

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Frank Damski, :
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 : Petitioner :
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 : v. :
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 : Workers' Compensation Appeal :
 : Board (Archbald Auto & Truck :
 : Repair), : No. 2659 C.D. 2010
 : Respondent : Submitted: November 18, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: December 16, 2011

Frank Damski (Claimant) appeals from an order of the Workers' Compensation Appeal Board (Board) reversing the decision of the Workers' Compensation Judge (WCJ) granting Claimant's penalty petition and expanding the previously-litigated description of injury to include symptomatic spinal stenosis requiring Archbald Auto & Truck Repair (Employer) to pay for the surgery and subsequent medical expenses which were not work-related. Because the nature of Claimant's injuries was previously litigated, and the Board committed no error in applying the doctrine of collateral estoppel and reversing the WCJ's decision, we affirm.

In order to analyze the instant appeal, we must set forth the facts surrounding Claimant's initial injury and what was at issue in the claim petition. Claimant worked for Employer as a heavy-truck mechanic for more than seven years. On August 30, 2007, Claimant was underneath a truck drilling the frame when the drill he was using jammed, causing his body to twist and injure his lower back. Claimant filed a claim petition, and Employer filed a notice of denial arguing that Claimant had not suffered a work-related injury.

In support of his claim petition, Claimant presented the deposition testimony of Sheryl Oleski, D.O. (Dr. Oleski), who began treating Claimant approximately two weeks after the injury. Dr. Oleski testified that Claimant suffered from right L4 radiculopathy and that this condition, to a reasonable degree of medical certainty, was the result of the August 30, 2007 work incident. Dr. Oleski testified that in reviewing Claimant's MRI film from September 6, 2007, she observed bony central canal stenosis and degenerative disc disease from L3 through S1; however, she specifically stated that these conditions were not related to his work injury. Dr. Oleski made a secondary diagnosis of congenital lumbar stenosis, but stated that this also was not related to Claimant's work injury. According to Dr. Oleski, stenosis typically caused pain in the back of both legs which worsened with standing and walking, and that this did not correlate with Claimant's symptoms. After the initial examination, Dr. Oleski prescribed physical therapy for Claimant as well as epidural steroid injections and released Claimant to return to work with restrictions. Dr. Oleski continued to treat Claimant on a regular basis and referred him for a neurosurgical consult with Philip J. Hlavac, M.D. (Dr. Hlavac).

In opposition to the claim petition, Employer presented the deposition testimony of David C. Baker, M.D. (Dr. Baker), who performed an independent medical examination (IME) of Claimant on January 9, 2008. As part of the IME, Dr. Baker took a history from Claimant, performed a physical examination, and reviewed Claimant's MRI report and film, the records of his epidural injections with Dr. Oleski, and records from Dr. Hlavac. Dr. Baker diagnosed Claimant with right L4 radiculopathy and an L4-5 disc herniation, and acknowledged that Claimant remained symptomatic as of the date of the IME.

In his decision regarding the claim petition, the WCJ found the testimony of Dr. Oleski to be the most credible and persuasive medical testimony presented because it was corroborated by diagnostic studies, test results, Claimant's own testimony and the physical findings made during the IME. The WCJ granted the claim petition finding that Claimant sustained a compensable work injury "consisting of an L4-5 disc herniation and right L4 radiculopathy" (February 18, 2009 WCJ Decision at 5), from which he had not yet fully recovered. Notably, stenosis was not included in the description of Claimant's work injury. This decision was not appealed by either party.

As to the facts giving rise to the present appeal, Claimant was seen by Dr. Hlavac on April 28, 2008, for a surgical consult with his chief complaint being severe back and right thigh pain with tingling and numbness into his right foot. Dr. Hlavac performed L2-3 to S1 lumbar decompression surgery on Claimant on July 17, 2008, to treat what Dr. Hlavac referred to as symptomatic stenosis. Employer refused to pay the medical bills for this surgery and Claimant's subsequent

treatment on the basis of causal relatedness. Claimant then filed a penalty petition, which is the subject of this appeal.

During the proceedings surrounding the penalty petition,¹ the parties agreed to submit all medical evidence by report. Claimant submitted the report of Dr. Hlavac who stated that when he first started treating Claimant in April 2008, he diagnosed him with lumbar stenosis and disc bulges/herniations noted at L4-5, L5-S1. Dr. Hlavac then referred Claimant for a second MRI which showed severe stenosis at L2-S1. In his report, Dr. Hlavac stated, “[t]he clinical diagnosis at that time was lumbar radiculopathy caused by a work related injury making his lumbar stenosis symptomatic.” (Reproduced Record (R.R.) at 35a). Dr. Hlavac also noted that Claimant’s stenosis was not symptomatic prior to the work injury, and that Claimant “had surgery on 07/19/2008 for a lumbar stenosis.” *Id.* Dr. Hlavac also stated in his report:

I believe the work related injury did not cause the stenosis. However, I do believe within a reasonable degree of medical certainty that the work related injury caused the stenosis to become symptomatic which was previously asymptomatic, thus causing the radiculopathy which required surgery. He also required postoperative physical therapy and medication.

(R.R. at 35a).

¹The WCJ who handled Claimant’s initial claim petition, Patrick Cummings, also handled the proceedings pertaining to this penalty petition.

During the penalty petition proceedings, Employer did not present any additional medical reports and instead relied upon the description of Claimant's work injury as found in the initial WCJ opinion to be "an L4-5 disc herniation and right L4 radiculopathy." Employer argued that Claimant's surgery and resulting treatment were performed in order to treat his stenosis, not a disc herniation or radiculopathy, and involved numerous vertebrae other than L4-5. In support of this fact, Employer pointed to Dr. Hlavac's report which stated that Claimant had surgery to treat his stenosis and that the stenosis was not caused by the work injury. In addition, the report from the hospital where Claimant had his surgery indicated a diagnosis of lumbar stenosis partially due to degenerative changes. Employer argued that the doctrine of collateral estoppel prevented Claimant from re-litigating the definition of his work-related injury during the penalty petition proceedings. The relevant facts were known to the parties at the time of the ruling on the initial claim petition, the matter was fully litigated, and because the WCJ's original determination of the work injury was not appealed, it was conclusive between the parties. The accepted description of the injury did not include stenosis or any vertebrae other than L4-5; therefore, Employer argued that the surgery was not causally related to Claimant's work injury, and Employer was not required to pay for the related medical expenses.

The WCJ accepted Dr. Hlavac's medical report as credible and, despite his final determination regarding the initial claim petition, found that the compensable work-related injury aggravated Claimant's pre-existing stenosis and caused it to become symptomatic, requiring surgery and ongoing treatment. The WCJ noted that while the hospital's description of Claimant's surgery addressed

discs from the L2 through S1 levels, those levels included the L4-5 level which was specifically identified as compensable in the previous decision. In addition, Employer failed to submit any medical evidence to contradict Dr. Hlavac's report. The WCJ found that the surgery and subsequent treatment at issue were causally related to Claimant's compensable work injury, and Employer's refusal to pay the associated medical expenses constituted a violation of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§1-1041.4, 2501-2708. Therefore, the WCJ granted the penalty petition.

Employer appealed to the Board, which reversed, emphasizing the fact that the WCJ's unappealed February 2009 decision determined Claimant's compensable work injury consisted *solely* of an L4-5 disc herniation and right L4 radiculopathy. Even though Claimant had been treating with Dr. Hlavac for almost a year at that point, the WCJ's decision did not include stenosis in the description of Claimant's injury. In addition, Dr. Hlavac's report admitted that the surgery was not performed to treat Claimant's L4-5 disc herniation; rather, it was performed because Claimant's stenosis became symptomatic. The nature of Claimant's injury was fully litigated at the time of the initial decision on his claim petition and this decision was not appealed; therefore, it became a final decision subject to collateral estoppel. The Board held that Claimant could not re-litigate the issue of the extent of his injury during the penalty petition proceedings and the WCJ erred in expanding the compensable injury to include stenosis. Because there was no evidence to support the finding that the surgery was causally related to Claimant's work injury, the WCJ erred in finding that Employer's refusal to pay

for surgery and treatment of Claimant's stenosis was a violation of the Act. This appeal followed.²

On appeal, Claimant argues that the Board erred in determining that collateral estoppel precluded him from re-litigating the issue of the extent of his injury during the penalty petition proceedings and that the WCJ erred in finding that his injury also included symptomatic stenosis. Noting that he did not file a review petition requesting that the description of his injury be expanded, Claimant contends that the WCJ did not actually change or expand the description of the compensable injury, but merely determined that his surgery and subsequent medical treatment was causally related to the work injury. We disagree.

We have repeatedly addressed the doctrine of collateral estoppel in workers' compensation cases, stating:

Where 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.

Williams v. Workers' Compensation Appeal Board (South Hills Health System), 877 A.2d 531, 535 n.4 (Pa. Cmwlth. 2005) (quoting *Patel v. Workmen's Compensation Appeal Board (Sauquoit Fibers Company)*, 488 A.2d 1177, 1179

² Our review of the Board's decision is limited to determining whether an error of law was committed, constitutional rights were violated or whether necessary findings of fact are supported by substantial evidence. *Williams v. Workers' Compensation Appeal Board (South Hills Health System)*, 877 A.2d 531, 535 n.4 (Pa. Cmwlth. 2005).

(Pa. Cmwlth. 1985)). Collateral estoppel acts to foreclose the re-litigation of issues “that were actually litigated; were essential to the judgment; and material to the judgment.” *Williams*, 877 A.2d at 535 (citing *Maranc v. Workers’ Compensation Appeal Board (Bienenfeld)*, 751 A.2d 1196 (Pa. Cmwlth. 2000)).

Obviously, the WCJ’s determination of the scope of Claimant’s work injury was both essential and material to the initial claim petition, and the extent of Claimant’s work injury was fully litigated at that time. Despite Claimant’s arguments, it is abundantly clear that his stenosis was not only known at the time of the initial claim petition proceedings, but was addressed in his own medical expert’s testimony. In her deposition presented in support of the initial claim petition, Dr. Oleski testified that Claimant had both bony central canal stenosis and congenital lumbar stenosis. However, Dr. Oleski clearly testified that Claimant’s stenosis was *not* related to his work injury and did not correlate with his symptoms. The WCJ found the whole of Dr. Oleski’s medical testimony to be credible and persuasive, and the diagnosis of stenosis was *not* included in the description of Claimant’s compensable work injury. The WCJ’s decision regarding the initial claim petition, including the description of the compensable work injury, was not appealed and, consequently, became a final decision binding on the parties.

In addition, the work injury was limited to specific vertebrae because the description was phrased as “an L4-5 disc herniation and right L4 radiculopathy.” However, the surgery admittedly addressed discs from the L2 through S1 levels, and the WCJ erred in expanding the description of the work injury to include these additional vertebrae. The compensable work injury did not

include stenosis or these other vertebrae, and Claimant failed to produce any evidence that the surgery and resulting treatment resulted from his L4-5 disc herniation and L4 radiculopathy. Therefore, the Board correctly determined that the WCJ's finding that Claimant's surgery was causally related to his work injury was not supported by substantial evidence.

Claimant also points to Section 413(a) of the Act and several cases citing this section for the proposition that a WCJ may clarify or amend the description of a claimant's work injury at any time. However, this is not an accurate statement of the law because Section 413(a) refers only to the description of an injury contained in a notice of compensation payable or agreement of the parties, not a description resulting from a final determination binding upon the parties:

A workers' compensation judge may, at any time, review and modify or set aside a *notice of compensation payable and an original or supplemental agreement* or upon petition filed by either party with the department, or in the course of the proceedings under any petition pending before such workers' compensation judge, if it be proved that *such notice of compensation payable or agreement* was in any material respect incorrect.

77 P.S. §771. (Emphasis added). Section 413(a) does not mention and is not applicable to final determinations which are binding upon the parties. If it did, the doctrine of collateral estoppel would not be applicable at all in workers' compensation cases because a WCJ could make modifications to or set aside a determination at any time regardless of whether or not a valid final judgment had

been rendered. With respect to the present case, at the time of the proceedings regarding the initial claim petition, Claimant had been treating with Dr. Hlavac for almost a year. If Claimant did not agree with the WCJ's initial description of his work injury and believed Dr. Hlavac's diagnosis of stenosis should have been part of that description, the appropriate remedy was to appeal that decision. Because he did not do so, Claimant is now collaterally estopped from re-litigating this material fact in the penalty petition.

Accordingly, the order of the Board is affirmed.

DAN PELLEGRINI, Judge

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ORDER

AND NOW, this 16th day of December, 2011, the order of the
Workers' Compensation Appeal Board, dated November 22, 2010, is affirmed.

DAN PELLEGRINI, Judge