

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

|                                    |   |                             |
|------------------------------------|---|-----------------------------|
| Judy Atwell,                       | : |                             |
|                                    | : |                             |
| Petitioner                         | : |                             |
|                                    | : |                             |
| v.                                 | : | No. 1813 C.D. 2009          |
|                                    | : |                             |
| Workers' Compensation Appeal Board | : | Submitted: January 29, 2010 |
| (Lake Lehman School District),     | : |                             |
|                                    | : |                             |
| Respondent                         | : |                             |

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE COHN JUBELIRER**

**FILED: April 21, 2010**

Judy Atwell (Claimant) petitions for review of the order of the Workers' Compensation Appeal Board (Board), which affirmed the remand decision of a Workers' Compensation Judge (WCJ) that, in relevant part, granted Claimant workers' compensation benefits for a closed period, denied Claimant's request for unreasonable contest attorney's fees under Section 440 of the Workers' Compensation Act (Act),<sup>1</sup> and denied Claimant's request for ongoing benefits during the pendency of the proceedings.

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<sup>1</sup> Act of June 2, 1915, P.L. 736, as amended, added by Section 3 of the Act of February 8, 1972, P.L. 25, 77 P.S. § 996.

On September 24, 2002, Claimant filed a claim petition alleging that, while working as a custodian for the Lake Lehman School District (Employer), she sustained foot, neck, and back injuries “when a heavy aquarium stand fell on her right foot” on August 5, 2002. (WCJ Decision, Findings of Fact (FOF) ¶ 1, June 30, 2004.) Employer filed an answer denying the allegations, particularly the allegation that Claimant suffered any disability. The matter was assigned to a WCJ for hearings.

Claimant testified before the WCJ, describing the August 5<sup>th</sup> incident and her medical treatment. (FOF ¶¶ 3-4.) Claimant indicated that: (1) after the incident, she was going to return to work; (2) Employer offered her a light-duty position on August 13, 2002; (3) she did not believe that she could drive from her home to work with her injured foot; and (4) Employer refused to provide transportation for her. (FOF ¶¶ 5, 10.) Claimant also presented the deposition testimony of Albert Janerich, M.D., who began treating Claimant on September 8, 2003.<sup>2</sup> (FOF ¶ 7.) Dr. Janerich acknowledged that Claimant’s medical history revealed that she “had prior neck and low back problems,” but that Claimant had no problems with her right foot before the August 5, 2002 work incident. (FOF ¶ 8.) Dr. Janerich indicated that he found tenderness and spasm in Claimant’s back, and he opined that the August 5, 2002 incident “aggravated . . . Claimant’s pre-existing degenerative arthritis and caused disc herniations in her cervical spine.” (FOF ¶ 8.) Dr. Janerich also opined that

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<sup>2</sup> Prior to treating with Dr. Janerich, Claimant sought treatment from several other physicians and underwent physical therapy but did not have any injections, chiropractic treatment, or treatment with a podiatrist. (FOF ¶ 7.)

“Claimant suffered a contusion to her right foot” which has caused arthritic changes in that foot. (FOF ¶ 8.)

Employer submitted the deposition testimony of Thomas DiBenedetto, M.D., who examined Claimant on January 30, 2003 at Employer’s request. (FOF ¶ 9.) Dr. DiBenedetto testified that, immediately following the incident, “Claimant was placed in a walking cast,” a “cam walker,” and released to light-duty work. (FOF ¶ 9.) Dr. DiBenedetto acknowledged that the “cam walker” impeded Claimant’s ability to drive. (FOF ¶ 9.) Dr. DiBenedetto stated that, during his examination of Claimant’s right foot, he saw no swelling. He further noted that “[t]he diagnostic tests, including a bone scan, did not show any fractures.” (FOF ¶ 9.) Accordingly, Dr. DiBenedetto opined that: (1) Claimant sustained a contusion to her right foot; (2) “Claimant could have performed light-duty work immediately following the injury”; (3) “by the time of his evaluation,” Claimant could return to work with no restrictions; and (4) “based on the mechanism of the injury . . . Claimant did not injure her neck or back in any way” on August 5, 2002. (FOF ¶¶ 9, 11.) Employer also presented the testimony of Jackie Moran, a human relations representative, who confirmed that work within Claimant’s restrictions was available to Claimant from the time of the injury through the date of the hearing. (FOF ¶ 10.)

After considering the testimony the WCJ found, based on Claimant’s and both physicians’ testimony, that Claimant sustained a contusion to her right foot. (FOF ¶ 11.) The WCJ credited Dr. DiBenedetto’s opinions that the foot injury was not severe, “Claimant was never totally impaired or disabled,” Claimant “would have been able to perform the light-duty work offered” by Employer and, at the time of his

examination, Claimant was able to return to her regular work without restrictions. (FOF ¶¶ 11-12.) The WCJ further accepted Dr. DiBenedetto's opinion that the August 5, 2002 incident was not severe enough to aggravate Claimant's pre-existing neck or back arthritis. (FOF ¶ 12.) Accordingly, the WCJ denied indemnity benefits, finding that, "although . . . Claimant injured her right foot, there was suitable work available for her thereafter and that she was fully recovered" as of January 30, 2003.<sup>3</sup> (FOF ¶ 13.)

Claimant appealed to the Board, asserting that the WCJ erred in: denying her benefits based on the availability of suitable work; finding Claimant fully recovered from the right foot injury as of January 30, 2003; and finding that Claimant sustained no work-related aggravation to her neck or back. Claimant further asserted that the WCJ failed to describe the reasons for his credibility determinations and erred by not awarding unreasonable contest fees. By decision and order dated February 8, 2006, the Board agreed that Claimant's inability to drive herself to work because of the "cam walker" and her pain medications, as acknowledged by Dr. DiBenedetto, rendered the light-duty position Employer offered "unavailable" as a matter of law. See Roadway Express, Inc. v. Workmen's Compensation Appeal Board (Palmer), 659 A.2d 12, 18-19 (Pa. Cmwlth. 1995) (holding that a job that is within the restrictions of the claimant is not available where, even if the claimant can physically perform the job duties, the claimant cannot perform the duties and tolerate the commute to and from work). Accordingly, the Board found that Claimant was entitled to benefits from August 13, 2002 through January 30, 2003, the date Dr.

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<sup>3</sup> The WCJ granted the claim petition, but awarded only necessary and reasonable medical benefits. (WCJ Decision, Conclusions of Law ¶ 2, June 30, 2004.)

DiBenedetto examined her. The Board also concluded that the WCJ failed to articulate objective reasons for crediting Dr. DiBenedetto's opinions regarding Claimant's back and neck injuries over those of Dr. Janerich. Thus, the Board remanded the matter, directing the WCJ to articulate objective bases for his credibility determinations and advising the WCJ that he was free to make contrary credibility determinations on remand. Further, the Board advised the WCJ that he should "make specific findings on the nature of the work injury and whether Claimant is recovered from same so as to justify a termination." (Board Op. at 9, February 8, 2006.) Finally, noting that the WCJ made no findings regarding the reasonableness of Employer's contest, the Board directed the WCJ to make findings on whether Employer's contest was reasonable.<sup>4</sup>

In his remand decision, the WCJ addressed some of the issues requested by the Board, but again failed to articulate reasons for crediting Dr. DiBenedetto's testimony over Dr. Janerich's testimony. The WCJ again concluded that Claimant sustained only a right foot contusion, from which she had recovered as of January 30, 2003, and that there was no logical nexus between the "aquarium falling on [Claimant's] foot and any problems that she had with her neck and back, especially because the Claimant had neck and back problems before the incident occurred." (FOF ¶¶ 2-3, December 28, 2006.)

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<sup>4</sup> The Board's decision also directed the WCJ to make findings: (1) on Claimant's average weekly wage and compensation rate; (2) regarding the counsel fee agreement between Claimant and her counsel; and (3) relating to the proper award of reasonable litigation costs.

Claimant again appealed to the Board, asserting that the WCJ dismissed her claim for neck and back injuries without adequate findings, erred by not immediately reinstating indemnity benefits as she established disability from her job per the Board's February 8, 2006 order, and did not render the credibility determinations as directed by the Board in its remand order. The Board held in a September 27, 2007 decision that the WCJ had "adequately addressed the issue of whether Claimant sustained a neck or back injury as a result of the work incident," noting that the WCJ found Claimant's evidence unpersuasive because of the "circumstances of the injury and Claimant's pre-existing condition." (Board Op. at 8, September 27, 2007.) The Board rejected Claimant's request for reinstatement of indemnity benefits, noting that, although its order found that Claimant was entitled to benefits until January 30, 2003, the Board made no determination regarding Claimant's disability status *after* that date. The Board noted that "[u]nless or until the fact-finder finds that Claimant's disability continued after January 30, 2003, Claimant has not 'proven' disability beyond that date," which Claimant bore the burden of proving. (Board Op. at 10.) Noting that the WCJ had not rendered credibility determinations or made findings regarding the nature of Claimant's injury or the duration of Claimant's disability/recovery from the injury, the Board remanded the matter again to the WCJ for those findings. Finally, the Board directed the WCJ to make findings regarding whether Employer's contest was reasonable.

On the second remand, the WCJ again credited Dr. DiBenedetto's opinions over the contrary opinions of Dr. Janerich and provided objective reasons for why he did so. (FOF ¶¶ 6-7, August 29, 2008.) The WCJ found, based on Dr. DiBenedetto's credible testimony, that Claimant's work-related injury was in the nature of a right-

foot contusion, from which she was fully recovered as of January 30, 2003. (FOF ¶¶ 6-7.) The WCJ then concluded that Employer's contest was reasonable, noting that he initially had found that Claimant suffered no disability as a result of the August 5, 2002 incident and that Employer had relied on that finding during the various appeals to the Board. (FOF ¶ 8.) Thus, the WCJ granted Claimant indemnity benefits from August 13, 2002 through January 30, 2003, terminated Claimant's benefits thereafter, and dismissed Claimant's claim for unreasonable contest attorney's fees. (WCJ Order, August 29, 2008.)

Claimant appealed to the Board, this time asserting, in relevant part,<sup>5</sup> that the WCJ erred in finding that Employer's contest was reasonable and by not directing Employer to pay Claimant indemnity benefits throughout the pendency of the claim petition proceedings. The Board rejected each of these arguments and affirmed the WCJ's order by decision and order dated August 20, 2009. The Board concluded that Employer's contest was reasonable because Employer presented medical evidence limiting both the extent of Claimant's injury and period of disability. Indeed, the Board noted that the WCJ initially believed there was no disability as a result of Claimant's work injury. With regard to Claimant's request for the payment of ongoing benefits, the Board reiterated its position from its September 27, 2007 opinion that Claimant was not entitled to reinstatement of benefits *until* Claimant

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<sup>5</sup> We address only the two allegations of error that Claimant raised before the Board and has appealed to this Court.

proved that her disability continued *after* January 30, 2003. Claimant now petitions this Court for review.<sup>6</sup>

Claimant first argues that she is entitled to attorney's fees because there was no evidence presented to contest the fact that she sustained a work-related right-foot injury that rendered her disabled from August 13, 2002 until January 30, 2003. Claimant contends that, despite the fact that the experts agreed upon this injury and disability and her request that Employer acknowledge this uncontested right foot injury and disability, Employer required her to fully litigate this uncontested claim. Claimant further asserts that Employer never issued a Notice of Compensation Payable (NCP) or Notice of Compensation Denial (NCD) as required by Section 406.1 of the Act.<sup>7</sup> Thus, according to Claimant, the Board erred in finding Employer's contest reasonable. We disagree that Employer's contest was unreasonable, but for reasons that differ from those of the Board.<sup>8</sup>

Section 440 of the Act provides, in relevant part:

[i]n any contested case where the insurer has contested liability in whole or in part . . . the employe . . . in whose favor the matter at issue

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<sup>6</sup> In workers' compensation proceedings, our review is "limited to determining whether constitutional rights were violated, an error of law was committed, or whether the necessary findings of fact are supported by substantial evidence." Crouse v. Workers' Compensation Appeal Board (NPS Energy SVC), 801 A.2d 655, 656 n. 2 (Pa. Cmwlth. 2002).

<sup>7</sup> Added by Section 3 of the Act of February 8, 1972, P.L. 25, 77 P.S. § 717.1. This section requires an employer to promptly investigate a reported injury, to promptly pay compensation for the injury through a NCP or temporary NCP, or to promptly deny liability by issuing a NCD. Id.

<sup>8</sup> "This Court may affirm on other grounds where grounds for affirmance exist." Bonifate v. Ringgold School District, 961 A.2d 246, 253 n.2 (Pa. Cmwlth. 2008) appeal denied, \_\_\_ Pa. \_\_\_, 983 A.2d 730, (2009).

has been finally determined in whole or in part shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred for attorney's fee . . . Provided, That cost for attorney fees may be excluded when a reasonable basis for the contest has been established by the employer or the insurer.

77 P.S. § 996. “[T]he employer bears the burden of presenting sufficient evidence to establish a reasonable basis for contesting a claim petition.” Crouse v. Workers’ Compensation Appeal Board (NPS Energy SVC), 801 A.2d 655, 657 (Pa. Cmwlth. 2002). “The reasonableness of an employer’s contest depends upon whether the contest was prompted to resolve a genuinely disputed issue.” Coyne v. Workers’ Compensation Appeal Board (Villanova University), 942 A.2d 939, 956 (Pa. Cmwlth. 2008). “A reasonable contest will be found if there is an issue as to whether an injury necessarily results in a disability.” Id. Whether the employer has presented “a reasonable contest is a question of law, based on the WCJ’s findings of fact, and thus, fully reviewable by this Court.” Crouse, 801 A.2d at 657.

Contrary to Claimant’s assertions, the extent of Claimant’s injuries and work-related disability was at issue throughout the proceedings. “The term disability is synonymous with a ‘loss of earning power.’” Inglis House v. Workmen’s Compensation Appeal Board (Reedy), 535 Pa. 135, 142, 634 A.2d 592, 595 (1993) (quoting Dugan v. Workmen’s Compensation Appeal Board (Fuller Company of Catasauqua), 569 A.2d 1038, 1041 (Pa. Cmwlth. 1990)). As Employer points out in its brief, its contention that Claimant was not disabled following her injury on August 5, 2002 was based on the availability of continuing work within the restrictions imposed by Claimant’s prior treating physicians. (Employer’s Br. at 10-11.) Ms.

Moran testified that Employer had work available for Claimant in August 2002 and that such work continued to be available.<sup>9</sup> (WCJ Hr’g Tr. at 6, 8, March 16, 2004.) Claimant acknowledged that Employer offered her light-duty work in August 2002, but that she did not return to work because she felt she could not drive. (WCJ Hr’g Tr. at 36-38, August 12, 2003.) Thus, at the time Employer declined to acknowledge the disability and challenged the claim petition, based on its position that Claimant was not disabled, (Defendant’s Answer To Claim Petition ¶ 14, October 25, 2002), the issue of Claimant’s disability was genuinely disputed.<sup>10</sup> In fact, the WCJ initially agreed with Employer’s position in his first opinion and denied indemnity benefits on that basis. Accordingly, we conclude that Employer’s contest was prompted by genuinely disputed issues and, as such, was reasonable under the Act.<sup>11</sup> Coyne, 942 A.2d at 956.

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<sup>9</sup> An employer may rebut a claimant’s proof of disability “by demonstrating ‘that suitable work was available.’” Coyne, 942 A.2d at 945 (quoting Vista International Hotel v. Workmen’s Compensation Appeal Board (Daniels), 560 Pa. 12, 742 A.2d 649 (1999)).

<sup>10</sup> We recognize that, at the time Employer denied the allegations in the claim petition, its physician had not yet examined Claimant to determine the extent of any work injury she may have sustained and whether Claimant had recovered from that injury. However, as noted, the question of whether Claimant had a loss of earnings related to the work injury existed at the time Employer filed its answer. Moreover, to the extent that Claimant argues that Employer acknowledged that she injured her right foot and was entitled to benefits on that basis, we note that the Bureau of Workers’ Compensation did not issue or authorize the “medical only” NCP, permitting a claim for “medical only” compensation until May 29, 2004. Orenich v. Workers’ Compensation Appeal Board (Geisinger Wyoming Valley Medical Center), 863 A.2d 165, 169 n.5 (Pa. Cmwlth. 2004). Here, Claimant was injured in August 2002, well before the implementation of the “medical only” claim.

<sup>11</sup> Because we conclude that Employer’s contest was reasonable, we need not address Claimant’s assertion that, because the uncontested portion of her injury and disability were not finally resolved until the December 26, 2008 order by the WCJ, any award of attorney fees should include all litigation up to that point.

Claimant next argues that the Board erred in concluding that she was not entitled to continuing wage loss benefits throughout the pendency of her appeal following the Board's order vacating the WCJ's termination of her benefits as of January 30, 2003, which was based on Dr. DiBenedetto's opinion that Claimant was fully recovered. Claimant reasons that she is entitled to these benefits because she:

presented medical evidence in support of injury and disability. [Employer] presented evidence of full recovery. The [Board] determined that Claimant met her burden of proving injury and disability. The [Board] vacated and remanded the WCJ's finding of full recovery. At that point, there was no existing finding of fact to support a reduction in benefits.

(Claimant's Br. at 11.) Again, we disagree.

Where a claimant initiates the proceedings by filing a claim petition, the claimant retains the burden of proving that her disability continued throughout the pendency of the proceedings. Inglis House, 535 Pa. at 141, 634 A.2d at 595; Coyne, 942 A.2d at 953. An employer has no obligation to present any evidence during a claim petition. Coyne, 942 A.2d at 954. In Coyne, the claimant, like Claimant here, argued that she was entitled to indemnity benefits through the date of the workers' compensation judge's decision, which was more than one year beyond the closed period of benefits the claimant was awarded. This Court rejected the claimant's argument, stating that the employer "was under no obligation to commence paying benefits until the WCJ's October 21, 2003 Order. As that Order awarded a closed period of disability concluding on August 26, 2002, [the employer] need not pay indemnity benefits through the date of the Decision." Id. at 951. We further noted that our Court was "not aware of any authority permitting an award of benefits to a

claimant who would not otherwise be entitled to them based upon an employer's failure to comply with the Act.” Id.

Contrary to Claimant’s contentions, neither the WCJ nor the Board ever found that Claimant established that she suffered *any* disability *after* January 30, 2003.<sup>12</sup> In fact, the Board indicated its contrary position in its September 27, 2007 opinion, stating:

[i]n that [February 8, 2006] Opinion, we determined that Claimant was entitled to disability benefits until Dr. DiBenedetto’s examination on January 30, 2003, given Claimant’s undisputed restrictions. We made no determination as to Claimant’s disability status after that date, and given the conflicting evidence, this Board would have erred in making a determination on that issue. . . . Unless or until the fact-finder finds that Claimant’s disability continued after January 30, 2003, Claimant has not “proven” disability beyond that date.

(Board Op. at 9-10, September 27, 2007 (citations omitted).) After reviewing the WCJ’s findings of fact, we agree with the Board that there was no determination by a fact-finder indicating that Claimant had proven that her work-related disability lasted beyond January 30, 2003, such that Employer would be obligated to pay Claimant disability benefits beyond the closed period. Accordingly, we conclude, like the Board, that Claimant was entitled to benefits *only* for the closed period from August 13, 2002 through January 30, 2003 and that, as of that date, Claimant was fully recovered from her work-related injury.

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<sup>12</sup> Essentially, Claimant’s position is that, when the Board vacated the WCJ’s finding of full recovery, her evidence, Dr. Janerich’s testimony, became credible and satisfied her burden of proving ongoing disability; however, Dr. Janerich’s testimony was *never* accepted as credible.

Accordingly, we affirm.

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**RENÉE COHN JUBELIRER, Judge**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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| Petitioner                         | : |                    |
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| Workers' Compensation Appeal Board | : |                    |
| (Lake Lehman School District),     | : |                    |
|                                    | : |                    |
| Respondent                         | : |                    |

**ORDER**

**NOW**, April 21, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED**.

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**RENÉE COHN JUBELIRER, Judge**