

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Hub Fabricating/TYCO, :  
Petitioner :  
 : No. 1792 C.D. 2009  
v. :  
 : Submitted: March 12, 2010  
Workers' Compensation Appeal :  
Board (Lucas), :  
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McCULLOUGH

FILED: May 26, 2010

Hub Fabricating/TYCO (Employer) petitions for review of the August 21, 2009, order of the Workers' Compensation Appeal Board (Board), which affirmed the decision of Workers' Compensation Judge (WCJ) Peter Perry granting the reinstatement petition filed by Barry Lucas (Claimant). We affirm.

By decision and order dated May 20, 2004, WCJ Brian Eader awarded Claimant total disability benefits, based on his finding that "Claimant suffered work-related injuries on March 10, 2003, which included a left herniated disc with an L-2 extruded fragment, which have disabled him from his pre-injury job." (WCJ Eader's Finding of Fact No. 10, May 20, 2004.) Claimant's benefits were suspended as of August 12, 2003, upon Claimant's return to modified work without a wage loss.

Claimant continued working until April 4, 2007, when he underwent surgery for a non-work-related hernia. Claimant was expected to return to work on

May 7, 2007. However, at that time, Claimant experienced severe back and leg pain, and he sought further medical treatment. On May 21, 2007, Claimant filed a petition to reinstate his total disability benefits, alleging a worsening of his condition that resulted in decreased earning power. Employer filed an answer denying these allegations, and the case proceeded with hearings before the WCJ.

Claimant testified about his original work injury, his 2007 hernia surgery, the subsequent exacerbation of pain in his back and leg, and his course of medical treatment. Claimant also presented the deposition testimony of James Barrett, M.D., his treating physician. Dr. Barrett noted that while he first saw Claimant in October of 2006, Claimant had been treating with another physician in his office since August of 2004.

Dr. Barrett testified that the incident at work on March 10, 2003, “resulted in the extrusion of disc material, first, at L2-3 with a documented bulge at L4-5 and symptoms relating to both of those areas.” (R.R. at 49a.) Dr. Barrett stated that Claimant first presented himself to Dr. Barrett’s practice in August of 2004 complaining of right-sided low back pain. Dr. Barrett indicated that a 2005 MRI “continued to show abnormalities in the L4-5 disc a posteriolateral disc bulge more pronounced [sic] on the right than the left....” Id.

Dr. Barrett testified that, during an examination on October 19, 2006, Claimant complained that his back pain had been aggravated by a job change and that the pain began radiating below his knee. (R.R. at 39a.) After performing selective nerve root blocks, Dr. Barrett isolated Claimant’s complaints to the L-4 nerve root. Id. Dr. Barrett indicated that additional testing revealed “further progression of the abnormality at L4-5.” (R.R. at 50a.) Following Claimant’s complaints of increased pain in April of 2007, Dr. Barrett ordered new MRI and

EMG studies, which revealed a “right L4-5 disc herniation with impingement on the L4 nerve root and a right L4-5 radiculopathy with left sciatic nerve root involvement...” (WCJ’s Finding of Fact No. 3, December 16, 2008.) Dr. Barrett unequivocally opined that Claimant’s condition was causally related to the original work injury and that Claimant was incapable of returning to his pre-injury position with Employer or any other work. (R.R. at 96a-98a.)

Employer presented the deposition testimony of its own medical expert, William Prebola, M.D. Dr. Prebola performed an independent medical examination of Claimant on October 3, 2007. Dr. Prebola also reviewed films from four MRIs performed in March 2003, September 2005, October 2006, and June 2007. Dr. Prebola noted a history of a left-sided L-2 disc herniation. Dr. Prebola acknowledged that the later MRIs revealed a right-sided L4-5 disc herniation. Although Dr. Prebola opined that the L4-5 disc herniation was the source of Claimant’s present complaints, he did not believe that it was related to Claimant’s original work injury. (R.R. at 141a-54a.)

Dr. Prebola noted that, in 2003, Claimant’s original complaints related to his left side, and an MRI confirmed a disc fragment at L2-3 as the cause of these complaints, whereas Claimant’s present complaints related to his right side, with an MRI confirming a herniation at a different disc level, L4-5. Dr. Prebola indicated that Claimant had reached maximum medical improvement with respect to the original work injury, but he still had residuals relating to that injury which limited Claimant to performing light-duty work. (R.R. at 152a-55a.)

The WCJ accepted the testimony of Claimant and Dr. Barrett as credible, and he resolved any conflicts in the medical testimony in favor of Dr. Barrett. (WCJ’s Findings of Fact Nos. 5-7, December 16, 2008.) The WCJ

explained that Dr. Barrett's practice had been treating Claimant since 2004, that Dr. Barrett's interpretation of the diagnostic studies was more persuasive and was supported by various clinical examinations, and that Dr. Prebola only saw Claimant on one occasion. (WCJ's Finding of Fact No. 7, December 16, 2008.) Based upon these credibility determinations, the WCJ concluded that Claimant had sustained his burden of proving that his disability related to his original work injury had increased such that he was again totally disabled as of May 7, 2007. Hence, the WCJ granted Claimant's reinstatement petition. Employer appealed to the Board, which affirmed the WCJ's decision and order.

On appeal to this Court,<sup>1</sup> Employer argues that the WCJ erred as a matter of law in failing to hold that Claimant was collaterally estopped from expanding the scope of his work-related injury. We disagree.

The doctrine of collateral estoppel, often referred to as issue preclusion, is designed to prevent relitigation of an issue in a later action, despite the fact that the later action is based on a cause of action different from the one previously litigated. Pucci v. Workers' Compensation Appeal Board (Woodville State Hospital), 707 A.2d 646 (Pa. Cmwlth. 1998). Collateral estoppel applies where: (1) the issue decided in the prior case is identical to the one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the doctrine is asserted was a party or in privity with a party in the prior case and had a full and fair opportunity to litigate the issue; and (4) the determination in the prior proceeding was essential to the judgment. Id.

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<sup>1</sup> Our scope of review is limited to determining whether findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Meadow Lakes Apartments v. Workers' Compensation Appeal Board (Spencer), 894 A.2d 214 (Pa. Cmwlth. 2006).

Employer first cites Lowe v. Workmen's Compensation Appeal Board (Pennsylvania Mines Corp.), 683 A.2d 1327 (Pa. Cmwlth. 1996), for support. In Lowe, the claimant's benefits were terminated based upon the WCJ's finding of full recovery. Thereafter, the claimant filed a reinstatement petition alleging that his disability had recurred. The WCJ granted the claimant's petition, concluding that the evidence established that the claimant's condition had worsened.

The Board reversed, noting that the opinion of the claimant's medical witness in the reinstatement proceeding was premised on his belief that the claimant had never fully recovered from his original work injury. The Board concluded that revisitation of the issue of full recovery was barred by the doctrine of res judicata.<sup>2</sup> We affirmed the Board's order, holding that the claimant's reinstatement petition constituted an impermissible attempt to relitigate the issues previously decided in the prior termination.

Employer also cites Williams v. Workers' Compensation Appeal Board (South Hills Health System), 877 A.2d 531 (Pa. Cmwlth. 2005). In Williams, the claimant received benefits pursuant to a notice of compensation payable (NCP) that described her injury as a lumbosacral strain. The claimant's benefits were subsequently terminated, and the WCJ's decision included a specific finding that the claimant did not have a work-related disc herniation. The claimant later filed a reinstatement petition alleging that her original work injury had worsened as a result of a disc herniation.

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<sup>2</sup> Collateral estoppel and technical res judicata, often referred to as claim preclusion, are both encompassed within the parent doctrine of res judicata, which prevents the relitigation of claims and issues in subsequent proceedings. Henion v. Workers' Compensation Appeal Board (Firpo & Sons, Inc.), 776 A.2d 362 (Pa. Cmwlth. 2001).

The WCJ granted the claimant's reinstatement petition, but the Board reversed, noting that, in granting the employer's termination petition, the WCJ specifically rejected testimony from the claimant's medical witness that the claimant sustained a work-related disc injury. The Board concluded that the WCJ's termination decision acted as estoppel with respect to claimant's reinstatement petition. We affirmed the Board's order, agreeing that the claimant was collaterally estopped from asserting a work-related disc herniation.

Finally, Employer cites Weney v. Workers' Compensation Appeal Board (Mac Sprinkler Systems, Inc.), 960 A.2d 949 (Pa. Cmwlth. 2008), appeal denied, 601 Pa. 691, 971 A.2d 494 (2009). The claimant in Weney received benefits pursuant to an NCP that described his injury as a shoulder strain. The claimant filed a review petition seeking to expand the description of his injuries, and the parties stipulated that the NCP should be amended to include "a tear of the anterior labrum with large glenohumeral joint effusion, tendonitis or a partial tear of the supraspinatus/infraspinatus, minimal impingement, and biceps tenosynovitis." Id. at 951. The claimant later filed a second review petition seeking to expand the description of his injury to include four herniated discs in his neck.

The WCJ granted the claimant's second review petition, but the Board reversed. The Board reasoned that the claimant was aware that his neck injury was work-related during the prior litigation and, hence, was collaterally estopped from raising this issue in his second review petition. We affirmed the Board's order, observing that the subject matter of both the first and second review petitions concerned the nature and extent of the claimant's injuries and that the claimant was

well aware that his neck injury was work-related during the course of litigation of his first review petition.

We conclude that Employer's reliance on Lowe, Williams, and Weney is misplaced. In the present case, there has been no prior determination that Claimant was fully recovered or that his disability had ceased. Additionally, in his May 2004 decision, WCJ Eader made no specific finding that an L4-5 disc injury was not work related. Furthermore, although the medical experts for both Claimant and Employer in the original litigation acknowledged a herniated and extruded disc at L-2 and a bulging disc at L3-4, they did not discuss any disc problem at the L4-5 level, which is at issue in the present litigation. Because no prior findings address an L4-5 disc injury, the doctrine of collateral estoppel is inapplicable.

Employer next argues that Dr. Barrett's testimony was incompetent as a matter of law because Dr. Barrett did not acknowledge WCJ Eader's findings regarding the original work injury. We disagree.

Generally, where an expert's opinion is based on an assumption that is contrary to the established facts of record, the expert's opinion is worthless. Taylor v. Workers' Compensation Appeal Board (Servistar Corporation), 883 A.2d 710 (Pa. Cmwlth. 2005); Williams v. Workers' Compensation Appeal Board (Hahnemann University Hospital), 834 A.2d 679 (Pa. Cmwlth. 2003). Employer argues that Dr. Barrett did not accept WCJ Eader's finding that Claimant's injury consisted of a herniated disc at L-2. However, as previously indicated, Dr. Barrett specifically acknowledged that Claimant's injury resulted in the extrusion of disc material at L2-3, and he noted that Claimant's initial treatment was related to the

L2-3 disc. (R.R. at 49a.) Thus, the record provides no support for Employer's contention.

Accordingly, the order of the Board is affirmed.

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PATRICIA A. McCULLOUGH, Judge



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***ORDER***

AND NOW, this 26th day of May, 2010, the August 21, 2009, order of the Workers' Compensation Appeal Board is hereby affirmed.

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PATRICIA A. McCULLOUGH, Judge