

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Susan Gracely,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1679 C.D. 2007
	:	SUBMITTED: January 4, 2008
Workers' Compensation Appeal	:	
Board (CompServices, Inc.),	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: July 11, 2008

Claimant, Susan Gracely, appeals the decision of the Workers' Compensation Appeal Board (Board) reversing the Workers' Compensation Judge's (WCJ) award of attorneys' fees for unreasonable contest. We affirm.

Claimant suffered a work-related injury on March 16, 2005 while in the course of her duties at her Employer, CompServices, Inc. The Notice of Compensation Payable (NCP) described Claimant's injury as a "right foot fracture." On August 10, 2005, Claimant filed a Petition to Review (petition) the NCP alleging that the description of her injury should also include a right Achilles tendon tear. On August 22, 2006, the WCJ granted Claimant's petition, amending the NCP to include a partial tear of the Achilles' tendon, and awarding attorney's fees to Claimant. The WCJ found that Claimant had established that she sustained

an Achilles tendon tear in relation to her employment and that Employer did not present a reasonable contest to the petition because Employer's physician had not testified that Claimant's Achilles tendon tear was unrelated to her employment. Employer filed an appeal with the Board. The Board affirmed the WCJ's decision to amend the NCP to include a partial Achilles tendon tear. However, the Board reversed the WCJ's decision awarding unreasonable contest fees because the testimony of Employer's physician conflicted with the testimony of Claimant's physician regarding the existence of a partial Achilles tendon tear, thus creating a genuinely disputed issue. Claimant appealed to this Court asserting that the Board erred in reversing the award of attorney fees for unreasonable contest.

Claimant presented evidence from Vincent J. Muscarella, M.D. and Paul D. Cryan, D.P.M. and various x-ray and MRI reports in support of her petition. In May and June of 2005, Claimant reported right foot and Achilles tendon soreness to her physical therapists. Dr. Cryan's report dated July 27, 2005, indicated that too vigorous physical therapy resulted in some longitudinal tears of Claimant's Achilles tendon. An MRI reported dated July 14, 2005, indicated a small longitudinal tear in the most distal aspect of the right Achilles tendon and no Achilles tendon separation. On both July 14, 2005 and July 18, 2005, Dr. Muscarella noted a thickening of the Achilles tendon and an appearance of a partial tear just proximal to the insertion. An MRI dated August 16, 2005, revealed "the abnormal signal in the Achilles tendon appears somewhat more prominent on today's examination but this may be equipment or technique related." In addition, the August 16, 2005 MRI note indicated signal intensity within the Achilles tendon could be "related to tendinosis representing degeneration rather than tear."

Employer presented the testimony of Ronald Kraznick, M.D., a board certified orthopedic surgeon, in opposition to Claimant’s petition. Dr. Kraznick examined Claimant on September 7, 2005, and reviewed x-ray and MRI films. Dr. Kraznick testified that he did not see any tears of the Achilles tendons, but rather that he saw fluid between the fibers, which is not a tear. Dr. Kraznick did not find any disruption of continuity of the fibers of the Achilles tendon. Dr. Kraznick agreed that Claimant had abnormalities with her Achilles tendon. Dr. Kraznick testified that he disagreed with the radiologist description of “longitudinal tear” on the July 2005 MRI report because there was no lack of continuity of the Achilles tendon. He further stated that Claimant exhibited a separation of fibers of the Achilles tendon, which is consistent with an inflammatory response. Dr. Kraznick stated that he was talking about a “semantic distinction” in that he and his colleagues would not call the abnormality a tear, but would call it an inflammation of the tendon.

Whether to award unreasonable contest attorney’s fees is a question of law subject to plenary review by the Board and this Court. *Jordan v. Workers’ Comp. Appeal Bd. (Phila. Newspapers, Inc.)*, 921 A.2d 27 (Pa. Cmwlth. 2007). “Section 440(a) of the Act,¹ 77 P.S. § 996(a), provides that where a claimant succeeds in a litigated case reasonable counsel fees are awarded against the employer, as a cost, unless the employer meets its burden of establishing facts sufficient to prove a reasonable basis for the contest.” *U.S. Steel Corp. v. Workers’ Comp. Appeal Bd. (Luczki)*, 887 A.2d 817, 820 (Pa. Cmwlth.), *appeal denied*, 587 Pa. 726, 899 A.2d 1125 (2005). “A reasonable contest is established when medical

¹ Workers’ Compensation Act, Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§ 1-1041.4; 2501-2708.

evidence is conflicting or susceptible to contrary inferences, and there is an absence of evidence that an employer's contest is frivolous or filed to harass a claimant." *Id.* The employer bears the burden of proving a reasonable basis for contesting liability. *Gumm v. Workers' Comp. Appeal Bd. (J. Allan Steel)*, 942 A.2d 222, 230 (Pa. Cmwlth. 2008) citing *Dep't of Corr. v. Workers' Comp. Appeal Bd. (Clark)*, 824 A.2d 1241 (Pa. Cmwlth. 2003).

The Board found that Dr. Kraznick's testimony that Claimant did not sustain a tear of the Achilles tendon gave Employer a reasonable basis to contest the petition. Claimant's physician diagnosed a partial distal tear of the Achilles tendon. Employer's physician determined that Claimant's pain was caused by abnormalities in Achilles tendon causing inflammation. In addition, a full reading of Claimant's August 16, 2005 MRI report reveals that the radiologist believed that Claimant's condition could be the result of degenerative tendinosis rather than a tear of the Achilles tendon. Based on a review of these differing diagnoses, the medical evidence is clearly conflicting and susceptible to contrary inferences. A review of the record does not reveal any allegations or evidence to suggest that Employer contested Claimant's petition frivolously or intended to harass her. Accordingly, as the conflicting medical evidence regarding Claimant's injury created a genuine dispute and because Employer did not contest the petition frivolously or to harass Claimant, this Court concludes that Employer did not engage in unreasonable contest of the petition.

For these reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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ORDER

AND NOW, this 11th day of July, 2008, the order of Workers' Compensation Appeal Board in the above captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge