

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Michael Reed, | : | |
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| Petitioner | : | |
| | : | |
| v. | : | No. 1399 C.D. 2010 |
| | : | Submitted: November 5, 2010 |
| Workers' Compensation Appeal | : | |
| Board (Wilbur White Coal Co.), | : | |
| | : | |
| Respondent | : | |
| | : | |

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: December 7, 2010

Michael Reed (Claimant) petitions for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of a Workers' Compensation Judge (WCJ) disposing of multiple petitions and declining to award litigation costs. We affirm.

Claimant sustained injuries in the course and scope of his employment on December 18, 2006. Wilbur White Coal Co. (Employer) issued a Notice of Temporary Compensation Payable that later converted into a Notice of Compensation Payable (NCP). Employer acknowledged injuries to Claimant's left shoulder, left knee, chest, and back. The NCP indicated Claimant's average weekly wage (AWW) was \$640.00.

Employer filed a Termination Petition alleging Claimant was fully recovered from his work-related injury as of September 5, 2007. It subsequently filed a Modification/Suspension Petition alleging work within Claimant's physical restrictions was generally available. It sought modification of Claimant's benefits as of April 7, 2008.¹ Claimant filed a Review Petition alleging his injury description was materially incorrect and that the NCP should be amended to include a head injury.² Claimant also filed a Petition to Review Utilization Review Determination (UR Petition) in regard to treatment rendered by John Dolbin, D.C.

In a decision dated April 29, 2009, the WCJ denied Claimant's Review and UR Petitions as well as Employer's Modification/Suspension Petition. The WCJ granted Employer's Termination Petition and found Claimant fully recovered as of September 5, 2007. The WCJ declined to award litigation costs. The Board affirmed. This appeal followed.³

Claimant's sole argument on appeal is that the WCJ erred in failing to award litigation costs. According to Claimant, the WCJ denied

¹ In support of its Modification/Suspension Petition, Employer submitted the testimony of Michael Smychynsky, a certified rehabilitation counselor. He testified that he completed a labor market survey dated April 7, 2008 and found multiple positions within Claimant's geographical area that Claimant was capable of performing.

² Claimant later filed a Petition alleging his AWW was incorrectly calculated. The parties resolved this matter by stipulation approved by the WCJ in November of 2008.

³ Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated. Young v. Workers' Compensation Appeal Board (LGB Mechanical), 976 A.2d 627 (Pa. Cmwlth. 2009).

Employer's Modification/Suspension Petition. He contends that he prevailed, in part, below and that an award of litigation costs is warranted.

Section 440(a) of the Pennsylvania Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §996(a), provides that if an employer contests liability it will be liable for the claimant's costs, including counsel fees, if the matter is resolved in whole or in part in the claimant's favor. An award of litigation costs is warranted when a claimant is successfully able to achieve financial benefit for himself through litigation. Watson v. Workers' Compensation Appeal Board (Special People in Northeast), 949 A.2d 949 (Pa. Cmwlth. 2008). See also Minicozzi v. Workers' Compensation Appeal Board (Indus. Metal Plating, Inc.), 873 A.2d 25 (Pa. Cmwlth. 2005). When a perceived "victory" has no actual impact on a claimant, litigation cost will not be recoverable. See Bentley v. Workers' Compensation Appeal Board (Pittsburgh Bd. of Educ.), 987 A.2d 1223 (Pa. Cmwlth. 2009)(holding that when the Board corrected a technical error and changed the effective date of a modification of benefits to conform to the evidence, the claimant was not entitled to litigation costs when there was no actual dispute before the WCJ as to the date of availability of the jobs contained in a labor market survey and the claimant continued to receive total disability through the date of decision).

Claimant is not entitled to costs in this instance. Employer sought to modify or suspend his benefits as of April 7, 2008. It sought relief based in part on the testimony of its vocational expert and the labor market survey. Employer, in the alternative, sought termination of benefits. The WCJ granted Employer's Termination Petition and found Claimant fully

recovered from his work-related injuries as of September 5, 2007. The WCJ found any physical impairment attributable to Claimant's employment ceased to exist seven months before Employer claimed entitlement to modification of benefits. Although the WCJ denied Employer's Modification/Suspension Petition, he just as easily could have declined to address the Petition by finding it moot.

Although litigation costs are recoverable when a claimant succeeds in part in litigation consistent with Section 440(a) of the Act, Claimant's supposed victory in this proceeding had no impact on him. Claimant received no financial benefit from prevailing on the Modification/Suspension Petition. Consequently, litigation costs are not recoverable in this instance. Watson; Minicozzi; Bentley. We see no error in the Board's determination to affirm the WCJ's denial of costs in this matter.

JIM FLAHERTY, Senior Judge

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ORDER

AND NOW, this 7th day of December, 2010, the order of the
Workers' Compensation Appeal Board is AFFIRMED.

JIM FLAHERTY, Senior Judge