IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dominic Marian, Petitioner	:	
v.	:	No. 1616 C.D. 2009
	:	Submitted: December 24, 2009
Workers' Compensation Appeal Board (Scott Township), Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: February 24, 2010**

In this third related appeal, Dominic Marian (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) affirming the termination of his disability benefits on the basis he fully recovered from his recognized work injury, a low back strain. Claimant contends the Workers' Compensation Judge (WCJ) erred in holding a prior decision precluded a finding that Claimant's lumbar fusion surgery and resulting disability were not compensable. Claimant further contends Scott Township (Employer) is collaterally estopped from asserting he fully recovered from his work injury because it took a contrary position in concurrent proceedings under the Heart and Lung Act (HLA).[1] Additionally, Claimant contends Employer's medical expert's testimony is insufficient to support a termination. Upon review, we affirm.

[1] Act of June 28, 1935, P.L. 477, as amended, 53 P.S. §§637-38 (commonly known as the Heart and Lung Act).

I. Background

Claimant worked for Employer for approximately 20 years as a police officer. In February, 2005, Claimant sustained a work-related back injury when he slipped on ice in Employer's parking lot and twisted his lower back. Employer issued a notice of compensation payable (NCP) granting Claimant workers' compensation benefits for an injury described as a "low back strain." In addition, Employer paid Claimant HLA benefits.[2]

In October, 2005, Claimant filed a review petition seeking to expand the NCP's description of injury to include three annular tears of his lumbar discs. In January, 2006, Claimant's surgeon, Dr. Thomas J. Kramer (Surgeon), performed fusion surgery at L3-L5 to repair the annular tears.

In support of his review petition, Claimant submitted Surgeon's deposition testimony. Surgeon testified Claimant's work injury caused or aggravated the annular tears. Surgeon intended the fusion surgery to stabilize Claimant's spine so the annular tears would no longer be symptomatic. However, Surgeon opined Claimant would never be able to return to his police officer duties.

Employer submitted deposition testimony from John B. Tucker (Employer's Physician), an orthopedic surgeon. Employer's Physician diagnosed Claimant's work injury as a lumbar strain/sprain without any specific structural

[2] Pursuant to Section 1a of the HLA, certain types of employees, including township police officers, who are temporarily incapacitated from performing their duties due to a work-related injury, are entitled to receive their full salary until the disability resolves. 53 P.S. §637(a). The injured employee must turn over any workers' compensation benefits received to employer. Id.

derangement. He did not believe Claimant's annular pathology was caused or aggravated by the work injury. Rather, Employer's Physician opined Claimant's annular pathology was degenerative. He further opined Claimant's fusion surgery treated his degenerative disc disease, not his work-related strain/sprain.

In June, 2007, WCJ Charles Lawton (First WCJ) circulated a decision and order denying Claimant's review petition. First WCJ credited Employer's Physician's testimony in its entirety and rejected Surgeon's testimony. He concluded Claimant failed to prove his annular tears, or the surgery to repair them, were related to the February, 2005 work injury. The Board affirmed. Claimant appealed, and this Court affirmed. See Marian v. Workers' Comp. Appeal Bd. (Scott Twp.), (Pa. Cmwlth., No. 1398 C.D. 2008, filed April 8, 2009) (Simpson, J.) (Marian-Review Petition).

Meanwhile, in October, 2006, Employer notified Claimant it no longer believed he was "temporarily incapacitated" for purposes of continued HLA benefits. Based on a February, 2006 report from Surgeon, and a concurring opinion of another physician, Employer took the position Claimant will never be able to return to work as a police officer. Therefore, Employer terminated Claimant's HLA benefits effective November, 2006. In July, 2007, an HLA hearing examiner, based in part on Surgeon's opinions, found Claimant no longer entitled to HLA benefits because Employer established his disability is no longer temporary.

Shortly thereafter, Claimant filed a timely petition for rehearing under Section 426 of the Workers' Compensation Act (Act)[3] advancing a collateral estoppel argument based on the HLA decision. Relying on Kohut v. Workmen's Compensation Appeal Board (Township of Forward), 621 A.2d 1101 (Pa. Cmwlth. 1993), Claimant asserted Employer was precluded from asserting in the workers' compensation proceeding that Claimant's injury was not work related while, at the same time, maintaining in the HLA proceeding that Claimant was permanently disabled. In response, Employer argued the HLA hearing examiner did not find Claimant permanently disabled as a result of his work-related low back strain. Ultimately, the Board denied Claimant's petition for rehearing. On appeal, we affirmed. See Marian v. Workers' Comp. Appeal Bd. (Scott Twp.), (Pa. Cmwlth., No. 2028 C.D. 2008, filed April 8, 2009) (Simpson, J.) (Marian-Rehearing).

Also, in the interim, Employer filed a termination petition alleging Claimant fully recovered as of Employer's Physician's November, 2007 examination. Claimant filed an answer denying Employer's allegations. The termination petition was assigned to WCJ Eric Jones (Second WCJ).

Employer again submitted testimony from its Physician. He testified Claimant's low back strain/sprain resolved either by the time of the January, 2006 surgery or as of the date of the surgery. He further opined Claimant's current symptoms (centrally located low back pain) were consistent with recovery from fusion surgery. Employer's Physician would not impose any limitations as a result

[3] Act of June 15, 1915, P.L. 736, as amended, 77 P.S. §871.

of Claimant's February, 2005 work injury. However, he would restrict Claimant to light duty work while he continued to recover from the fusion surgery.

Surgeon confirmed he still treated Claimant in 2008. He acknowledged chronic sprains are rare and the average healing time for a moderate to severe sprain would be a few months. He opined Claimant sustained a sprain/strain of his lumbar spine as a result of the February, 2005 slip and twist; that incident also aggravated a pre-existing lumbar condition including annular tearing at the L3-4 and L4-5 levels. However, Surgeon acknowledged he did not diagnose a lumbar sprain or strain until February, 2008.

Surgeon opined his 2006 lumbar fusion surgery would stabilize the spine so Claimant's annular tears were no longer symptomatic. Stabilizing the spine also allows sprains and strains to resolve. Nonetheless, Surgeon opined Claimant's complaints of back pain were reduced, but not eliminated.

Surgeon also testified that in October, 2007, Claimant sustained a lumbar strain and severe neck pain as a result of an automobile accident. As of January, 2008, Claimant still had lumbar and cervical complaints. Surgeon opined Claimant's 2005 low back strain still contributed to his pain. However, Surgeon could not determine how much pain emanated from the sprain injury versus the degenerative disc condition. Surgeon opined the 2005 low back strain, the 2006 surgery and the 2007 auto accident all contributed to Claimant's low back strain injury.

In a decision and order circulated in July, 2008, Second WCJ made the following critical findings (with emphasis added):

10. **Resolution of the conflict of evidence, analysis of the evidence and discussion**. Based on a weighing of all the evidence in the case, I make the following findings of fact, with accompanying discussion:

* * *

b. Claimant's testimony at the December 27, 2007 hearing referred to a January, 2006 spinal fusion surgery. Claimant's testimony was credible that he still was taking pain relief medications as well as muscle relaxant medications. However, as came out at that time, [First WCJ] in a decision dated June 28, 2007, found [C]laimant's annular tears and surgery by [Surgeon] not related to [C]laimant's work injury.

* * *

d. This is another case where [in] the [HLA] determination dated July 27, 2007, [E]mployer proved that [C]laimant had a permanent "disability" within the meaning of the [HLA]. Therefore, that order terminated [HLA] benefits effective January 17, 2007. The hearing examiner relied on a report by [Surgeon] as well as report [by another medical expert]. Finding of fact number 6 by the hearing examiner is that [C]laimant underwent a lumbar fusion and decompression at L3-4 and L4-5 on January 5, 2006. However, the decision of the hearing examiner does not determine whether the need for the lumbar fusion and decompression was work related or not work related or a combination of the two.

* * *

f. Claimant was a very credible witness. I have no doubt that he has low back pain and is limited by that low back pain. There is undoubtedly a certain appearance of unfairness that [E]mployer relied on [C]laimant's low back surgery to defeat [C]laimant's [HLA] benefits, but yet [E]mployer prevailed in the review petition litigated before [First WCJ] based on denying the relationship between [C]laimant's work injury and [C]laimant's low back surgery. As stated previously, I must honor the

decision of [First WCJ] denying the review petition, since it is the law of the case.

* * *

h. Had I been free to choose whether [C]laimant had his January, 2006 surgery as the result of [C]laimant's February 10, 2005 work injury, I find the evidence compelling that [C]laimant had no significant low back problems before his work injury. Therefore, the evidence would have been compelling with [C]laimant as a credible witness that his low back symptoms did not begin until after his work injury. However, [First WCJ's] decision that the surgery was unrelated to [C]laimant's work injury takes away my authority to make that finding of fact.

Therefore, I am left with [Employer's Physician] opining that [C]laimant has recovered from his lumbar strain injury. [Surgeon] obviously believes, as his testimony indicates, that [C]laimant has the annular tears and surgery for the annular tears as the result of [C]laimant's work injury. [Surgeon] continually referred to the rejected opinion that [C]laimant's surgery is related to the work injury. That is a legal collateral attack on [First WCJ's] decision. "[I]t is well-settled that where an expert's opinion is based on an assumption which is contrary to established facts of record, that opinion is worthless." [Williams v. Workers' Comp. Appeal Bd. (Hahnemann Univ. Hosp.), 834 A.2d 679, 684 (Pa. Cmwlth. 2003)].

i. However, since it is … [E]mployer's burden of proof in a termination petition, the mere finding that [Surgeon] disagrees with the legal description of injury does not alone allow … [E]mployer to prevail. [Employer's Physician's] opinion that the pain from the lumbar strain is gone based on a fusion of … [C]laimant's spine is persuasive. That is particularly so when [Surgeon] acknowledged that the stabilizing of [C]laimant's spine by surgery would have the effect of resolving any strain. … [Surgeon] acknowledged that until his February, 2008 report he never referred to a diagnosis of a lumbar strain.

Second WCJ Dec., 07/03/08, at 10-13 (citations omitted). Based on Employer's Physician's opinion that Claimant's work-related low back strain resolved as of November, 2007, Second WCJ granted Employer's termination petition.

On appeal, the Board affirmed. Claimant petitions for review.[4]

II. Issues

Claimant presents three issues for review. Claimant contends Second WCJ erred in holding First WCJ's decision precluded him from finding that Claimant's surgery and resulting disability were not related to his work injury. Claimant further contends that Employer's position in the HLA proceeding, that Claimant is permanently disabled, precluded Employer from asserting in the workers' compensation proceeding that Claimant fully recovered from his work injury. Additionally, Claimant contends Second WCJ erred in finding Employer's Physician's testimony sufficient to support a termination of benefits.

A. Claimant's Surgery

Claimant first contends Second WCJ erred in holding First WCJ's decision precluded him from determining that Claimant's fusion surgery was work related. As noted above, Second WCJ credited Employer's Physician's opinion that Claimant continued to suffer from symptoms consistent with his recovery from fusion surgery.

[4] This Court's review is limited to determining whether the WCJ's findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Minicozzi v. Workers' Comp. Appeal Bd. (Indus. Metal Plating, Inc.), 873 A.2d 25 (Pa. Cmwlth. 2005).

Claimant acknowledges the doctrine of collateral estoppel precludes a party from re-litigating issues previously adjudicated. See Volkswagon of Am., Inc. v. Workers' Comp. Appeal Bd. (Bennett), 858 A.2d 151 (Pa. Cmwlth. 2004) (prior determination that claimant's absent Achilles reflex and left leg atrophy were work related precluded employer from proving they were caused by non-work related factors).

Here, Claimant asserts, in Marian-Review Petition he sought to expand the NCP to include annular tears; he did not allege his surgery was work related. Therefore, the litigation focused on whether Claimant had additional work injuries, not whether Claimant fully recovered from his accepted work injury. In addition, Surgeon did not opine whether Claimant's fusion surgery also treated his accepted work injury. Conversely, in the present litigation, Surgeon explained the fusion surgery not only treated Claimant's annular tears, but stabilized the spine in such a manner as to relieve Claimant's strain. Therefore, Claimant maintains, First WCJ's decision in the review petition did not preclude Second WCJ from determining that Claimant's surgery and resulting disability were work related.

We disagree. "Collateral estoppel acts to foreclose litigation in a later action of issues of law or fact that were actually litigated; were essential to the judgment; and material to the judgment." Williams v. Workers' Comp. Appeal Bd. (South Hills Health Sys.), 877 A.2d 531, 535 (Pa. Cmwlth. 2005). "[W]here particular questions of fact essential to the judgment are actually litigated and determined by a final valid judgment, the determination is conclusive between the parties in any subsequent action on a different cause of action." Id. (quoting Patel v. Workmen's Comp. Appeal Bd. (Sauquoit Fibers Co.), 488 A.2d 1177, 1179 (Pa. Cmwlth. 1985)).

Here, in denying Claimant's review petition, First WCJ accepted Employer's Physician's testimony in its entirety and rejected Surgeon's testimony as not credible. First WCJ's Dec., 06/28/07, at 10, Finding of Fact (F.F.) No. 11. First WCJ specifically found Claimant's annular tears were not related to his February, 2005 work injury. Id. at F.F. No. 12; Conclusion of Law No. 1. Employer's Physician opined Claimant's fusion surgery treated his degenerative disc disease and was not related to the work injury. Id. at F.F. No. 7j.

In his decision, Second WCJ determined First WCJ's decision that Claimant's surgery was unrelated to his work injury took away his authority to make that finding of fact. See Second WCJ's Dec., 07/03/08, at 12, F.F. No. 10h. We agree. First WCJ's findings (that Claimant's annular tears, and the surgery to treat them, were not work related) were material and essential to the denial of the review petition. These factual and legal issues were litigated before First WCJ, who held in favor of Employer. As a result, we hold Claimant is collaterally estopped from re-litigating these issues in the current termination proceeding. Williams.

B. HLA Decision

Citing Kohut, Claimant contends Second WCJ erred in determining the 2007 HLA decision finding Claimant permanently disabled did not preclude a contrary holding in the workers' compensation termination proceeding.[5]

[5] In Kohut, a township police officer sustained a work injury in an automobile accident and received both HLA and workers' compensation benefits. In May, 1988, the township supervisors filed a decision ruling the officer was no longer entitled to HLA benefits due to permanent disability as a result of his work injury. In December, 1988, a workers' compensation referee (now WCJ) granted the township's termination petition on the basis the
(Footnote continued on next page…)

Claimant acknowledges Kohut is limited by subsequent decisions. See Cohen v. Workers' Comp. Appeal Bd. (City of Phila.), 589 Pa. 498, 909 A.2d 1261 (2006) (declining to make decision in Philadelphia Civil Service Regulation 32 litigation preclusive in subsequent workers' compensation case, Court recognized tension with Kohut, but noted Kohut is limited to facts); City of Pittsburgh v. Workers' Comp. Appeal Bd. (McGrew), 785 A.2d 170 (Pa. Cmwlth. 2001) (limiting Kohut to its facts and explaining the decision merely prevents an employer from arguing contrary positions at the same time in order to satisfy different legal standards); Galloway v. Workmen's Comp. Appeal Bd. (Pa. State Police), 690 A.2d 1288 (Pa. Cmwlth. 1997) (a finding of permanent disability in HLA proceeding does not preclude, under Kohut, a subsequent petition to suspend or modify claimant's workers' compensation benefits; question of whether

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(continued…)

officer was no longer disabled. In determining that collateral estoppel applied in Kohut, we reasoned:

> [The employer] admitted in the [HLA] proceeding that [c]laimant would never again be able to do his time-of-injury job because of his work-related disability. Having made such an admission it cannot now be permitted to assert a contrary position for the same period of time. In short, the issue of whether [c]laimant would be able to return to his time-of-injury job has been finally decided and [the employer] is collaterally estopped from relitigating it for the same period of time. As previously noted, no appeal was taken from the Township's determination that [c]laimant is permanently disabled from performing his duties as a police officer. Hence, that decision is final. And, obviously, the decision in the work[ers'] compensation litigation is not final as it is before us now.

621 A.2d at 1104.

claimant could perform any job was neither essential nor material to HLA decision).

Here, Claimant asserts that these limiting cases are inapplicable and Kohut is directly on point because of timing. Second WCJ found Claimant's work-related low back strain resolved as of November, 2007, less than five months after the July, 2007 HLA decision finding Claimant permanently disabled. Moreover, Employer's Physician actually opined Claimant fully recovered from his back strain as of the January, 2006 surgery, prior to the HLA determination.

We rejected the applicability of Kohut before, in Marian-Rehearing, and we do so again. In Cohen, the Supreme Court recognized Kohut is limited to its facts and noted, in view of the unique nature of Pennsylvania's workers' compensation scheme, it is preferable to permit the determination of disability for purposes of workers' compensation benefits to be made within that scheme. Here, the HLA hearing examiner found Claimant underwent a lumbar fusion and decompression at the L3-4 and L4-5 areas of his lumbar spine. R.R. at 15a. However, as Second WCJ recognized in Finding of Fact No. 10d, "the decision of the [HLA] hearing examiner does not determine whether the need for the lumbar fusion and decompression was work related or not work related or a combination of the two." Second WCJ's Dec. at 10-11.

As discussed above, Employer issued an NCP recognizing Claimant's work injury as a "low back strain." The HLA decision finding Claimant's disability to be of a lasting and indefinite nature does not make any distinction between Claimant's low back strain injury, typically a short-term condition, and his degenerative disc disease. The HLA hearing examiner never determined that

Claimant's annular tears were causally related to his February, 2005 injury at work. Consequently, the HLA decision does not preclude a termination of workers' compensation benefits on the basis Claimant fully recovered from his low back strain and that his current disability is causally related to a non-work related condition and the surgery to correct it. See Noverati v. Workmen's Comp. Appeal Bd. (Newtown Squire Inn), 686 A.2d 455 (Pa. Cmwlth. 1996) (an employer is entitled to terminate benefits if it demonstrates the claimant recovered from his work-related injury and any remaining disability is due to a pre-existing condition).

C. Employer's Physician's Testimony

In his final argument, Claimant contends Employer's Physician's testimony is insufficient to support a termination of benefits. In a termination petition, the employer bears the burden of proving all of the claimant's work-related disability resolved. Noverati. Where current disability exists, the employer has the burden of proving independent cause or the lack of a causal connection between the continuing disability and the work-related injury. Id.

Claimant argues that Employer's Physician concurred with Surgeon's opinion regarding the effect of the surgery by stating Claimant fully recovered from his strain as a result of the surgery.[6] Additionally, Claimant asserts,

[6] In particular, Employer's Physician testified:

> there was no evidence that [Claimant] had any residual lumbar strain and sprain and indeed from a biomechanical perspective [it is] really not possible for [Claimant] to be exhibiting any findings consistent with a low lumbar sprain and strain as he had a fusion done in these motion segments that were the cause of symptoms from a sprain and strain are now fused. A sprain is strictly defined as a stretching causing pain and ligaments, and ligaments are soft

(Footnote continued on next page…)

Employer's Physician testified the surgery precluded him from returning to his pre-injury police officer job. Id. at 308a. Further, although Employer's Physician testified the surgery was unrelated to the low back strain, he conceded the surgery "would have the serendipitous side effect of curing any sprain or strain that might have persisted …." Id. at 306a. Claimant therefore asserts he is entitled to benefits because the medical treatment for his work injury is now the cause of his disability. See Brockway v. Workers' Comp. Appeal Bd. (Collins), 792 A.2d 631 (Pa. Cmwlth. 2002) (claimant entitled to benefits based on disability resulting from treatment for prior compensable back injury); Moltzen v. Workmen's Comp. Appeal Bd. (Rochester Manor), 646 A.2d 748 (Pa. Cmwlth. 1994) (termination of benefits not proper where claimant suffered pain in knee caused by physical therapy prescribed for work-related back injury).

As noted, to terminate benefits where current disability exists, the employer must establish an independent cause for the disability or a lack of a causal connection between the continuing disability and the recognized work injury. Noverati. In denying Claimant's review petition, First WCJ determined Claimant's annular tears, a reflection of degenerative disc disease, were not work related. See First WCJ's Dec. at F.F. No. 12. He also credited Employer's

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(continued…)

> connective tissue structures that connect one bone to another, and a strain is a tearing of muscle fiber that moves these motion segments. So if these motion segments are now fused by metallic implants and also incorporating bone graft, then the process of doing the fusion … would completely negate any concept that there was a residual sprain and strain ….

(R.R. at 304a-05a).

Physician's testimony that Claimant's fusion surgery was not related to the work injury. Id. at F.F. No. 7j. Rather, the surgery treated Claimant's degenerative disc disease. Id. Second WCJ recognized these determinations are the law of the case and thus prevented him from making contrary findings. Second WCJ's Dec., F.F. No. 10h.

Here, Employer's Physician testified he examined Claimant in August, 2005 and November, 2007. R.R. at 295a. He reviewed a history of Claimant's February, 2005 work injury and reviewed records of Claimant's medical treatment, including his L3-L5 fusion surgery in January 2006. Id. at 295a-303a. As of Employer's Physician's November, 2007 examination, Claimant showed no signs or symptoms consistent with a lumbosacral sprain or strain. Id. at 303a-04a. Claimant had no visible or palpable muscle spasm, and his lumbar range of motion was as expected. Id. at 304a. Claimant reported pain central to his low back, but it did not radiate anywhere. Id. at 304a-05a. These symptoms are consistent with recovery from spinal fusion, and they are not consistent with a sprain or strain, where the pain tends to radiate up and then down into the posterior thigh. Id. at 305a. Employer's Physician's testimony that Claimant fully recovered from his work related low back strain as of his November, 2007 examination provides substantial evidence for a termination of Claimant's benefits effective that date. Noverati.

Moreover, although Employer's Physician testified Claimant's fusion surgery completely negated any possibility of a residual sprain or strain, he did not testify the fusion surgery was work related. To the contrary, Employer's Physician testified that no doctor would ever treat a strain or sprain with fusion surgery and that Surgeon did not do so here. R.R. at 306a. Rather, the accepted treatment for

sprains and strains is either supportive care, flexion exercises, or, in some cases, treatment with a physical therapist or chiropractor. Id. at 307a. Consequently, Employer's Physician did not opine Claimant's fusion surgery was related to his low back stain. Therefore, we reject Claimant's contention that a fair reading of Employer's Physician's testimony indicates that Claimant's fusion surgery treated his work injury. Because Claimant did not undergo the fusion surgery for treatment of a work-related injury, any residual disability attributable to the surgery is not compensable. As a result, Brockway and Moltzen are inapplicable here.

For these reasons, Second WCJ properly granted Employer's termination petition. Noverati. Discerning no error in the Board's decision, we affirm.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dominic Marian, Petitioner	:	
v.	:	No. 1616 C.D. 2009
Workers' Compensation Appeal Board (Scott Township), Respondent	:	

O R D E R

AND NOW, this 24th day of February, 2010, the order of the Workers' Compensation Appeal Board is **AFFIRMED**.

ROBERT SIMPSON, Judge