

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mark Deless, :
Petitioner :
 :
v. : No. 1957 C.D. 2007
 : Submitted: January 18, 2008
Workers' Compensation Appeal :
Board (Butler Auto Auction), :
Respondent :

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: February 27, 2008

Mark Deless (Claimant) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) denying Claimant attorneys' fees. The Board affirmed the decision of the Workers' Compensation Judge (WCJ) that the termination petition filed in this case was not unreasonable and, thus, Claimant was not entitled to attorneys' fees. For the reasons that follow we will affirm the Board's adjudication.

Claimant was employed as a tow truck driver by Butler Auto Auction (Employer). On June 11, 2003, Claimant was repossessing two vehicles from a dealer's lot when he was attacked by two employees. The attack left him unconscious for some period of time and required sutures to his head. Claimant received temporary total disability benefits pursuant to a Notice of Temporary Compensation Payable that accepted liability for a "possible concussion."

Reproduced Record at 3a (R.R. ____). Subsequently, the parties executed an Agreement for Compensation that defined the work-related injury as “post traumatic stress disorder” as a result of “mild traumatic brain injury.” R.R. at 22a. On June 21, 2005, Employer filed a termination petition asserting that Claimant had fully recovered from the work-related injury and was able to return to his pre-injury employment without restrictions.¹

At the hearing before the WCJ, Claimant testified that he continues to have difficulty with mental functioning and that he suffers migraine headaches and anxiety attacks. Claimant stated that he continues to receive treatment for his ongoing symptoms related to the post traumatic stress disorder. However, Claimant acknowledged that he sought treatment for depression and anxiety prior to the work injury. Claimant further acknowledged that all his treating physicians have stated that he can work in some capacity.

Employer introduced the deposition testimony of James D. Petrick, Ph.D., a board-certified clinical neuropsychologist. Dr. Petrick testified that he examined Claimant on April 26, 2005, at the request of Employer. Dr. Petrick reviewed Claimant’s medical history, records, and diagnostic studies in conjunction with the evaluation. Dr. Petrick testified that “globally speaking, I didn’t find much wrong with [Claimant] in terms of his primary cognitive functions that would be associated with any type of acquired brain damage.” R.R. at 56a. Dr. Petrick further stated that there was no “evidence of any type of acquired neurological injury, neurological disability, or organic basis for [Claimant’s] complaints.” R.R. at 57a.

¹ Claimant did not file an answer to the termination petition.

Dr. Petrick acknowledged Claimant's work-related injury to be mild traumatic brain injury with post traumatic stress disorder. He opined as follows:

[M]y opinion is that [Claimant] does not continue to suffer from any type of mild traumatic brain injury, and that his symptoms ... are a result of other factors.... I think there are pre-morbid factors, including his history of depression, limited coping skills, and ongoing environmental or psychosocial stressors that are contributing to his symptom maintenance.

R.R. at 58a. Dr. Petrick concluded that Claimant had made a full recovery with respect to any possible work-related neurological disability or impairment, and he opined that Claimant was able to return to his pre-injury employment without restrictions.

Claimant introduced the deposition testimony of Gary Goldberg, M.D., who is board-certified in physical medicine and rehabilitation. Dr. Goldberg testified that he began treating Claimant on October 23, 2003, and has continued to treat Claimant for symptoms that include: headaches, dizziness, depression, and post traumatic stress. Dr. Goldberg testified that these symptoms were directly related to Claimant's work-related injury. Dr. Goldberg testified that he did not believe Claimant had "the cognitive skills, the emotional status, the emotional strength and the general awareness and memory capabilities to really manage" his pre-injury employment on a full-time basis. R.R. at 100a. Dr. Goldberg acknowledged that there was no observable evidence of any injury to Claimant's brain. He based his diagnosis upon Claimant's subjective complaints as well as neuropsychological testing.

On January 11, 2007, the WCJ issued a decision finding that Employer did not prove that Claimant had fully recovered from his work-related injury and

denied Employer's termination petition.² However, the WCJ found that Employer's termination petition was reasonable because it was based upon the opinions of Dr. Petrick. Accordingly, the WCJ denied Claimant attorneys' fees for an unreasonable contest. Claimant appealed to the Board, which affirmed. Claimant now petitions for review.³

Claimant raises one issue for this Court to review. Claimant argues that Employer's medical expert did not offer an opinion about the cause of Claimant's current symptoms that differed in any significant way from the opinion of Claimant's expert. He claims that Employer's expert did not directly refute Claimant's expert opinion that the work-related incident caused his on-going symptoms. Thus, Claimant argues that Employer's termination petition was unreasonable, entitling him to attorneys' fees pursuant to the Workers' Compensation Act (Act).⁴

We begin with a review of an award of attorneys' fees for an unreasonable contest. Under Section 440 of the Act, 77 P.S. §996, a claimant who prevails, in whole or in part, is entitled to recover reasonable attorneys' fees from the employer unless the employer satisfies its burden of establishing a reasonable basis for the contest.⁵ A contest is reasonable when there is medical evidence that is

² The WCJ found the testimony of Claimant's medical expert, Dr. Goldberg, to be more credible than the testimony of Employer's expert, Dr. Petrick.

³ This Court's review of an order of the Board is limited to determining whether the necessary findings of fact were supported by substantial evidence, Board procedures were violated, constitutional rights were violated, or errors of law were committed. *Borough of Heidelberg v. Workers' Compensation Appeal Board (Selva)*, 894 A.2d 861, 863 n.3 (Pa. Cmwlth. 2006).

⁴ Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§1-1041.4, 2501-2626.

⁵ Section 440(a) of the Act, added by the Act of February 8, 1972, P.L. 25, provides in relevant part:

In any contested case where the insurer has contested liability in whole or in part
... the employe ... in whose favor the matter at issue has been finally determined
(Footnote continued on the next page . . .)

conflicting or susceptible to contrary inferences, and there is no evidence that the employer's contest was frivolous. *Schachter v. Workers' Compensation Appeal Board (SPS Technologies)*, 910 A.2d 742, 746 (Pa. Cmwlth. 2006). The question of whether a contest is reasonable is a question of law fully reviewable by this Court. *Id.*

In a termination proceeding, the employer bears the burden of proving that the claimant's disability has ceased or that any current disabilities are unrelated to the work injury. *Gillyard v. Workers' Compensation Appeal Board (Pennsylvania Liquor Control Board)*, 865 A.2d 991, 995 (Pa. Cmwlth. 2005). This burden can be met by competent and unequivocal medical evidence of a claimant's full recovery from a work injury. *Koszowski v. Workmen's Compensation Appeal Board (Greyhound Lines, Inc.)*, 595 A.2d 697, 699 (Pa. Cmwlth. 1991). Where the claimant complains of continued symptoms, the employer's medical expert must testify with a reasonable degree of medical certainty that the claimant has fully recovered; can return to work without restrictions; and that there are no objective medical findings to substantiate the complaints or to connect them to the work injury. *Udvary v. Workmen's Compensation Appeal Board (USAir, Inc.)*, 550 Pa. 319, 327, 705 A.2d 1290, 1293 (1997). Stated otherwise, to constitute a reasonable contest, a termination

(continued . . .)

in whole or in part shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred for attorney's fee, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend the proceedings: Provided, That cost for attorney fees may be excluded when a reasonable basis for the contest has been established by the employer or insurer.

77 P.S. §996.

proceeding must raise a genuinely disputed issue concerning the extent of the claimant's recovery.⁶

In this case, Employer presented the deposition testimony of Dr. Petrick, who testified that Claimant had fully recovered with respect to any possible neurological disability or impairment related to his work injury. Dr. Petrick acknowledged that Claimant's work injury included post traumatic stress disorder symptoms, as he was required to do in order for his testimony to be competent. However, Dr. Petrick explained that there was no objective evidence of any organic basis for Claimant's ongoing symptoms. Dr. Petrick also testified that any need for Claimant's continuing medical treatment relates to his *pre-existing conditions* rather than his work injury, *i.e.*, "pre-morbid factors, including his history of depression, limited coping skills, and ongoing environmental or psychosocial stressors." R.R. at 58a. Dr. Petrick opined that Claimant was fully recovered from the work-related injury and capable of returning to his pre-injury position without restrictions.

Dr. Petrick directly contradicted the testimony of Claimant's medical expert, Dr. Goldberg, that Claimant had not fully recovered from his work-related injury. Dr. Petrick acknowledged that Claimant still needed medical treatment, but

⁶ See *Schachter*, 910 A.2d 742 (employer satisfied its burden to establish a reasonable basis for a termination petition through evidence that was directly contrary to the testimony of claimant's medical expert that claimant had not fully recovered from the injury). *But cf. Gillyard*, 865 A.2d 991 (employer's termination petition was found to be unreasonable where employer's evidence failed to acknowledge the established injury or that claimant had recovered from said injury); *Eidell v. Workmen's Compensation Appeal Board (Dana Corp.)*, 624 A.2d 824, 826 (Pa. Cmwlth. 1993) ("[W]here, as here, an employer persists in maintaining a suspension or termination petition absent evidence to support the remedy sought, the employer's contest is unreasonable as a matter of law.") (quotation omitted).

he made it clear that this need did not relate to the incident on June 11, 2003.⁷ Dr. Petrick's testimony, if accepted by the WCJ, would have been sufficient to meet Employer's burden to prove that Claimant's disability had ceased and that any ongoing symptoms were unrelated to the work injury. Employer filed the termination petition to resolve a genuinely disputed issue concerning the extent of Claimant's recovery and, therefore, the WCJ properly denied Claimant attorneys' fees for an unreasonable contest.

Based on the foregoing, the decision of the Board will be affirmed.

MARY HANNAH LEAVITT, Judge

Judge Pellegrini dissents.

⁷ Dr. Petrick's report stated that Claimant had "made a complete recovery with respect to any possible neurological disability or impairment." R.R. at 60a. His report also stated that Claimant "was able to return to his pre-injury employment as a tow truck driver without restriction." *Id.*

On redirect, he was asked, "Does that remain your opinion today?" *Id.* He answered, "Yes, sir." *Id.* Dr. Petrick was also questioned about his statement that Claimant had not reached maximum medical improvement.

Q. When you made that statement, are you basing that statement upon factors other than what [Claimant] would have sustained as a result of the incident on June 11, 2003?

A. Yes, sir.

R.R. at 61a.

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ORDER

AND NOW, this 27th day of February, 2008, the order of the Workers' Compensation Appeal Board, dated September 21, 2007, in the above-captioned matter is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge