

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Daniel Clark,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2314 C.D. 2010
	:	
Workers' Compensation Appeal	:	Submitted: March 4, 2011
Board (Xerox Corporation),	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: May 20, 2011

Daniel Clark (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board), which affirmed the decision of a workers' compensation judge (WCJ) granting the Termination Petition filed by Xerox Corporation (Employer) and denying Claimant's Petition to Review Compensation Benefits (Review Petition) and Petition for Review of Utilization Review Determination (Utilization Review Petition). We affirm.

On May 8, 2007, Claimant sustained an injury in the course and scope of his employment with Employer. Employer issued a Notice of Compensation Payable (NCP), accepting Claimant's injury in the nature of a lumbar sprain and strain.

On March 4, 2008, Claimant filed a Review Petition on the basis that the description of the injury is incorrect and should include bilateral radiculopathy. Employer filed a timely answer denying the material allegations claimed therein. Employer then filed a Termination Petition alleging that Claimant had fully recovered from the work injury as of June 5, 2008. Employer also filed a utilization review request seeking review of treatment rendered to Claimant by Lorenzo A. Alston, D.C. A Utilization Review Determination was issued finding the treatments rendered were not reasonable or necessary. On December 8, 2008, Claimant filed a Utilization Review Petition. The petitions were consolidated for hearing.

Before the WCJ, Claimant testified and offered the deposition testimony of John Bowden, D.O. Employer presented the testimony of Neil Kahanovitz, M.D., Michael Lee Brooks, M.D., and Frank Imbarlina, P.C. The WCJ found the testimony of Claimant and Dr. Bowden to be credible in part. The WCJ credited Claimant's testimony that Claimant had back pain prior to May 8, 2007 and has continued to experience pain in his lower back and right leg. The WCJ also credited Claimant's testimony that he developed pain in his right knee and right shoulder subsequent to the work injury, but rejected Claimant's testimony that the right knee pain was caused by his right leg giving out, and instead believed Dr. Kahanovitz's testimony that Claimant did not have any neurological basis for his right leg to give out due to this back condition. The WCJ credited Dr. Bowden's opinion that as a result of the May 8, 2007 work injury, Claimant sustained a myoligamentous injury to his low back.

In other respects the WCJ found the testimony of Dr. Kahanovitz to be more credible that Claimant did not sustain any injuries other than a lumbar sprain/strain and aggravation of pre-existing degenerative disease of the lumbar spine

as a result of this injury. The WCJ specifically credited Dr. Brooks' testimony that Claimant's lumbar spine MRI films show degenerative disease and do not indicate any basis for a diagnosis of bilateral radiculopathy. The WCJ credited Dr. Kahanovitz's testimony that Claimant had fully recovered from the work injury as of June 5, 2008. The WCJ also credited Dr. Imbarlina's testimony that the medical treatment provided by Dr. Alston from August 8, 2008 onward was not reasonable or necessary.

The WCJ ultimately found that as a result of the injury of May 8, 2007, Claimant sustained a lumbosacral strain/sprain, myoligamentous spinal supporting structure injury and an aggravation of pre-existing degenerative disease of the lumbosacral spine. Claimant failed to establish that his work injury should be amended to include bilateral radiculopathy. As of June 5, 2008, Claimant was fully recovered from his injury of May 8, 2007; any ongoing complaints are not related to the work injury. The treatment provided by Dr. Alston from August 8, 2008 onward was not reasonable or necessary for treatment of the work injury. The WCJ further found that although the costs incurred by Claimant's counsel were reasonable, Claimant's counsel is not entitled to reimbursement of these costs since Claimant was not successful in any of the petitions.

By order dated February 17, 2010, the WCJ denied Claimant's Review and Utilization Review Petitions and granted Employer's Termination Petition terminating benefits effective June 5, 2008. From this decision, Claimant filed an appeal with the Board, which affirmed. This appeal now follows.¹

¹ This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of appeal board procedures, and whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; Lehigh County Vo-Tech School

(Continued....)

Claimant raises the issue of whether the Board erred in affirming the denial of Claimant's Review Petition and reimbursement of litigation costs where the litigation affected an expansion of the NCP's description of the injury. The only issue properly before the Court is whether the WCJ erred in denying litigation costs as the issue of whether the WCJ erred in denying Claimant's Review Petition was not raised before the Board and is therefore waived. See Jonathan Sheppard Stables v. Workers' Compensation Appeal Board (Wyatt), 739 A.2d 1084 (Pa. Cmwlth. 1999); 34 Pa. Code §111.11(a)(2).

Claimant contends that the WCJ's failure to award litigation costs is unsupported by substantial evidence and is erroneous as a matter of law where the WCJ found that Claimant sustained additional injuries not included in the NCP. We disagree.

Section 440(a) of the Workers' Compensation Act² (Act) authorizes an award to a claimant for a reasonable sum for litigation costs. Section 440(a) provides:

*In any contested case where the insurer has contested liability in whole or in part, including contested cases involving petitions to terminate, reinstate, increase, reduce or otherwise modify compensation awards, agreements or other payment arrangements or to set aside final receipts, the employe or his dependent, as the case may be, **in whose favor the matter at issue 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, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend the proceedings:***

v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

² Act of June 2, 1915, P.L. 736, added by the Act of February 8, 1972, P.L. 25, as amended, 77 P.S. §996(a).

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(a) (emphasis added). Under the plain language of Section 440(a), the trigger for an award of litigation costs is, most generally, a final determination in a claimant's favor. Jones v. Workers' Compensation Appeal Board (Steris Corp.), 874 A.2d 717 (Pa. Cmwlth. 2005). “[A] claimant must prevail on the contested issue in order to be awarded litigation costs.” Id. at 721. This Court has held that litigation costs are warranted when a claimant is at least partially successful before a WCJ. Watson v. Workers' Compensation Appeal Board (Special People in Northeast), 949 A.2d 949 (Pa. Cmwlth. 2008); Minicozzi v. Workers' Compensation Appeal Board (Indus. Metal Plating, Inc.), 873 A.2d 25 (Pa. Cmwlth. 2005); Budd Co. v. Workers' Compensation Appeal Board (Kan), 858 A.2d 170 (Pa. Cmwlth. 2004).

Here, Employer issued an NCP describing Claimant's work injury as a lumbar strain. Claimant filed a Review Petition seeking to correct the description of the work injury on the NCP to include bilateral radiculopathy. Reproduced Record (R.R.) at 2a. The WCJ specifically found that Claimant did not establish that he sustained bilateral radiculopathy as a result of the work injury. Thus, Claimant was not successful on the “contested issue” of the Review Petition.

Claimant relies upon Jeanes Hospital v. Workers' Compensation Appeal Board (Hass), 582 Pa. 405, 872 A.2d 159 (2009),³ and Budd Co. v. Workmen's

³ Overruled in part on other grounds, Cinram Manufacturing, Inc. v. Workers' Compensation Appeal Bd. (Hill), 601 Pa. 524, 975 A.2d 577 (2009) (Pennsylvania Supreme Court disapproved Jeanes Hospital “to the extent it suggests an absolute requirement of a review petition as a prerequisite to corrective amendments.”)

Compensation Appeal Board (Bradley), 601 A.2d 1322 (Pa. Cmwlth.), petition for allowance of appeal denied, 530 Pa. 656, 608 A.2d 31 (1992), for the proposition that an NCP is materially incorrect if the accepted injury does not reflect all of the injuries sustained in the initial work incident. To this end, Claimant contends that he was successful in establishing that the NCP in this case was “materially incorrect” because the WCJ recognized additional injuries, which were not included on the NCP. Although the WCJ found that Claimant had sustained a myoligamentous injury to his low back and an aggravation of pre-existing degenerative disease of the lumbosacral spine, the WCJ did not find that Claimant sustained any other injuries other than a lumbar sprain/strain and aggravation of pre-existing degenerative disease of the lumbar spine as a result of this injury. According to Dr. Bowden’s credible testimony, a myoligamentous injury is basically a sprain/strain type of injury (R.R. at 84a), which is the description of Claimant’s injury on the NCP. Claimant did not establish that the aggravation of his preexisting degenerative disease of the spine was anything other than the strain/sprain injury sustained.

Ultimately, Claimant did not establish that the description of the injury was materially incorrect and, consequently, the WCJ did not amend the NCP. The WCJ denied Claimant’s Review and Utilization Review Petitions and granted Employer’s Termination Petition. Since Claimant did not prevail on any of the petitions or contested issues raised, Claimant is not entitled to litigation costs under Section 440(a) of the Act. We, therefore, conclude that the WCJ did not err in denying litigation costs to Claimant.

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

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ORDER

AND NOW, this 20th day of May, 2011, the order of the Workers' Compensation Appeal Board, at No. A10-0320, dated September 30, 2010, is affirmed.

JAMES R. KELLEY, Senior Judge