T., p. 18). Mr. Martin continued to work as a bus operator from November 1996 to September 1997, despite the continued pain and numbness in his shoulder. (Claimant, N.T., p. 19). After attempting to work through his right shoulder pain and sleepless nights hoping his shoulder would improve, Mr. Martin realized on or about September 12, 1997 that he could no longer perform his job. (Claimant, N.T., p. 20).

Mr. Martin filed a Claim Petition on or about January 30, 1998, alleging that he had suffered a work-related right shoulder injury as a result of his motor vehicle accident on

September 12, 1996. The Respondent filed an Answer admitting that Mr. Martin had suffered a work-related injury on September 12, 1996, but denying that he was disabled as a result of that injury. The matter was initially assigned to Workers' Compensation Judge George W. Nickel. After Judge Nickel retired, the matter was reassigned to Judge Geoffrey W. Dlin without objection.

In support of his Claim Petition, Mr. Martin testified on his own behalf, and offered the testimony of his treating physician, Dr. Timothy Tymon, M.D. In opposition to the petition, the Respondent presented the testimony of Dr. Cheryl Opalack, D.O., the director of the Respondent's Work Connection panel facility.

Mr. Martin testified that he is unable to drive and can lift "very small amounts because a lot of times my right shoulder just gives out if I lift anything too heavy and it drop." (Claimant, N.T., p. 24). Mr. Martin further testified that he still cannot lift over his head with his right shoulder, thus making dressing, shaving, and bathing difficult tasks. (Claimant, N.T., pp. 25, 7-29).

Mr. Martin is a diabetic. Beginning in 1989 or 1990, he started taking medication for his condition. (Claimant, N.T., p. 41). This medication helped to keep his diabetes under control until October 1997, when he began taking insulin two times per day. (Claimant, N.T., p. 43). Mr. Martin received conflicting reports on how this change in his diabetic condition would affect his job. First, he was informed that he could not take insulin and hold a commercial drivers' license. Then, he was told that if drivers were not away from home at night, they could hold a commercial drivers' license so long as there was a facility available where he could refrigerate his insulin. (Claimant, N.T., p. 44).

Dr. Tymon began treating Mr. Martin for a **left shoulder** problem in March, 1994. (Tymon, N.T., p. 8). Dr. Tymon then began treating Mr. Martin for his right shoulder problem on December 19, 1997. (Tymon, N.T., p. 9). Upon examination, it was “most apparent” to Dr. Tymon that Mr. Martin did not have a full range of motion in his right shoulder. (Tymon, N.T., pp. 9-10). Based upon his initial examination of Mr. Martin, and a review of x-rays, Dr. Tymon concluded that Mr. Martin had an adhesive capsulitis of his right shoulder, or “frozen shoulder” related to the September 1996 motor vehicle accident. (Tymon, N.T., pp. 10-11). A subsequent MRI showed some mild changes in Mr. Martin’s rotator cuff, confirming his diagnosis of adhesive capsulitis. (Tymon, N.T., p. 11).

Dr. Tymon testified that he did not believe that Mr. Martin could return to his pre-injury position as a bus driver because of the limited range of motion of his right shoulder. This was due to the work-related injury. (Tymon, N.T., pp. 12-13). Although Dr. Tymon agreed that the adhesive capsulitis may be related to Mr. Martin’s diabetes, he unequivocally testified that the “triggering event” which caused the disabling adhesive capsulitis was the September 12, 1996 work-related motor vehicle accident. (Tymon, N.T., pp. 12-13, 19).

Dr. Opalack examined Mr. Martin on September 13, 1996. (Opalack, N.T., p. 16). Based on this initial examination, Dr. Opalack concluded that Mr. Martin suffered from a right shoulder strain and sprain and a right trapezius strain secondary to the motor vehicle accident. (Opalack, N.T., p. 18). Dr. Opalack prescribed Darvocet for Mr. Martin. (Opalack, N.T., p. 18). The last time Dr. Opalack examined Mr. Martin’s right shoulder was on October 28, 1996, when she cleared him to return to work. (Opalack, N.T., p. 22).

Dr. Opalack had referred Mr. Martin to Dr. Joseph Mehm, an orthopedic specialist, who

diagnosed Mr. Martin with adhesive capsulitis following an October 17, 1996 examination. (Opalack, N.T., pp. 51-52). Dr. Opalack considered the adhesive capsulitis to be “an inflammatory condition that’s mostly degenerative in nature.” (Opalack, N.T., p. 29). Dr. Opalack testified that Mr. Martin’s right shoulder sprain and strain had resolved itself. (Opalack, N.T., p. 31).

The Respondent brought to the attention of the WCJ regulations promulgated pursuant to the Federal Motor Carrier Safety Act, 49 U.S.C. §§ 31101-62. Specifically, 49 C.F.R. § 391.41(b)(3) states that a person is not physically qualified to drive a commercial motor vehicle if that person requires insulin to control diabetes mellitus.

Judge Dlin circulated his Decision on November 30, 1999. Judge Dlin accepted Mr. Martin’s testimony regarding the details of his accident and his physical condition as credible. Judge Dlin further accepted the testimony of Dr. Tymon that Mr. Martin suffers from a work-related right shoulder adhesive capsulitis as credible. Judge Dlin rejected Dr. Opalack’s opinion that the adhesive capsulitis was related solely to Mr. Martin’s diabetes as not credible. Judge Dlin granted Mr. Martin’s Claim Petition, and awarded benefits from September 15, 1997 to October 22, 1997. Judge Dlin concluded that on October 23, 1997, Mr. Martin’s disability ended when he became insulin dependent. On December 17, 1999, Mr. Martin filed an appeal with the Workers’ Compensation Appeal Board, contending the WCJ erred in concluding that Mr. Martin’s work-related disability ended on October 23, 1997. The Respondent filed a cross-appeal, contending that there was no substantial evidence that the adhesive capsulitis was work-related. The WCAB denied the Respondent’s request for a supersedeas on January 11, 2000.

The WCAB issued its opinion on December 7, 2000, affirming the Decision of the WCJ. The WCAB concluded that the evidence supported a finding that after October 23, 1997, the Petitioner became disabled due to his diabetes. The WCAB also noted that the WCJ had specifically accepted the testimony of Dr. Tymon as being more credible than that of Dr. Opalack.

The Petitioner filed the instant appeal with the Commonwealth Court of Pennsylvania, alleging the WCAB had committed an error of law because the WCJ had failed to make a finding that the Petitioner's work-related injury had healed to the point where from the point of view of the work-related injury alone he could have returned to his pre-injury position. The Respondent filed a cross-appeal, alleging the testimony of Dr. Tymon to be equivocal and incompetent as a matter of law.

SUMMARY OF THE ARGUMENT

The WCAB's Decision affirming the Decision of the WCJ should be reversed. The WCAB committed an error of law when it affirmed the WCJ's decision to stop the Petitioner's benefits as of October 22, 1997. The WCJ suspended benefits solely on the basis of the Petitioner's becoming insulin dependent on that date, and thus ineligible by Federal Regulation to drive a bus. However, before benefits can be suspended due to a subsequent physical condition causing disability, the WCJ must first make a determination that the claimant's work-related injury had healed to the point where based on the work-related injury alone, the claimant could have returned to his pre-injury position. The WCJ made no such finding in this case. Rather, the WCJ concluded that the existence of a non-work-related disability contemporaneously with a work-related disability was automatic grounds for a suspension of benefits.

Before suspending benefits, there must be a showing of a change in physical condition, and job availability. The existence of a non-work-related disability is only relevant on the issue of whether proof must be offered on job availability. The Petitioner did present evidence that his disability due to the work-related injury persisted past the date on which the benefits were suspended. However, the WCJ failed to address this factual issue. Instead, the WCJ addressed the non-work-related injury before addressing the physical limitations imposed on the Petitioner due to the work-related injury. For this, the case must be remanded for the WCJ to apply the proper analysis.

ARGUMENT

A. THE WCAB ERRED AS A MATTER OF LAW IN AFFIRMING THE DECISION OF THE WCJ TO END THE PETITIONER'S WORKERS' COMPENSATION BENEFITS AS OF OCTOBER 22, 1997.

The WCJ's decision must be rejected when it is not supported by substantial evidence, Bethenergy Mines, Inc. v. W.C.A.B. (Skirpan), 531 Pa. 287, 291, 612 A.2d 434, 436 (1992), or the WCJ has committed an error of law. City of Philadelphia v. W.C.A.B. (Candito), 734 A.2d 73, 75 (Pa. Cmwlth. 1999). The WCJ committed an error of law in suspending Mr. Martin's workers' compensation benefits as of October 22, 1997. The WCJ made no finding that Mr. Martin's work-related injury had healed to the point where from the point of view of the work-related injury alone, Mr. Martin could return to his pre-injury position. The WCJ erroneously concluded that the existence of a non-work-related disability automatically suspended the Petitioner's compensation benefits.

In order to demonstrate an entitlement to a suspension of benefits, the employer bears the burden to demonstrate: (1) a change in the claimant's physical condition so that the claimant has recovered his ability to work; and (2) the availability of a job within the claimant's limitations.¹ Kachinski v. W.C.A.B. (Vepco Constr. Co.), 516 Pa. 240, 532 A.2d 374, 379-80 (1987). See also Landmark Constructors, Inc. v. W.C.A.B. (Costello), 560 Pa. 618; 747 A.2d 850, 853-55 (2000). Before a defendant can receive a modification or suspension of benefits based on the allegation that the disability is caused by some other non-work-related condition, the defendant

¹ Pursuant to the 1996 Amendments, earning power is determined by the work the claimant is capable of performing, and can be based on expert opinions that includes job listings with the agencies of the department, private job placement agencies, and advertisements in the usual employment areas. 77 P.S. § 512(2). This provision became effective on June 24, 1996.

must first demonstrate that the claimant's loss of earnings from his work-related injury has abated. See USX Corp. v. W.C.A.B. (Hems), 647 A.2d 605, 606-07 (Pa. Cmwlth. 1994) [hereinafter Hems]; 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) [hereinafter Seybert].

In Seybert, 623 A.2d at 955, the claimant suffered a work-related myocardial infarction. The claimant also underwent bypass surgery due to a preexisting coronary artery disease. While the myocardial infarction permanently damaged his heart, the claimant had recovered from that injury sufficiently to return to his pre-injury position. However, he was disabled because of the preexisting coronary artery disease. Id. at 956. The Commonwealth Court concluded that the employer was entitled to a suspension of benefits because the claimant's disability due to his work-related injury had ceased. Id. at 957.

In Columbo, 638 A.2d at 478, the claimant suffered work-related injuries to his low back and right knee. The claimant's treating physician testified that the knee had healed significantly, and that from a standpoint of the knee alone, the claimant could return to work. However, arthritis in the claimant's right ankle that was not work-related prevented the claimant from returning to work. Id. Because the work-related injury had healed to the point where the claimant could have returned to work but for the non-work-related arthritic condition, the defendant was granted a suspension of benefits. Id. at 479-80.

In Hems, the claimant suffered a work-related injury to his left thumb. 647 A.2d at 605. While recovering from his injury, the claimant also suffered from a non-work-related brain abscess. This brain abscess caused the claimant to fall, misjudge distances, and diminished his

coordination of his right extremities. The work-related injury, however, had healed to the point where it no longer prevented the claimant from returning to his pre-injury position. Id. The Court noted that evidentiary record indicated that while the work-related injury had healed sufficiently to allow the claimant to return to work, the non-work related brain abscess was currently causing the loss of earning power. Id. at 606. Thus, the employer was entitled to a suspension of benefits without showing job availability. Id. at 606-07.

In Sheehan v. W.C.A.B. (Supermarkets General), 600 A.2d 633, 635 (Pa. Cmwlth. 1991), petition for allowance of appeal denied, 530 Pa. 663, 609 A.2d 170 (1992), the claimant had suffered a work-related back injury, and a non-work-related heart attack. The claimant had recovered from his work-related injury to the point where he could return to light duty. Id. at 635-36. The Court, therefore, required a showing of job availability based on limitations still imposed by the work-related medical condition. Id. at 637.

Thus, in all four cases, Hems, Columbo, Seybert, and Sheehan, the most critical factor was the level of physical restrictions placed upon the claimant by reason of the work-related injury. The level of disability attributable to the subsequent, non-work-related physical condition was relevant solely for the purpose of determining the quality of evidence the defendant was required to present on the issue of job availability. Where the work-related injury no longer prevented the claimant from returning to his pre-injury position, and the non-work-related injury caused a total disability, the defendant was relieved of the burden of showing job availability.

This is consistent with the recent decision of Schneider, Inc. v. W.C.A.B. (Bey), 560 Pa. 608, 747 A.2d 845 (2000). There, the claimant suffered a work-related injury to his head and neck. Id. at 845. Subsequently, the claimant was attacked, and suffered stab wounds to the head. These stab wounds left the claimant brain damaged and paralyzed. These subsequent non-work-related injuries left the claimant permanently and totally disabled. Id. at 846. The evidence presented demonstrated 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. Id. The Pennsylvania Supreme Court held that in this **unique** situation, the employer was entitled to a suspension of benefits without demonstrating job availability. Id. at 847, 849.

In this case, the WCJ failed to make the crucial first step of determining whether any physical limitations remained on Mr. Martin due to the work-related injury. Rather, the WCJ made a conclusion of law that the Claimant's disability ceased when he became insulin dependent on October 23, 1997. (Conc. of Law No. 3). In essence, the WCJ skipped a step in the analysis. The fact that Mr. Martin had become insulin dependent, and therefore ineligible to drive a bus under Federal regulations, would only be relevant to determine whether the Respondent was required to offer proof of job availability. Before reaching that step, the WCJ must first conclude that there was a change in Mr. Martin's physical condition that lessened his level of disability.

On the issue of Mr. Martin's continued disability, Dr. Tymon testified, "As of the last time I saw him, I did not feel that he could return to being a bus driver at that time based on his limited motion of his shoulder." (Tymon, N.T., p. 12). This last visit occurred on January 9, 1998, (Tymon, N.T., p. 11), a little over two months after the date on which the WCJ concluded

that the disability had ceased due to the diabetes. Therefore, testimony from the Petitioner's medical expert, found credible by the WCJ, clearly showed that the disability due to the work-related injury persisted past the date on which Mr. Martin became insulin dependent.

Accordingly, this is not a case where the rule of Inglis House v. W.C.A.B. (Reedy), 535 Pa. 135, 634 A.2d 592, 595-96 (1993) and Innovative Spaces v. W.C.A.B. (DeAngelis), 646 A.2d 51, 54-56 (Pa. Cmwlth. 1994), that the claimant maintains the burden of demonstrating disability throughout the pendency of the Claim Petition, prevents Mr. Martin from recovering beyond the October 22, 1997 date. In both Inglis House, 634 A.2d at 593, and Innovative Spaces, 646 A.2d at 52, the claimants failed to present evidence to demonstrate that the disability due to their work-related injury continued beyond a certain date. Here, Mr. Martin presented specific evidence that his disability due to his work-related adhesive capsulitis continued past the date on which the WCJ ceased benefits, (Tymon, N.T., pp. 11-12), but the WCJ failed to address the factual issue. The WCJ made a specific finding that Dr. Tymon's testimony was credible. However, this finding was limited to the attribution of the cause of the left shoulder adhesive capsulitis to Mr. Martin's work. (Finding of Fact No. 16). The WCJ failed to make a specific finding in his decision concerning the level of physical limitations placed on Mr. Martin due to the work-related adhesive capsulitis. Presumably this is due to the erroneous conclusion of law the WCJ made with respect to the relevance of the disability caused by Mr. Martin's diabetes. The non-work-related disability would be relevant solely to determine whether it was futile for the Respondent to present evidence of work availability. Thus, because the WCJ skipped a step in the analysis and assumed that the disability caused by the diabetes superseded the disability caused by the work-related injury, the WCJ failed to even address the evidence on the record that

showed that the disability due to the work-related injury persisted. This erroneous conclusion of law requires that the case be remanded for the WCJ to apply the proper analysis, and address the record evidence concerning the physical limitations placed on Mr. Martin due to the work-related injury.

CONCLUSION

For the above stated reasons, the Petitioner Jere Martin respectfully requests that this Court reverse the decision of the WCAB and remand the case back to the WCJ to apply the proper analysis of what physical limitations were placed on the Petitioner due to the work-related injury before determining the relevance of the non-work-related disability.

Respectfully submitted,

Attorney for Petitioner, JERE MARTIN