IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Elliott Hackney,	:	
Petitioner	:	
	:	
v.	:	No. 1812 C.D. 2007
	:	Submitted: February 22, 2008
Workers' Compensation Appeal	:	
Board (Ikon Office Solutions),	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKEY FILED: April 25, 2008

Elliott Hackney (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (the Board), dated August 28, 2007, affirming the decision of a Workers' Compensation Judge (WCJ), which granted the termination petition filed by Ikon Office Solutions (Employer). We now reverse.

At the crux of the issues in this case is whether the "bilateral wrist injuries" ultimately stipulated to by the parties may be limited to sprains and strains or whether Employer either accepted injuries that were greater in scope or is estopped from asserting that the injuries were limited to sprains and strains.

On March 4, 1999, Claimant was involved in an automobile accident during the course and scope of his employment with Employer as a driver/delivery person. Claimant was treated in the emergency room following the accident. Claimant

subsequently sought treatment from Dr. Cash,[1] and he performed a radiocarpal fusion of Claimant's right wrist on May 26, 1999 (less than three months after the accident).[2]

Employer accepted responsibility for the work injury and issued a notice of compensation payable (NCP), dated June 4, 1999, pursuant to the Workers' Compensation Act (the Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§1-1041.4, 2501-2626. The NCP described the injury only as a "right wrist sprain/strain." Claimant later underwent a proximal row carpectomy of the left wrist on January 5, 2000, during which the proximal row of carpal bones were removed surgically.[3]

On or about July 10, 2000, Claimant returned to work with restrictions at less than pre-injury earnings and received partial disability indemnity benefits. At some point thereafter, Claimant returned to his full duties, although he testified in an earlier proceeding that the duties exceeded his restrictions and he continued to experience pain and swelling. He was laid off from his employment with Employer on or about November 16, 2001, and he signed a severance agreement on November 21, 2001.

On or about December 6, 2001, Employer filed a petition for suspension of benefits, alleging that Claimant returned to work on April 28, 2001, at earnings equal to or greater than his pre-injury wage. Claimant filed an answer denying the allegations and asserting that his average weekly wage was understated and that he was laid off due to no fault of his own on November 16, 2001. On February 5, 2002, Claimant filed a

[1] The full name of Dr. Cash is not evident in the record.

[2] Claimant underwent another surgery on July 22, 1999, to remove hardware from his right wrist.

[3] Claimant also underwent a subsequent surgery on his left wrist to remove hardware. While the exact date of this surgery is not clear in the record, it appears as though this surgery took place at sometime in February of 2000.

petition to reinstate workers' compensation benefits and a petition to review the NCP due to an under-calculation of his average weekly wage and an incorrect description of his work injury. Claimant sought to amend the NCP to add left wrist, back and neck injuries.

By decision and order dated October 16, 2003, WCJ Scott Olin noted that the parties stipulated that the description of the work injury set forth in the NCP was "amended by agreement to include bilateral wrist injuries." The parties also stipulated to correct Claimant's pre-injury average weekly wage. Based on the stipulations, Claimant withdrew the review petition.

WCJ Olin then addressed Claimant's petition for reinstatement. In so doing, WCJ Olin relied on the Court's holding in Teledyne McKay v. Workmen's Compensation Appeal Board (Osmolinski), 688 A.2d 259 (Pa. Cmwlth. 1997), and afforded Claimant a presumption that his present disability, i.e. loss of earning power, was causally related to the continuing work injury, thereby entitling Claimant to a reinstatement of indemnity benefits. WCJ Olin recognized that Employer could rebut the presumption by establishing that the present loss of earnings is not a result of the work-related injury. WCJ Olin stated that Employer did not show any other reason for Claimant's wage loss. WCJ Olin's order, dated October 16, 2003, granted Claimant's petitions for penalties and reinstatement of compensation benefits and dismissed Employer's petition for suspension.[4] As there was no need to consider the review petition, the WCJ did not make any other determinations regarding the nature of Claimant's work injury.

[4] WCJ Olin stated that Employer presented no evidence that Claimant returned to work at pre-injury wages on April 28, 2001, thereby entitling it to a suspension.

Thereafter, on February 5, 2004, Employer filed a termination petition, alleging that Claimant had fully recovered from his March 4, 1999, work injury as of December 4, 2003. Claimant filed an answer denying that he had fully recovered. Also, on or about August 5, 2004, Claimant filed a petition for penalties, alleging that Employer illegally reduced Claimant's weekly indemnity benefits, to which Employer filed an answer denying the allegations.

The petitions were assigned to WCJ Robert Simmons. WCJ Simmons conducted hearings regarding Employer's termination petition.[5] Employer presented the deposition testimony of John Taras, M.D. Claimant presented the deposition testimony of Scott H. Jaeger, M.D. Claimant also testified on his own behalf.

Dr. Taras testified that he conducted independent medical examinations (IMEs) of Claimant on behalf of Employer on March 18, 2002, following Claimant being laid off, and again on December 4, 2003. Based upon his initial examination of Claimant on March 18, 2002, and the history provided by Claimant, Dr. Taras concluded that Claimant's case was "fairly straightforward." At that time, Dr. Taras noted that there was evidence that Claimant had an injury and that he had persistent limitations as a result of the injury. However, following his second examination of Claimant and a review of medical records, Dr. Taras diagnosed Claimant with bilateral wrist arthritis with post-degenerative changes. He opined that Claimant's limitations

[5] At a hearing on August 24, 2005, the parties requested that the petition for penalties be amended to include a petition to seek approval of a compromise and release agreement, which request was granted. The matter then proceeded in accordance with Section 449 of the Act, added by Act of June 24, 1996, P.L. 350, 77 P.S. §1000.5. Under the terms of the compromise and release agreement, Employer remained responsible for payment of future reasonable, necessary and related medical expenses subject to the terms of the Act. Employer reserved the right to request utilization review regarding the reasonableness and necessity of future medical treatment, and the parties agreed that Employer's termination petition would remain open.

were a result of pre-existing, degenerative arthritis unrelated to the work injury. He opined that Claimant had suffered a "right greater than left wrist sprain" as a result of the work injury, but that he had recovered from it. Dr. Taras explained that the typical recovery time for a sprain and strain of the wrist is two (2) to three (3) months. Therefore, Dr. Taras opined that Claimant had recovered from his work injury prior to the surgeries on his wrists. Moreover, the surgeries were unrelated to the work injury and were necessitated by pre-existing degenerative arthritis.

Dr. Yeager testified that he first examined Claimant on September 16, 2003. He diagnosed Claimant as suffering from multiple post-traumatic neuropathies of the ulnar nerve; bilateral median nerve neuropathy; post-traumatic radial nerve neuritis on the left; post-traumatic degenerative arthritis on the left; and progressive post-traumatic degenerative arthritis on the right. He causally related all of the conditions to Claimant's work injury. He agreed that Claimant had some level of arthritis prior to the work injury and acknowledged that the two types of surgeries performed on Claimant could be performed to correct an arthritic condition.

Claimant testified that he injured his wrists in 1999 and underwent surgeries on both wrists. He testified that he can not do as many things with his hands as he could before he injured his wrists in the work accident. He testified that he can drive a car, but he also testified that he cannot push a shopping cart. However, on cross-examination, Claimant identified himself in surveillance video that showed him pushing a shopping cart on several occasions.

By decision and order dated August 24, 2006, WCJ Simmons found that Claimant was fully recovered from his work injuries as of December 4, 2003, and terminated Claimant's benefits as of that date. Claimant appealed WCJ Simmons' order

to the Board. By opinion and order dated August 28, 2007, the Board affirmed. Petitioner then filed the subject petition for review with this Court.

On appeal,[6] Claimant raises several issues. First, Claimant argues that the doctrine of res judicata applies to estop Employer from denying causation as to the bilateral wrist injuries from which Claimant suffered at the time of petition for reinstatement. Second, Claimant argues that Employer failed to show a change in Claimant's condition since the prior litigation over Claimant's disability status. Third, Claimant argues that Employer's medical expert's opinion was equivocal and cannot legally support an opinion of full recovery of both wrist fractures because he changed his opinion based upon a single report of an unreadable x-ray of one injured wrist. Finally, Claimant argues that the WCJ's decision must be remanded because WCJ Simmons failed to understand the medical evidence presented and his reasoning was contradicted by the medical evidence.

The doctrine of res judicata prevents the relitigation of claims and issues in subsequent proceedings. Temple University v. Workers' Compensation Appeal Board (Parson), 753 A.2d 289 (Pa. Cmwlth.), petition for allowance of appeal denied, 564 Pa. 720, 764 A.2d 1075 (2000). The term "res judicata" encompasses two related, yet distinct, principles: technical res judicata and collateral estoppel. Id. Technical res judicata provides that when a final judgment on the merits exists, a future suit between

[6] Our scope of review in a workers' compensation appeal 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. 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.

the parties on the same cause of action is precluded. Maranc v. Workers' Compensation Appeal Board (Bienenfeld), 751 A.2d 1196 (Pa. Cmwlth. 2000). On the other hand, collateral estoppel acts to foreclose relitigation in a subsequent action of an issue of fact or law that was actually litigated and was necessary to a prior final judgment. PMA Insurance Group v. Workmen's Compensation Appeal Board (Kelley), 665 A.2d 538 (Pa. Cmwlth. 1995), petition for allowance of appeal denied, 544 Pa. 618, 674 A.2d 1078 (1996).

To succeed in a petition to reinstate benefits, a claimant bears the burden to prove that: (1) through no fault of his own, the claimant's disability, i.e., earning power, is again adversely affected by the work-related injury; and (2) the disability which gave rise to the original claim continues. Teledyne McKay.

To succeed in a termination petition, the employer bears the burden of proving that the claimant's disability has ceased and/or that any current disability is unrelated to the claimant's work injury.[7] Jones v. Worker's Compensation Appeal

[7] Where an employer alleges the existence of an independent cause of a claimant's continuing disability unrelated to the work injury, the burden remains on the employer to prove that such cause exists. Beissel v. Workmen's Compensation Appeal Board (John Wanamaker, Inc.), 502 Pa. 178, 465 A.2d 969 (1983); City of Philadelphia v. Workers' Compensation Appeal Board (Fluek), 898 A.2d 15 (Pa. Cmwlth.), petition for allowance of appeal denied, 590 Pa. 662, 911 A.2d 937 (2006). Also, in the course of defending against a termination petition, when a claimant alleges a new and distinct physical injury or psychiatric condition not contemplated by the original agreement or award of compensation, the burden rests with the claimant to establish that this new injury/condition was work-related. See Commercial Credit Claims v. Workmen's Compensation Appeal Board (Lancaster), 556 Pa. 325, 728 A.2d 902 (1999) (claimant's accepted injury to neck and back and later alleged psychiatric injury); Fluek (claimant's accepted injury to knee and later alleged injury to back). However, where the claimant's ongoing disability is related to an injury or condition which is of a very similar nature and/or affects the same body parts which have been recognized as compensable, then the burden remains with an employer to establish an independent cause for the same. See Beissel (claimant's accepted injury to lower back and later alleged continuing back problems); Gumro v. Workmen's Compensation Appeal Board (Emerald Mines Corp.), 533 Pa. 461, 626 A.2d 94 (1993) (claimant's accepted injury to left knee and later alleged continuing problems with left leg).

Board (J.C. Penney Co.), 747 A.2d 430 (Pa. Cmwlth.), petition for allowance of appeal denied, 564 Pa. 718, 764 A.2d 1074 (2000).

Claimant argues that WCJ Simmons and the Board erred when they allowed Employer to relitigate the issue of whether Claimant's continuing disability and/or symptoms are related to the work injury. Claimant argues that during the course of the proceedings relating to Claimant's petition to reinstate benefits and Employer's petition for suspension, Employer had to either concede that Claimant's work injury continued, or it had to raise the defense that the work injury no longer caused the wage loss. Employer did not allege a full recovery from the work injury or that the surgeries or disability is unrelated to the work injury. Instead, Employer entered into an agreement with Claimant to expand the description of injury to "bilateral wrist injuries" from the earlier description of "right wrist sprain/strain."

Although the precise nature of the "bilateral wrist injuries" was not specified, Claimant posits that the only conclusion one can draw from the conduct of the parties over the years of litigation and Employer's payment for medical services, is that Employer accepted that the wrist surgeries and their sequelae as part and parcel of the stipulated work injury. Also, Claimant points out that WCJ Olin determined that Claimant enjoyed the presumption that he continued to suffer an existing, on-going work-related injury. WCJ Olin wrote that Claimant's "loss of earning power [was] linked to his work injury." (WCJ Olin's decision and order at 6, attached to Claimant's brief as Appendix A). Now, through its termination petition, Employer essentially alleges that Claimant's work injury resolved years before, sometime prior to the wrist surgeries in 1999 and 2000. For those reasons, Claimant argues that Employer should be estopped from contesting that the surgeries were related to the work injuries, which continued to cause disability thereafter. In addition, Claimant asserts that Dr. Taras'

testimony, which WCJ Simmons credited, is equivocal because Dr. Taras fails to recognize and opine full recovery from accepted and recognized injuries.

Employer asserts that it never contested that Claimant suffered bilateral wrist injuries, as it acknowledged in the stipulation between the parties. Rather, in support of its termination petition, Employer presented medical evidence to prove that Claimant's work related injuries were limited to wrist strains and sprains from which Claimant had recovered and that Claimant's remaining disability related to pre-existing arthritis in both wrists. Employer responds that Claimant's reliance upon Beissel is completely misplaced and in no way supports a reversal of WCJ Simmons' decision and order. Employer argues that Beissel precludes an employer from terminating a claimant's benefits after it has issued an NCP by later presenting evidence that the disability it agreed it was responsible for was never work-related. Employer essentially asserts that this case is distinguishable from Beissel, because Employer in this case never agreed that Claimant's "bilateral wrist injuries" included anything more than sprains and strains.

Employer contends that the situation in this case is more analogous to this Court's decision in Royster v. Workmen's Compensation Appeal Board (National Mines Corp.), 518 A.2d 331 (Pa. Cmwlth. 1986). In Royster, the employer admitted that the claimant sustained a work-related injury in the nature of a right knee contusion. However, in the context of a petition for termination, the employer presented evidence that the claimant's disability caused by this injury had ceased and his residual symptoms related to preexisting arthritis.

We must disagree with Employer that this case is controlled by Royster. Instead, we must conclude that the circumstances are more similar to those in Beissel in

that Employer accepted liability for a work injury and then sought to establish that the injury was not work-related.

Here, Claimant sought to amend the NCP, which accepted only a right wrist sprain/strain, to include injuries to the left wrist. In lieu of litigating the review petition, the parties agreed, after examination of Claimant by Dr. Taras, to amend the NCP to include "bilateral wrist injuries." Although the parties did not specify precisely what medical conditions were to be included in the term "bilateral wrist injuries," we must conclude that the circumstances surrounding the parties' stipulation establish that Employer accepted that the work injury included bilateral wrist injuries that necessitated the surgeries to both wrists and resulted in disability that supported the reinstatement of benefits in October, 2003. We note that, in March of 2002, Employer's own medical expert, Dr. Taras, stated that Claimant's case was "straightforward," and he diagnosed Claimant as "status post bilateral wrist fractures." (Deposition transcript of Dr. Taras at 44). We also note that Employer subsequently agreed to stipulate that the work injury consisted of bilateral wrist injuries instead of litigating the review petition. Further, we note that Employer made no attempt to prove, in its opposition to Claimant's reinstatement petition, that Claimant was fully recovered from the work-related injury or that his continuing disability was not related to the original injury.

Given these circumstances, it appears that Employer, after learning of Dr. Taras' initial diagnosis of "status post bilateral wrist fractures," accepted that Claimant's work injury necessitated surgeries and resulted in the disability. It further appears that Employer decided not to challenge the review petition or reinstatement petition on that basis. Instead, Employer agreed to enter into the stipulation and challenged the reinstatement petition only on the basis that the wage loss did not relate to the work injury. It is illogical to believe that Employer, when it entered into the

stipulation, was only accepting liability for injuries that had resolved two (2) or three (3) months after the work accident in March, 1999, given that Employer was not provided that medical theory until after Dr. Taras examined Claimant in December, 2003. It was only after WCJ Olin granted the reinstatement petition that Employer had Claimant re-examined and Dr. Taras completely revised his opinion. However, Dr. Taras' revised opinion came too late, as Employer had already accepted liability for the expanded description of the work injury.

Also, even if we had not determined that Employer accepted Claimant's version of the work injury, we would still conclude that Employer is estopped from denying that Claimant's work injury included bilateral wrist injuries, which necessitated the surgeries to both wrists and resulted in the disability that supported the reinstatement of benefits in October, 2003. This is because in order to prevail in a petition for reinstatement, Claimant was required to prove that: (1) through no fault of his own, the claimant's disability is again adversely affected by the work-related injury; and (2) the disability which gave rise to the original claim continues. Teledyne McKay. Given that WCJ Olin granted the petition for reinstatement, it is apparent that he concluded that Claimant had established that he was again adversely affected by the work injury and that it continued to cause disability. To simply allow Employer to negate the determination of WCJ Olin by thereafter obtaining a "revised" medical opinion that advances a "new" theory of Claimant's medical condition, would allow Employer to improperly re-litigate an issue that was determined by a previous proceeding. In addition, to allow Employer a second chance to litigate an issue it should have previously litigated more fully would actually encourage parties to litigate in a piecemeal fashion. That way, if a party were unsuccessful on a narrow or limited issue, the party could then develop a new strategy in an attempt to gain a more favorable

ruling, thereby introducing uncertainty in the system designed to resolve conflicts and establish rights.

Additionally, we must agree with Claimant that Dr. Taras' testimony is equivocal because Dr. Taras fails to recognize and opine full recovery from accepted and recognized injuries. See GA & FC Wagman, Inc. v. Worker's Compensation Appeal Board (Aucker), 785 A.2d 1087 (Pa. Cmwlth. 2001). Hence, the WCJ could not rely upon Dr. Taras' testimony to support Employer's termination petition.

For these reasons, we must reverse the order of the Board.[8]

JOSEPH F. McCLOSKEY, Senior Judge

[8] As we have concluded that we must reverse the order of the Board, we need not address Claimant's remaining issues.

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Elliott Hackney, Petitioner	:	
v.	:	No. 1812 C.D. 2007
Workers' Compensation Appeal Board (Ikon Office Solutions), Respondent	:	

O R D E R

AND NOW, this 25th day of April, 2008, the order of the Workers' Compensation Appeal Board is hereby reversed.

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JOSEPH F. McCLOSKEY, Senior Judge