

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by NEWMAN
Commissioner

May 6, 2015

YVONNE S. ALLY v. THE VIRGINIAN
KEY RISK INSURANCE COMPANY, Insurance Carrier
KEY RISK INSURANCE COMPANY, Claim Administrator
Jurisdiction Claim No. VA02000015552
Claim Administrator File No. 10135442
Date of Injury: October 29, 2013

W. David Falcon, Jr., Esquire
For the Claimant.

Brian A. Richardson, Esquire
For the Defendants.

REVIEW on the record by Commissioner Williams, Commissioner Marshall, and Commissioner Newman at Richmond, Virginia.

The claimant requests review of the Deputy Commissioner's November 5, 2014 Opinion denying her claim. We AFFIRM.

I. Material Proceedings

On November 13, 2013, the claimant filed a Claim for Benefits alleging she sustained injuries to her low back, right knee, and right leg on October 29, 2013, when she tripped over an electrical cord. The defendants stipulated as to the compensability of her injury, but argued the claimant was barred from receiving benefits because she failed to disclose prior back injuries on her employment application.

The Deputy Commissioner found the defense applicable and denied the claim, holding that:

[T]he claimant intentionally failed to report her long pre-existing history of both scoliosis and significant back problems resulting from a 2006 work-related injury at the time she applied for the job with the employer herein. The record contains detailed treatment notes from Dr. Dawson for a period of nearly 2 years following an April 2006 injury. Dr. Dawson's May 8, 2008, [note] indicated that the claimant "has significant neurologic impingement to the lower extremities" that would affect "her weight bearing status or activity for any significant length of time." Dr. Dawson imposed significant restrictions, and we credit Henry's testimony that those restrictions would preclude the claimant from working as a registered nurse, even in a part-time capacity. We closely observed the claimant during the course of her hearing testimony, and we simply did not believe her testimony that she considered herself symptom-free when she applied for and subsequently commenced working for the employer herein. We credit Henry's testimony that, at the time the claimant was hired, the employer was not aware that she had been diagnosed with scoliosis, that she had a prior back injury, and that she had a prior workers' compensation claim. We determine that the employer relied to its detriment on the claimant's misrepresentations regarding the absence of any back problems, and we note Dr. Dawson's October 24, 2014, statement that the claimant had "a predisposed status of not tolerating falls well, so it is not unreasonable that she would have injuries" resulting from a subsequent fall. We therefore determine that the employer's reliance on the claimant's misrepresentations resulted in the apparently significant injuries following the subject October 29, 2013, injury and that a causal relationship therefore exists between the misrepresentations and the injuries.

(Op. 7-8.)

The claimant filed a timely request for review by the Commission, and argued her claim should not be barred because her accident and injury were unrelated to the misrepresentation on her employment application. The defendants argued the misrepresentation was intentional, the claimant would not have been hired if the employer was aware of her preexisting condition, and the misrepresentation was related to the injury, as her condition made the kind of accident she sustained more likely.

II. Findings of Fact and Rulings of Law

In Hawkins v. The Lane Company, Inc., 49 O.I.C. 144 (1967), the Commission made the following ruling:

Under the Virginia Workmen's Compensation Law, the employer takes the employee as he is and if the employee is suffering some physical infirmity, which is aggravated by an industrial accident, the employer is responsible for the end result of such accident. Under such circumstances, there is compelling reason for the employer to ascertain the physical condition of the prospective employee before entering into the employment contract. If material misrepresentations as to his physical condition are made by the prospective employee to the prospective employer and employment is afforded on the basis of misrepresentations to the determinant of the employer it is only right and just that compensation benefits be denied.

Id. at 147.

The claimant correctly states the law when she argues a misrepresentation on a job application will not bar a claim unless the subsequent injury is causally related to the misrepresentation itself. Grimes v. Shenandoah Valley Press, 12 Va. App. 665, 668, 406 S.E.2d 407, 409 (1991) ("The fact that an employee has misrepresented in a job application . . . does not bar recovery where [it] is not proved by the employer to be causally connected to the consequent injury.").

The causal connection . . . is not satisfied by merely showing that the claimant previously had a similar injury in the same general area of [her] body which [she] failed to disclose in the application process. . . . Instead, this causal connection is established when the prior injury is causally linked to the present accident, that is, when the present accident causes a recurrence, progression, deterioration, or aggravation of the prior injury. . . .

McDaniel v. Tyson Foods, Inc., VWC File No. 215-31-88 (Mar. 3, 2005), aff'd, No. 1142-05-4 (Va. Ct. App. Sept. 13, 2005).

In Bean v. Hungerfood Mechanical Corp., 16 Va. App. 183, 428 S.E.2d 762 (1993), the claimant applied for employment as a plumber and indicated on the application he had “no physical problems that would prevent him from performing his duties.” Id. at 184, 428 S.E.2d at 763. However, the claimant had “a history of arthritis,” as well as neck and back problems he had last been treated for earlier that year. Id. at 185, 428 S.E.2d at 763. The claimant subsequently suffered a fall which caused contusions, a cervical strain, and disc fragmentation. The claimant conceded “that his injury . . . was exacerbated due to his pre-existing condition of arthritis in that same area.” Id. at 189, 428 S.E.2d at 766. The Court of Appeals affirmed the Commission’s denial of benefits because “an injury that aggravates a pre-existing condition is still an injury [that] justifies a complete denial of benefits. Id. at 188, 428 S.E.2d at 765 (citing McDaniel v. Colonial Mech. Corp., 3 Va. App. 408, 413-14, 350 S.E.2d 225, 228 (1986)).

The record in this case clearly shows the claimant failed to disclose her ongoing back problems and work restrictions on her job application, and the employer relied on that representation when hiring and scheduling her. For benefits to be barred, however, it must also show the misrepresented condition is causally related to her workplace injury.

The claimant sustained a compensable injury on April 17, 2006. (Defs.’ Ex. 1-2.) On May 22, 2006, her treating physician opined that she “should have a reasonable prognosis following general, ordinary, and the usual customary community of standard care measures. . . .” (Defs.’ Ex. 1-3.) However, the claimant did not recover as expected and had difficulty engaging in ordinary activities of daily life. (Defs.’ Ex. 1-11, 16, 17.) On March 27, 2008, the treating physician noted diminished deep tissue reflexes and recommended she engage only in semi-sedentary work for no “more than four hours per occasion.” (Defs.’ Ex. 1-26.) On May 8, 2008,

he released the claimant to four hours of sedentary work with no stooping, bending, twisting, pushing, pulling, or lifting above ten pounds. He noted she had “severe impingement to the lower extremities that affects her weightbearing status.” (Defs.’ Ex. 1-27.) The records detailing treatment of the claimant’s April 2006 injury also indicate she had the preexisting condition of “underlying scoliosis with . . . shortening to the left side.” (Defs.’ Ex. 1-9.)

The claimant began working for the current employer in 2008. She was able to perform her job duties and did not miss any work due to back problems until after the October 2013 injury. Although she was initially hired as a nurse to work four-hour shifts, she was subsequently promoted to nursing supervisor. Her prior injury and scoliosis, although undisclosed to her employer, do not appear to have impacted her job performance.

The claimant fell again on October 29, 2013, when exiting a room that had a power cord in front of the exit. Her “left foot got caught in [the] cord,” and she “lost [her] balance and fell.” (Tr. 2.) She injured her low back, right knee, and right ankle. (Tr. 3.) On November 8, 2013, she returned to the physician who treated her after the April 17, 2006 injury, and he noted she had “some previous history of injury, but no ongoing problems.” He did observe, however, a “very marked scoliotic curvature, which has been diagnosed previously. . . .” (Cl.’s Ex. 1-4.)

The claimant’s treating physician later found her injury was “superimposed upon a scoliotic curvature. In my opinion, this is a precipitous event and so there is the acute nature of this. This mitigates her resuming any status where she is standing, bending, twisting or stooping, as well as walking for any prolonged periods of time.” (Cl.’s Ex. 1-9.) The claimant’s scoliosis made the injury “difficult to shake loose and get her lower back what it has been previously. . . .”

(Cl.'s Ex. 1-10.) Although the October 29, 2013 accident caused a “new injury,” it “was enough to tip the patient over into significant symptoms” and cause “an exacerbation.” (Cl.'s Ex. 1-11.)

On October 24, 2014, the claimant’s treating physician conducted an orthopedic assessment and found:

Now, the overall discussion at this time is that the accepted facts at this time is the patient has a preexisting scoliotic condition. However, she did have an injury that seems clear and likely to cause soft tissue injury and aggravation, certainly to a lady with a predisposed status of not tolerating falls well, so it is not unreasonable that she would have injuries. . . .

. . . The patient did have worsening over the course of the accident. Unfortunately, she does have a scoliotic condition that, in my opinion, she should not be penalized for that, but it should be recognized that she had a condition that might be expected for a lady of her status to cause soft tissue injury and problems, such that she has, indeed, suffered from. . . .

(Cl.'s Ex. 1-16.)

It does not appear that either the claimant’s April 2006 injury or her scoliotic curvature caused her to trip over the power cord and fall on October 29, 2013. There is contradiction in the medical records regarding whether the claimant’s prior injury was affected by her October 2013 accident. At one point the treating physician stated the claimant had no ongoing problems due to her 2006 fall. Later he notes the new injury caused “aggravation” and “exacerbation.” However, the record quite clearly shows the claimant’s 2013 injury was superimposed upon her scoliotic curvature, making the later accident a “precipitous event” causing “soft tissue injury and problems.” The Deputy Commissioner also found the claimant’s credibility problematic, and “simply did not believe her testimony that she considered herself symptom-free when she applied for and subsequently commenced working for the employer . . .” (Op. 7.) We generally

defer to credibility determinations based on first-hand observation. See Goodyear Tire & Rubber Co. v. Pierce, 9 Va. App. 120, 122, 384 S.E.2d 333, 334 (1989).

We find the claimant's scoliosis, which she failed to disclose to the employer during the hiring process, was aggravated and exacerbated by her October 2013 industrial accident. Her misrepresentation is causally related to the injuries she sustained on October 29, 2013, and benefits for those injuries will be barred.

III. Conclusion

The Opinion below is AFFIRMED.

This matter is hereby removed from the review docket.

MARSHALL, COMMISSIONER, Concurring in Part and Dissenting in Part:

I concur with the majority that the claimant's pre-existing condition was exacerbated by her October 29, 2013 injury. The majority correctly concludes there is a causal connection between the claimant's pre-existing scoliosis and the October 29, 2013 accident and injuries.

The majority's opinion elicits my respectful dissent in part. I do not agree the claimant made a material misrepresentation in connection with her employment which the employer relied upon to its detriment. The employer failed to prove reasonable reliance. Therefore, the claim for benefits was not barred.

An Employee Health History (Defs.' Ex. 2.) was completed by the claimant on October 1, 2008. It stated, "Please check (√) if you have or have had any of the following?" The claimant checked the "No" column adjacent to "Ongoing BACK PROBLEMS." Four items out of thirteen contained the modifier, "ongoing." The claimant could not accurately and honestly answer "yes,"

to a question which posed whether she has now or had in the past an “ongoing” condition – one which is continuing to exist at present.

The employer’s unfortunate use of the adjective, “ongoing” with regard to conditions which you “have” or “have had,” and the space to only respond with a single check mark under “yes” or “no,” created a hopeless ambiguity. The word “ongoing” is an adjective which connotes a sense of the present. Merriam-Webster’s online dictionary defines it as, “continuing to exist, happen, or progress: continuing without reaching an end; being actually in process; continuing;” and “continuously moving forward: growing.” Synonyms include, “present-day,” “extant,” and “current.” The notion of having “had” in the past an “ongoing” condition is inherently inconsistent.

The ambiguity arising from, “ongoing” has not gone unnoticed. It was included in a critical collection of troublesome vocabulary: *Watson’s Dictionary of Weasel Words*.¹ The Guardian Style Guide tweeted on July 27, 2011, “Can we agree to delete the word ‘ongoing’ whenever & wherever we see it? The writing will be improved & the world will be a happier place.”²

The ambiguity of “ongoing,” together with the vagueness of “back problems,” in the Employee Health History suggest this was not a reasonable question which the claimant could have answered in an entirely accurate fashion or upon which the employer could have relied.

This conclusion is supported by the case law. We have held vague or ambiguous questions posed by an employer are insufficient to establish misrepresentation and reliance.

¹ Don Watson. *Watson’s Dictionary of Weasel Words, Contemporary Cliches, Cant & Management Jargon*. (Knopf. 1st ed. 2004.)

² <https://twitter.com/guardianstyle/status/96267011545509888>.

Gould v. Shoreline Contractors, Inc., VWC File No. 199-33-38 (Dec. 13, 2000) (question about prior ailments “that might have an effect on specific job assignments” was qualified and claimant did not misrepresent history); Russell v. Tidewater Equip. Corp., VWC File No. 166-15-10 (Dec. 7, 1994) (employer’s inquiries of whether claimant knew and was able to perform job-related functions required as a shipfitter called for a subjective determination and were insufficient to establish misrepresentation); Osborne v. Riverside Park Apartments, VWC File No. 156-67-32 (June 10, 1993) (Question which asked “Do you have any physical limitation . . .” was subjective and interpreted as meaning at present time was insufficient to prove misrepresentation by claimant with history of back surgery); Schaffer v. Va. Capes Seafood, Inc., VWC File No. 121-96-01 (July 31, 1986) (Question of, “Do you have any physical condition which may limit your ability to perform the job applied for?” was not sufficient to constitute basis for reliance by employer on a positive statement by claimant that he had no physical infirmities).

Because the Employer’s Health History form was ambiguous regarding the present or previous history of an “ongoing” condition of “back problems,” it was insufficient to meet the employer’s burden of proving misrepresentation and reliance.³

³ While the Virginia Supreme Court has held that an employer must prove it relied upon the misrepresentation, there is no published appellate decision indicating whether the proof must be by a preponderance or by clear and convincing evidence. Prince William Cnty. Serv. Auth. v. Harper, 256 Va. 277, 280, 540 S.E.2d 616, 617 (1998); Falls Church Constr. Co. v. Laidler, 254 Va. 474, 477-78, 493 S.E.2d 521 (1997); McDaniel v. Colonial Mech. Corp., 3 Va. App. 408, 411-12, 350 S.E.2d 225, 227 (1986). In an unpublished opinion, Progressive Driver Services, Inc. v. Talley, No. 0031-03-1 (Va. Ct. App. May 6, 2003), the Court of Appeals stated the employer bore the burden of proving its defense by a preponderance of the evidence. Recognizing that the misrepresentation defense sounds in fraud, some of our decisions imply a heightened standard of proof should apply. Schaffer v. Va. Capes Seafood, Inc., VWC File No. 121-96-01 (July 31, 1986); Yohe v. Harvest Fresh, Inc., VWC File No. 165-00-43 (July 6, 1994); Zook v Malone & Hyde, Inc., VWC Claim No. 584-555 (May 17, 1979). Because employer’s proof was deficient under either a preponderance or heightened standard, it is not necessary to decide this question.

The employer's evidence did not prove detrimental reliance on any purported misrepresentation. The testimony of Marvin Henry did not prove the employer relied to its detriment on any misrepresentation of the claimant.

Mr. Henry is the assistant human resource director at The Virginian. He was employed there since February 2012. The alleged misrepresentation of the claimant occurred on October 1, 2008, three years and four months earlier. Henry could not credibly testify about what decisions the employer would or would not have made in 2008, absent a policy, procedure, second-hand knowledge, or other testimony. There is no evidence in the record which established that Henry knew what the employer's hiring or employee screening procedures were in 2008. The employer could have, but did not, offer evidence regarding its practices at that time. Absent this foundation, Henry's testimony is insufficient as a matter of law to support the conclusion adopted by the majority. Centreville Auto., MSS v. Vanover, No. 1439-94-4 (Va. Ct. App. Feb. 28, 1995) (affirming Commission's finding that employer did not prove reliance on misrepresentation of medical condition based on testimony that it "probably" would not have hired claimant if it had known of claimant's seizures); Bailess v. Yeatts Transfer Co., VWC File No. 197-71-33 (Dec. 6, 2000) ("We also note that the employer presented no evidence at the hearing that it relied upon the allegedly false representation made by the claimant In its written statement, the employer states only that '[Employer] clearly relied upon the misrepresentation' No evidence supports this assertion. Accordingly, even if the claimant did misrepresent his physical and medical ability to perform the job as a truck driver, the employer's defense would fail for lack of proof."); Ezell v. Dixie Container Corp., VWC File No. 165-70-89

(Nov. 4, 1994) (rejecting misrepresentation defense where no evidence that employer would not have hired the claimant had it known of prior back injuries).

The lack of this critical foundation becomes clearer when Henry's testimony is analyzed. It is inconsistent. When he was asked the first time, Henry did not testify that if the claimant had checked, "Yes" on the Employee Health History form regarding ongoing back problems she would not have been hired. He said, "It would have caused us to look deeper or question what the ongoing back problems were and we probably would have elaborated more . . ." (Tr. 17.) This evidence was insufficient to prove detrimental reliance by the employer on any misrepresentation of the claimant.

In Progressive Driver Services, Inc. v. Talley, No. 0031-03-1 (Va. Ct. App. May 6, 2003), the Court of Appeals considered similar evidence. Weighing vague testimony from the employer's supervisor, the Court of Appeals held:

Here, no evidence established that employer relied upon claimant's misrepresentations. Schuster's deposition testimony that the application was a "tool in the hiring process" and provided "an opportunity for further investigation" did not prove that employer relied upon claimant's misrepresentations. Based upon this record, we cannot find as a matter of law that employer's evidence sustained its burden of proof.

Id.

The testimony in Talley parallels Henry's testimony in this case. Henry's suggestion that a different response on the Employee Health History form would have caused the employer to, "look deeper or question" the claimant was insufficient as a matter of law to prove detrimental reliance.

After he was presented with a series of leading questions from counsel, Henry changed his prior answer. He stated, “No” that the employer would not have hired the claimant if it had known of, “any” of the claimant’s pre-existing back problems. (Tr. 20.) From the leading nature of the questions which precipitated this, the previous answer which contradicted it, the absence of any explanation for this important difference, and **no** evidence that Henry knew what the employer would have done in 2008, the employer failed to meet its burden of proof. See Speer v. Riverside Reg’l Med. Ctr., VWC File No. 237-64-96 (Mar. 16, 2009) (employer did not follow its own rules in learning whether prior work injury would affect claimant’s ability to perform job and therefore employer did not meet burden of proving reliance to bar claim). The employer can rise no higher than its own evidence. Massie v. Firmstone, 134 Va. 450, 114 S.E. 652 (1922).

Henry’s testimony further was undermined by his testimony about the claimant’s restrictions. Speaking in the present tense, presumably about what the employer does now, Henry said if an employee was “cleared for 4 hours,” he would not permit them to work unless they had a, “full medical release from a doctor saying that you are able to come back to work with no restrictions, no limitations.” He offered no explanation for the fact that the claimant was hired at a job limited to four hour shifts.

Because Henry’s testimony was inherently incredible due to the lack of a necessary foundation and internal inconsistencies, the employer did not meet its burden of proving it relied to its detriment on a material misrepresentation made by the claimant. The Deputy Commissioner’s decision should be reversed and remanded for a determination of the additional issues.

APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.