IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sheila Carter,	:	
Petitioner	:	
v.	:	No. 2467 C.D. 2010
	:	Submitted: February 25, 2011
Workers' Compensation Appeal	:	
Board (Walmart Distribution Center),	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED: July 28, 2011**

Petitioner Sheila Carter (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board), which affirmed a decision of a workers' compensation judge (WCJ). The WCJ granted Claimant's claim petition for a closed period followed by a termination, and denied Claimant's penalty petition. We affirm.

Petitioner filed a claim petition on October 10, 2008, asserting that she sustained an injury to her back on July 10, 2008, while in the course of her employment with Wal-Mart Distribution Center (Employer). Employer filed an answer denying the averments in the claim petition.[1]

[1] Claimant also filed a penalty petition in which she asserted that Employer did not issue a Notice of Compensation Payable within twenty-one days of receiving notice of Claimant's alleged work-related injury in accordance with Section 406.1 of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, added by Act of February 8, 1972, *as amended*, 77 P.S. § 717.1. Employer denied the averments in the penalty petition. Claimant did not challenge the WCJ's

During hearings before the WCJ, Claimant testified that she worked for Employer as a "hauler" and that on July 10, 2008, during the course of operating an electric pallet jack, she landed on her right knee. Claimant reported the incident to Employer and stated that she had injured her back. Approximately one week later, Claimant completed an incident report and reported to Employer's panel physician for examination. On July 29, 2008, Employer issued a notice of temporary compensation payable (NTCP) for medical treatment only and no loss of wages. The NTCP identified Claimant's injury as a lower back strain. On October 1, 2008, Employer issued a notice of compensation denial and notice stopping temporary compensation. Claimant worked modified duty following her injury and continued to work in that capacity until Employer's panel physician took Claimant out of work on September 26, 2008. Claimant filed her claim petition on October 10, 2008, seeking total disability benefits from September 26, 2008 onward as well as payment for her medical bills.

Claimant also testified before the WCJ regarding her injury. Claimant stated that she did not have any problem with her lower back before the work incident, and that she continues to have pain in her lower back and that the pain extends down her right leg. Claimant, however, also admitted that she had had back problems including sciatica before the date of her work injury. Claimant testified that she had sought treatment in late 2001 and May 2002 for low back pain that radiated into her right leg. Additionally, Claimant was treated in January 2008 for pain in her lower back that radiated into her leg. Claimant stated that epidural steroidal treatments relieved her right leg pain for a few weeks to a month, but that she did not receive any lasting relief from those treatments. Claimant

---

determination denying her penalty petition to the Board and has not raised any issue relating to that petition before this Court.

testified that she continues to experience difficulty twisting and turning and that, consequently, she does not believe she can return to the job she had at the time she was injured.

Claimant offered the medical deposition testimony of Robert W. Mauthe, M.D. Dr. Mauthe testified that his review of Claimant's medical records revealed that she had a history of back pain. Dr. Mauthe's review of MRIs of Claimant indicated that she had degenerative, age-related changes to her back that are unrelated to her work. Dr. Mauthe testified that when he examined Claimant in October 2008, her condition had improved, and he believed at that time that one or two more injections would return her to her "baseline." At the time of Dr. Mauthe's December 2008 examination of Claimant, he believed that although Claimant's condition was much improved, she had not fully recovered from her work injury, which he identified as an aggravation of lumbar radiculopathy.

Employer submitted the deposition testimony of John Anthony Kline, M.D. Dr. Kline examined Claimant on January 19, 2009. Dr. Kline's testimony was consistent with the testimony of Dr. Mauthe concerning Claimant's medical history of back and leg pain issues that pre-dated her work injury and the degenerative changes in Claimant's condition. Based upon his review of an MRI and an EMG performed in October and December 2008, respectively, Dr. Kline opined that the tests showed no signs of radiculopathy. Dr. Kline believed that Claimant's work-related injury consisted solely of a lumbrosacral strain or sprain, and that, as of the date of his examination on January 19, 2009, Claimant had fully recovered from that injury and required no modification of her work responsibilities or additional medical treatment. Although Dr. Kline disagreed with Dr. Mauthe's diagnosis of aggravation of lumbar radiculopathy, he testified

that, if Claimant had sustained such an aggravation injury, he observed no evidence that the aggravation continued at the time of his examination.

The WCJ determined that Claimant sustained a work-related injury in the nature of an aggravation of lumbar radiculopathy. The WCJ also concluded that Employer had demonstrated that Claimant had fully recovered from her work-related aggravation of lumbar radiculopathy. The WCJ therefore granted Claimant's claim petition for a closed period that ended January 19, 2009, the date upon which Dr. Kline examined Claimant and opined that she no longer suffered from any work-related injury. The Board affirmed the WCJ's decision, and this appeal followed.[2]

Claimant argues that Dr. Kline's testimony is legally insufficient to support the WCJ's conclusion that Claimant's work-related injury ceased. Claimant relies upon decisions arising the context of post-claim petition proceedings in which an employer seeks termination. Claimant is correct in arguing that when a WCJ has made an unchallenged determination in a claim petition that a claimant has sustained a particular work-related injury, an employer in a *later* termination action cannot satisfy its burden to prove that a work-related injury no longer exists through testimony that seeks to assert that the injury did not occur in the first instance. *Noverati v. Workmen's Comp. Appeal Bd. (Newtown*

[2] Our standard of review in a workers' compensation appeal is limited to determining whether an error of law was committed, whether constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704. We acknowledge our Supreme Court's decision in *Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe)*, 571 Pa. 189, 812 A.2d 478 (2002), wherein the Court held that "review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in which such question is properly brought before the court." *Wintermyer*, 571 Pa. at 203, 812 A.2d at 487.

Squire Inn), 686 A.2d 455, 460 (Pa. Cmwlth. 1996) ("[E]vidence that [a] claimant's condition was not work-related in the first instance, a matter previously adjudicated in [a claim petition] proceeding, will not suffice to satisfy [an e]mployer's burden of proof in its subsequent petition to terminate or suspend [a] claimant's benefits.").

The procedural posture of this case is different because this case does not involve a post-claim petition process seeking to terminate benefits. This case involves a ruling on a claim petition, in which the WCJ determined that Claimant did sustain an aggravation of a lumbar radiculopathy, but also accepted Employer's medical evidence that, if Claimant did suffer such an injury, she had recovered from that aggravation by the time Employer's medical expert examined her. Thus, the WCJ granted the claim petition for a closed period. In this case, Dr. Kline, while not accepting the fact of Claimant's alleged injury during the course of the claim petition proceedings, testified that Claimant no longer had any symptoms indicating that she continued to suffer from an aggravation of lumbar radiculopathy.

In *Milner v. Workers' Compensation Appeal Board (Main Line Endoscopy Center)*, 995 A.2d 492 (Pa. Cmwlth. 2010), this Court considered similar arguments in a case where a claimant filed a claim petition alleging a repetitive work injury. The workers' compensation judge granted benefits for a closed period and terminated benefits for the period that followed. This Court rejected the claimant's reliance on a case involving an employer's termination proceeding, and stated as follows:

> Not only is *Hebden [v. Workmen's Compensation Appeal Board (Bethenergy Mines, Inc.)*, 534 Pa. 327, 632 A.2d 1302 (1993)] an occupational disease case, but it is a case involving an action by the employer to terminate a

> claimant's benefits, placing the burden of proof on the employer to establish that the claimant's existing, recognized work-related disability has ceased. Because the case currently before us is a claim petition proceeding, no work-related injury has yet been recognized; rather it is the claimant's burden to establish all the necessary elements to support an award. Moreover, the claimant not only must prove that she has sustained a compensable injury but also that the injury continues to cause disability throughout the pendency of the claim petition proceeding. If the WCJ feels that the evidence supports a finding of disability only for a closed period, she is free to make such a finding. That is what the WCJ did here.

Id. at 495-96 (citations omitted).

The same reasoning applies in this case. It would be unreasonable to require an employer's medical expert to acknowledge as a fact that an injury that is still being litigated actually existed. In this case, Employer's medical expert did as much as he could. He testified that, if Claimant had suffered for a period from an aggravation of lumbar radiculopathy as a consequence of her work injury, she had recovered from that injury.

Consequently, we conclude that the Board did not err in affirming the WCJ's decision, and we affirm the Board's order.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sheila Carter,	:	
Petitioner	:	
v.	:	No. 2467 C.D. 2010
	:	
Workers' Compensation Appeal	:	
Board (Walmart Distribution Center),	:	
Respondent	:	

O R D E R

AND NOW, this 28th day of July, 2011, the order of the Workers' Compensation Appeal Board is AFFIRMED.

P. KEVIN BROBSON, Judge