

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

James Henry,	:	
Petitioner	:	
	:	
v.	:	No. 1720 C.D. 2010
	:	
Workers' Compensation Appeal	:	Submitted: December 30, 2010
Board (Commercial Testing &	:	
Engineering),	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE P. KEVIN BROBSON, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: March 3, 2011

James Henry (Claimant), representing himself, petitions for review from an order of the Workers' Compensation Appeal Board (Board), reversing the order of a Workers' Compensation Judge (WCJ). The WCJ granted Claimant's petition to review compensation benefits (review petition) and recalculated Claimant's average weekly wage (AWW) upward. We conclude the AWW issue was subject to *res judicata* and that the WCJ erred in recalculating Claimant's AWW. Accordingly, we affirm the Board.

Claimant sustained a work-related back injury in 1996 while working as a drill assistant with Commercial Testing & Engineering (Employer). Employer entered a supplemental agreement in 1996 which established Claimant's AWW as \$589.10 per week with a weekly disability rate of \$392.74.

In 2002, Employer filed a modification petition. Employer alleged Claimant was capable of performing available light duty work. Claimant contended he pursued these positions but the employers did not hire him. The modification WCJ concluded Claimant acted in bad faith by not properly pursuing the available positions.¹ The WCJ calculated the wages he would have received at this employment, and correspondingly reduced Claimant's AWW. Claimant appealed this decision. Both the Board and this Court affirmed. Henry v. Workers' Comp. Appeal Bd. (Commercial Testing), No. 685 C.D. 2007 (Pa. Cmwlth. November 19, 2007).

Employer filed a termination petition in 2007. The WCJ granted the petition in 2008, and the Board affirmed in 2010. Claimant's appeal of the termination is pending before this Court and is addressed at Henry v. Workers' Compensation Appeal Board (Commercial Testing & Engineering), No. 1721 C.D. 2010, (Pa. Cmwlth. filed March 3, 2011).

The present case involves a petition to review compensation benefits Claimant filed in 2009. Claimant argues his prior AWW failed to include a *per diem* to which he was entitled. Claimant filed this petition while his appeal of the termination petition was pending before the Board.

The review WCJ held two hearings. At the first hearing, Claimant

¹ The modification WCJ discredited Claimant's testimony that he pursued job leads in good faith. Instead, the WCJ concluded Claimant failed to appear at several interviews, conducted himself rudely in other interviews, and failed to return to a potential employer when he was requested to do so.

represented himself. Claimant testified he worked for Employer at locations throughout the United States. He said Employer gave him a daily food allowance and paid for his lodging. Claimant stated he had numerous documents substantiating this testimony, but he failed to bring them. The review WCJ granted Claimant 60 days to gather the documents and to hire an attorney.

At the second hearing, Claimant again represented himself. He offered a single exhibit, which consisted of three documents: (1) a travel authorization form from 1996; (2) an expense report from 1996; and (3) an advertisement for a lodging facility. The travel authorization form indicates Employer authorized Claimant to receive an advance of \$270.00 for a single 10-day period in 1996. The expense report appears to be partially completed, and it covers the same 10-day period. The expense report contains a section for Employer to approve the expenses, but this section is not completed. Claimant also testified he did not believe the food and lodging allowances were included in his AWW.

Employer's attorney stated Employer's wage records for the 1996 period were no longer available. Additionally, Employer's insurer did not submit any documents identifying how it calculated Claimant's AWW for the 1996 supplemental agreement.

The review WCJ found Claimant credible and granted Claimant's petition. The WCJ recalculated Claimant's AWW to include a daily food and lodging allowance. He modified Claimant's AWW to \$824.10 and the weekly

disability rate to \$527.00. The review WCJ directed Employer to pay the additional disability benefits as of 1996 with annual interest of 10%.

Also, the review WCJ noted Employer did not offer any evidence rebutting Claimant's evidence. He summarily rejected Employer's *res judicata* and collateral estoppel arguments.²

Employer petitioned for review, and the Board reversed. The Board concluded the issue of AWW was barred by *res judicata*/collateral estoppel. The Board reasoned "the matter of the accuracy of the defendant's calculation of Claimant's pre-injury AWW was an essential element in the prior [2002] modification proceedings and could or should have been addressed at that time." Bd. Op. at 5. Claimant petitions for review.³

Claimant argues the Board erred in applying *res judicata*. He argues the parties did not litigate AWW. Petitioner's Pet. for Review at ¶3.⁴

² Employer also raised the issue of statute of limitations, which the review WCJ also rejected summarily. Employer does not discuss the statute of limitations argument in its brief before this Court.

³ This Court's review is limited to determining whether the WCJ's findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Minicozzi v. Workers' Comp. Appeal Bd. (Indus. Metal Plating, Inc.), 873 A.2d 25 (Pa. Cmwlth. 2005).

⁴ Claimant identifies this as the sole issue in the statement of questions involved portion of his brief. In both his petition for review and his brief, Claimant lists additional complaints.

For instance, he argues "there is no statute of limitations with ongoing felonies." Petitioner's Pet. for Review at ¶3. It is not clear to what Claimant is referring, and he never develops the felony concept in his brief. Additionally, in his brief he avers, "I have been **(Footnote continued on next page...)**"

A WCJ may review and/or modify a notice of compensation payable or a claimant's benefits at any time. Section 413(a) of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §771. However, the common law principles of *res judicata* and collateral estoppel apply in workers' compensation proceedings. "Technical *res judicata* applies when the following four factors all are present: (1) identity of the thing sued upon or for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality or capacity of the parties suing or being sued." Henion v. Workers' Comp. Appeal Bd. (Firpo & Sons, Inc.), 776 A.2d 362, 365-66 (Pa. Cmwlth. 2001). "This doctrine applies to claims that were actually litigated as well as those matters that should have been litigated." Id. at 366. "Generally, causes of action are identical when the subject matter and the ultimate issues are the same in both the old and new proceedings." Id.

Each of those elements is met here. The parties are the same, the injury is the same, and the issue of Claimant's AWW has been litigated. Calculation of pre-injury AWW was an integral component of the 2002 modification litigation. Indeed, the modification WCJ made a specific finding on the pre-injury AWW. WCJ Op., 3/4/05, Finding of Fact No. 23.

Claimant had the opportunity to fully litigate AWW. Of note, the

(continued...)

discriminated against because of my appearance." Petitioner's Br. at 11. He does not elaborate on this argument. Claimant has not properly preserved or developed these arguments. Accordingly, they are waived.

exhibit Claimant submitted in the review proceeding is dated 1996, and there is no reason of record to question its availability at the time of the 2002 modification proceeding. Claimant should have raised any challenges to the accuracy of the pre-injury AWW figure at that time. We conclude Claimant's effort to re-modify his AWW is precluded by *res judicata*.

In his brief Claimant also challenges factual findings made by the modification WCJ.⁵ Additionally, Claimant brought this review petition after the termination petition was granted.⁶ “Just as an employer may not use a termination petition to relitigate the work relatedness of a certain injury, so too a claimant cannot relitigate a termination order under the guise of a petition for reinstatement.” Shipley Oil Co. v. Workmen's Comp. Appeal Bd. (Lehr), 658 A.2d 489, 492 (Pa. Cmwlth. 1995) (citation omitted). A similar principle applies here. Claimant may not use this proceeding to relitigate a modification petition or collaterally attack a termination petition under the guise of challenging AWW.

Additionally, Claimant raises several arguments directed at his prior counsel. Claimant's concerns with prior representation are not appropriately addressed in a workers' compensation administrative setting.

⁵ See Petitioner's Br. at 10-11.

⁶ Claimant raises a number of issues that he raised in his termination petition. The Board addressed these issues in the termination proceeding. Similarly, we have addressed these issues in our decision in Henry v. Workers' Compensation Appeal Board (Commercial Testing & Engineering), No. 1721 C.D. 2010, (Pa. Cmwlth. filed March 3, 2011). Claimant's effort to raise these same issues in this appeal supports the conclusion that the present case is largely a collateral attack on the decisions in the termination proceeding.

For the above reasons we conclude the Board did not err in reversing the WCJ. Accordingly, we affirm.

ROBERT SIMPSON, Judge

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ORDER

AND NOW, this 3rd day of March, 2011, the order of the Workers' Compensation Appeal Board is **AFFIRMED**.

ROBERT SIMPSON, Judge