IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Standard Steel, LLC and State Workers' Insurance Fund, Petitioners	:	No. 1190 C.D. 2010
v.	:	Submitted: September 24, 2010
Workers' Compensation Appeal Board (Stuter), Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: February 1, 2011

Standard Steel, LLC and the State Workers' Insurance Fund (collectively, Employer) petition for review of the May 19, 2010, order of the Workers' Compensation Appeal Board (Board), which affirmed the decision of a workers' compensation judge (WCJ) granting Ronald A. Stuter's (Claimant) petition to reinstate/review compensation benefits.[1] We affirm.

Claimant worked for Employer as a shift supervisor. On January 26, 2005, Claimant crouched down to position a pipe under a railroad car. When Claimant stood up and turned to walk away, he experienced a severe burning sensation in the middle of his right knee. Thereafter, Claimant was diagnosed with a

[1] Claimant also filed a penalty petition, which was granted by the WCJ. However, that petition is not at issue in this appeal.

torn right medial meniscus and underwent arthroscopic surgery to treat that condition. Arthritis was also discovered in Claimant's right knee.

On or about June 12, 2006, Claimant filed a claim petition, alleging that he sustained a work-related injury in the nature of a torn medial meniscus with the aggravation of pre-existing arthritis in his right knee on January 26, 2005. (Decision of WCJ Mullen, Procedural Record, at 1.) The claim petition, which was assigned to WCJ Mullen for adjudication, was for medical benefits only, and the parties submitted medical reports in support of their positions. On June 27, 2007, WCJ Mullen circulated a decision granting in part and denying in part the claim petition. WCJ Mullen found as fact that Claimant sustained a work injury in the nature of a torn medial meniscus of the right knee on January 26, 2005; however, she also found that Claimant failed to establish that he suffered a work-related aggravation of pre-existing arthritis. (Decision of WCJ Mullen, Finding of Fact No. 19; Conclusion of Law No. 3.) WCJ Mullen's decision was based on the following analysis of the opinion of Edwin J. Rogusky, M.D., Claimant's treating physician:

> With regard to the allegation of an aggravation of a pre-existing condition in the nature of osteoarthritis within the right knee, Claimant bears the burden of proving unequivocally that there is a causal relationship. Such evidence has not been presented in my estimation. Dr. Rogusky sets forth an opinion in his report that as a result of the removal of meniscus tissue, there are increased contact in the knee that can cause some increased forces across the joint. Dr. Rogusky uses equivocal language such as can, potential and eventually. *He is talking into the future when he says '…there will be anticipated increased forces across his knee. I believe this arthritic condition will be accelerated and that he will come to a knee replacement sooner because of this tear*.' These opinions are based on future findings plus the fact that words such as 'can' and 'potential' as well as 'will be accelerated' are not legally

> sufficient to meet the burden of establishing the alleged injury at this point in time.

(Decision of WCJ Mullen, Finding of Fact No. 18.) (Emphasis added.) WCJ Mullen also stated that

> Dr. Rogusky's opinion is couched in equivocal terms and deals mainly with future potential situations. *Dr. Rogusky's opinion would be better served in the future to address the condition at that time*.

(Decision of WCJ Mullen, Finding of Fact No. 19.) (Emphasis added.) Claimant appealed WCJ Mullen's decision to the Board challenging the reasonableness of Employer's contest, but raised no issue regarding the denial of his aggravation claim.

On or about September 4, 2007, Claimant filed a petition to reinstate/review compensation benefits, seeking to have the description of his work injury expanded to include an aggravation of osteoarthritis necessitating a total knee replacement. (Reproduced Record (R.R.) at 132a.) Although the matter initially was assigned to WCJ Mullen for adjudication, she retired during the course of the proceedings, and the case ultimately was reassigned to WCJ Koll.

In support of his reinstatement/review petition, Claimant testified that he continued under the care of Dr. Rogusky, who performed a total knee replacement on April 17, 2007. (R.R. at 46a-48a.) Claimant testified that he took arthritis medication prior to his work injury but that he never had any problem with his knees before January of 2005. (R.R. at 55a.) Even though he lost approximately four weeks of work, Claimant explained that he had no wage loss because he continued to be paid through a salary continuation plan. (R.R. at 49a.)

Claimant also submitted the August 21, 2007, report of Dr. Rogusky, who opined that Claimant's torn meniscus and meniscectomy aggravated Claimant's pre-existing arthritis. (R.R. at 68a.) Dr. Rogusky stated that Claimant's symptoms persisted following surgery to repair the torn meniscus and that Claimant developed progressive osteoarthritis in his knee. Dr. Rogusky stated that conservative management failed and Claimant was required to undergo knee replacement surgery.

Employer submitted the September 19, 2006, report of David R. Cooper, M.D., who opined that Claimant sustained a work injury in the nature of sprain to the right knee with meniscal tearing.[2] (R.R. at 16a.) Dr. Cooper stated that Claimant has pre-existing degenerative changes in his knee, but he concluded that those changes were not caused, exacerbated, or aggravated by the work injury.

Furthermore, Employer argued that Claimant's petition was barred by the doctrine of *res judicata* because WCJ Mullen determined in her June 27, 2007, decision that Claimant failed to prove that he sustained a work-related aggravation of his arthritic condition.

After reviewing the evidence, WCJ Koll found the testimony of Claimant and the opinions of Dr. Rogusky to be credible and persuasive. WCJ Koll rejected Dr. Cooper's opinions as not credible. Moreover, the WCJ rejected Employer's *res judicata* argument:

> …[I]t is found and concluded that whereas Judge Mullen determined that [Claimant] had not met his Burden of proving that the work injury resulted in an aggravation of his pre-existing degenerative arthritic condition, at that point in time, her Decision also includes explanatory

[2] Employer submitted the same medical report in the litigation before WCJ Mullen and WCJ Koll.

> language, presently found to have left open the possibility of further review in the future of the work-related status of any knee replacement and aggravation of degenerative arthritis. Judge Mullen repeatedly notes in her findings that the denial of the additional description of the injury was at 'this point in time' and that Dr. Rogusky's opinion with respect to possible future findings would be preserved better in the future to address the condition at that time.

(WCJ Koll's Decision, Conclusion of Law No. 3.) Therefore, WCJ Koll granted Claimant's petition and amended the description of the injury to include aggravation of degenerative arthritis of the right knee, resulting in a total knee replacement. Employer appealed to the Board, which affirmed WCJ Koll's decision.

On appeal to this Court,[3] Employer contends that WCJ Koll erred by failing to apply the doctrine of *res judicata* to bar Claimant's second petition regarding the aggravation injury. Employer argues that the parties litigated Claimant's aggravation claim before WCJ Mullen, who resolved it against Claimant, and that all of the elements of *res judicata* and collateral estoppel are established here. We disagree.

The doctrine of *res judicata* is cogently summarized as follows:

> The doctrine of res judicata encompasses two related, yet distinct, principles: technical res judicata and collateral estoppel. PMA Insurance Group v. Workmen's Compensation Appeal Board (Kelley), 665 A.2d 538 (Pa. Cmwlth. 1995). Technical res judicata, the principle applicable in the instant case, provides that when a final judgment on the merits exists, a future suit between the

[3] Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether the necessary findings of fact are supported by substantial evidence. McKenna v. Workers' Compensation Appeal Board (SSM Industries), 4 A.3d 211 (Pa. Cmwlth. 2010).

> parties on the same cause of action is precluded. Id. Collateral estoppel, on the other hand, acts to foreclose litigation in a later action of issues of law or fact that were actually litigated and necessary to a previous final judgment. Id.
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> Technical res judicata applies when the following four factors are present: (1) identity in the thing sued upon or for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality or capacity of the parties suing or sued. Patel v. Workmen's Compensation Appeal Board (Sauquoit Fibers Co.), 88 Pa. Commw. 76, 488 A.2d 1177 (Pa. Cmwlth. 1985). This doctrine applies to claims that were actually litigated as well as those matters that should have been litigated. Id. Generally, causes of action are identical when the subject matter and the ultimate issues are the same in both the old and the new proceedings. Hebden v. Workmen's Compensation Appeal Board (Bethenergy Mines), 142 Pa. Commw. 176, 597 A.2d 182 (Pa. Cmwlth. 1991), reversed on other grounds, 534 Pa. 327, 632 A.2d 1302 (1993).

Maranc v. Workers' Compensation Appeal Board (Bienenfeld), 751 A.2d 1196, 1199 (Pa. Cmwlth. 2000). Furthermore, under the doctrine of collateral estoppel, a party is foreclosed from re-litigating an issue of law or fact in subsequent workers' compensation proceedings when the following factors are demonstrated: (1) the legal or factual issues are identical; (2) they were actually litigated; (3) they were essential to the judgment; and (4) they were material to the adjudication. Farner v. Workers' Compensation Appeal Board (Rockwell International), 869 A.2d 1075 (Pa. Cmwlth. 2005).

Here, WCJ Mullen recognized in her decision that Claimant's aggravation claim was premature and that future litigation might be needed to resolve the issue. WCJ Mullen stated in her decision that Claimant's evidence was not

sufficient to meet his burden of establishing that the alleged injury existed at that "point in time" and that Claimant's medical evidence "would be better served in the future to address the condition at that time." These statements reflect that WCJ Mullen did not intend her decision to be the final word on Claimant's aggravation injury, but rather anticipated further review at a later time if and when Claimant's aggravation injury manifested and the issue ripened.

Moreover, the record shows that the issues before WCJ Mullen and WCJ Koll were not identical in that Claimant's physical condition had significantly changed after the medical evidence was submitted to WCJ Mullen.

The issue in the claim petition proceeding before WCJ Mullen was whether Claimant sustained a torn meniscus and an aggravation of arthritis in his right knee on January 25, 2005. (Decision of WCJ Mullen at 1.) Claimant and Employer submitted medical reports dated January 9, 2007, and September 19, 2006, respectively. Because he drafted his report months before Claimant's total knee replacement surgery, Dr. Rogusky could only predict that Claimant's arthritic condition would accelerate and eventually result in a knee replacement.

In contrast, in the reinstatement/review petition proceedings before WCJ Koll, the issue was whether, as of August 30, 2007, the description of Claimant's knee injury should be expanded to include the aggravation of the arthritic condition that caused him to undergo total knee replacement surgery. (R.R. at 132a.) Claimant submitted new medical evidence in support of his petition---Dr. Rogusky's August 2007 report---in which Dr. Rogusky opines that Claimant underwent total knee replacement surgery due to a work-related aggravation of his arthritis in his right knee. Dr. Rogusky's report states that Claimant's right knee arthritis condition had,

in fact, grown progressively worse following the medial meniscus surgery and that this accelerated the need for total knee replacement surgery. (R.R. at 68a.)

In light of the foregoing, we conclude that the Claimant's petition to reinstate/review compensation benefits was not barred by *res judicata* or collateral estoppel. See Temple University Hospital v. Workers' Compensation Appeal Board (Sinnott), 866 A.2d 489 (Pa. Cmwlth. 2005)[4] ; see also C.D.G., Inc. v. Workers' Compensation Appeal Board (McAllister), 702 A.2d 873 (Pa. Cmwlth. 1997).[5]

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[4] In Temple University Hospital the employer filed a termination petition alleging that the claimant had fully recovered from his injury as of August 24, 2000. The WCJ denied the petition. On appeal, employer argued that WCJ's findings conflicted with a 1995 adjudication and were thus barred by the doctrines of *res judicata* and/or collateral estoppel. We disagreed, concluding that *res judicata* and/or collateral estoppel were inapplicable because the proceedings involved the condition of the claimant as of different dates. The issues raised in the employer's termination petition concerned claimant's condition as of August 24, 2000, and thus were different from the issues decided in 1995, which related to the claimant's condition as of January 16, 1992.

[5] In C.D.G., Inc., while determining whether the claimant was precluded by the doctrine of collateral estoppel from relitigating the reasonableness and necessity of medical treatment in a utilization review matter, we cogently observed:

> [I]in other situations where a party has filed a subsequent petition, we have held that there has to be more than the mere passage of time for collateral estoppel not to apply. *A party seeking to alter benefits must prove that there has been a change in physical condition since the last legal proceeding addressing the nature and extent of the injury*. For example, when a claimant seeks reinstatement of benefits after termination, the claimant is required to establish by precise and credible evidence that the disability has increased or recurred and must show that his physical condition has actually changed in some manner.

702 A.2d at 876 (emphasis added) (citations omitted).

Accordingly, we affirm.

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PATRICIA A. McCULLOUGH, Judge

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ORDER

AND NOW, this 1st day of February, 2011, the May 19, 2010, order of the Workers' Compensation Appeal Board is hereby AFFIRMED.

PATRICIA A. McCULLOUGH, Judge