IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Charles Greskoff, Petitioner	:	
v.	:	No. 1560 C.D. 2010
	:	SUBMITTED: November 19, 2010
Workers' Compensation Appeal Board (Gordon Group Electric), Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge[1]

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED: February 24, 2011**

Claimant Charles Greskoff petitions for review of the order of the Workers' Compensation Appeal Board (Board) that affirmed the order of the Workers' Compensation Judge (WCJ) dismissing Greskoff's Petition to Review Compensation Benefits and Petition to Reinstate Compensation. For the reasons that follow, we reverse.

In 2005, Greskoff suffered a work-related injury to his left great toe and began receiving benefits. In 2006, Greskoff filed a Modification Petition accompanied by a joint stipulation with Gordon Group Electric (Employer). The

[1] This case was decided before Judge Flaherty's retirement on December 31, 2010.

stipulation stated that the injury to Greskoff's toe had required amputation, and that Greskoff was therefore entitled to 52 weeks of specific loss benefits. It further stated that "Claimant suffers no injury separate and distinct from the specific loss. The full extent of Claimant's work-related injury of April 20, 2005, is the aforementioned specific loss of the left great toe." Reproduced Record at 4a. The WCJ, in an opinion incorporating the stipulation, granted the requested benefits.

In May 2008, Greskoff filed the Review and Reinstatement Petition at issue in this case. In this petition, he alleged that, as a result of his work injury but separate and distinct from the loss of the toe, in February 2008, he suffered an ulceration at the bottom of his left foot, in which a bone pushed through the bottom of his foot. Greskoff alleged that this ulceration required surgery and disabled him. At the hearing, Employer moved to dismiss the petition on the grounds that it was precluded by the 2005 stipulation. The WCJ granted the motion to dismiss, and the Board affirmed, holding that judicial estoppel precluded Greskoff from alleging any further injury. An appeal to this court followed.

This court has previously articulated the doctrine of judicial estoppel:

> As a general rule, a party to an action is judicially estopped from assuming a position inconsistent with his or her assertion in a previous action, if his or her contention was successfully maintained. *Trowbridge v. Scranton Artificial Limb Company*, 560 Pa. 640, 747 A.2d 862, 864 (2000); *Associated Hospital Service of Philadelphia v. Pustilnik*, 497 Pa. 221, 439 A.2d 1149, 1151 (1981). The purpose of judicial estoppel is to uphold the integrity of the courts by preventing litigants from 'playing fast and loose' with the judicial system by changing positions to suit their legal needs. *Trowbridge*; *Gross v. City of Pittsburgh*, 686 A.2d 864, 867 (Pa. Cmwlth. 1996). Judicial estoppel is unlike collateral estoppel or res judicata, in that it depends on the relationship of a party to one or more tribunals, rather

> than on relationships between parties. *Sunbeam Corp. v. Liberty Mutual Insurance Co.*, 566 Pa. 494, 781 A.2d 1189 (2001).

Wallace v. Workers' Comp. Appeal Bd. (Bethlehem Steel/Pa. Steel Tech.), 854 A.2d 613, 618 (Pa. Cmwlth. 2004). Our Supreme Court has made clear that in order to apply judicial estoppel, we must answer both the following questions in the affirmative: (1) did Greskoff assume an inconsistent position in the petition at issue in this case, when he previously stipulated that he "suffers no injury separate and distinct from the specific loss;" and (2) was his previous contention successfully maintained? *See In re Adoption of S.A.J.*, 575 Pa. 624, 838 A.2d 616 (2003).

Generally, courts have found positions to be inconsistent when a party directly contradicts a prior assertion. In *Adoption of S.A.J.*, for example, estoppel was enforced when the punitive father first denied and then asserted paternity. In that case, our Supreme Court, quoting the Supreme Court of the United States, gave additional simple examples of inconsistent positions: "'[t]he light was red/green' or 'I can/cannot raise my arm above my head'" *Id.* at 634-35, 838 A.2d at 622 [quoting *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999)]. This court has found estoppel in the workers' compensation context when an employer made a stipulation, which was later incorporated into a WCJ order, that it was obligated to make certain payments, and then, after failing to make the payments, argued that the WCJ lacked jurisdiction to enforce the order. *Dep't of Public Welfare v. Workers' Comp. Appeal Bd. (Overton)*, 783 A.2d 358 (Pa. Cmwlth. 2001).

The assertions made by Greskoff in petition at issue in this case are not inconsistent with the prior stipulation. Greskoff simply alleges that his medical condition has changed over time. Greskoff's position is that the stipulation was

entirely accurate at the time it was made, but that his medical circumstances have changed, entitling him to additional benefits. That Greskoff does not challenge the accuracy of his prior statement at the time it was made distinguishes this case from *S.A.J.* and *Overton*. Quite simply, Greskoff does not appear to be "'playing fast and loose' with the judicial system," rather, he merely makes the contention, routinely made by workers' compensation claimants, that additional injuries have now resulted from the original harm.[2] This is the proper subject of a review petition under Section 413(a) of the Workers' Compensation Act,[3] 77 P.S. § 772. He clearly has a right to attempt to prove that this subsequent medical condition arises from his work-related injury. However, since it is a new condition which has not been adjudicated to be work-related, reinstatement would be an inappropriate remedy.

For the foregoing reasons, the Board erred in finding that judicial estoppel applies to this case. Therefore, we reverse and remand for further proceedings.

BONNIE BRIGANCE LEADBETTER,
President Judge

[2] The stipulation in this case was unlike a Compromise and Release Agreement, in which the two sides bargain and reach an agreement as to the level of compensation (and may specifically waive unknown future rights in exchange for present benefits). In this case, the parties merely stipulated to undisputed facts, and the WCJ ordered specific loss benefits as mandated by the Act. These facts, if found by litigation rather than stipulation, would have had no preclusive effect, as, unlike the collateral estoppel which normally applies to final adjudications, in workers' compensation either party is entitled to petition for a modification of benefits based on changed circumstances. *See Carmen Paliotta Gen. Constr. v. Workers' Comp. Appeal Bd. (Tribuzio)*, 528 A.2d 274 (Pa. Cmwlth. 1987). We see no reason why that core principle of the workers' compensation scheme should not apply simply because the facts were stipulated.

[3] Act of June 2, 1915, P.L. 736, *as amended*.

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O R D E R

AND NOW, this 24th day of February 2011, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby REVERSED, and the case is hereby REMANDED for proceedings consistent with this opinion.

Jurisdiction relinquished.

BONNIE BRIGANCE LEADBETTER,
President Judge