

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Ricci, :
Petitioner :
v. :
Workers' Compensation Appeal :
Board (Venice Auto Parts), : No. 2031 C.D. 2009
Respondent : Submitted: April 1, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: August 18, 2010

Joseph Ricci (Claimant) petitions for review from an order of the Workers' Compensation Appeal Board (Board) that reversed in part the Workers' Compensation Judge's (WCJ) decision to amend Claimant's April 7, 2005, work-related injury to include cervical radiculopathy and status post cervical surgery.

I. Prior Claim Petition.

On December 22, 2005, Claimant petitioned for benefits and alleged that on April 7, 2005, he sustained a work-related injury to his right shoulder and neck as a result of a lifting incident at Venice Auto Parts (Employer). Employer denied the allegations. Hearing was held before WCJ John Liebau (**WCJ Liebau**). On October 26, 2006, **WCJ Liebau** found:

2. Claimant testified as follows:

c. He reported his injury. He continued working. On April 18, 2005, he first sought medical treatment from

Dr. John Fanning. By this date the Claimant's right shoulder pain was going into his neck (emphasis added).

e. . . . He continues to treat for right shoulder pain. He still has pain in the front right shoulder and in the right side of his neck. (emphasis added).

. . . .

6. The Judge finds credible Claimant's testimony that on April 7, 2005, he injured his right shoulder while lifting a rear drive assembly The Judge finds credible Claimant's testimony that on June 28, 2005, he underwent right shoulder surgery and following this surgery, he was released to return to work with restrictions. (emphasis added).

7. The Judge finds credible Claimant's testimony that on or about September 30, 2005, he decided to start work at Gianna Auto Parts. The Judge accepts Claimant's testimony that this was a lighter duty job than his pre-injury position which involved heavy lifting. The Judge finds credible Claimant's testimony that on November 29, 2005 he underwent a second right shoulder surgery.

. . . .

9. The Judge having reviewed the record finds Dr. Isaacson's testimony to be more credible and persuasive than that of Dr. Didizian. The Judge gives the following reasons for this credibility determination:

. . . .

c. Dr. Isaacson credibly testified that the Claimant, as a result of undergoing two unsuccessful shoulder injuries, has developed reflex sympathetic dystrophy. (emphasis added).

WCJ Liebau's Decision, October 26, 2006, Findings of Fact (F.F.) Nos. 2c. and d., 6-7 and 9.c at 5-6; Reproduced Record (R.R.) at 11a-12a. **WCJ Liebau** concluded that Claimant suffered a right shoulder injury on April 7, 2005, and the Board affirmed.

II. Present Petitions.

On September 4, 2007, Claimant filed a “Petition to Review Medical Treatment and/or Billing” and alleged an “[i]ncorrect description of injury [April 7, 2005].” Petition to Review to Review Medical Treatment and/or Billing, September 4, 2007, at 1-2; R.R. at 15a. Claimant’s petition was assigned to WCJ Kathleen DiLorenzo (**WCJ DiLorenzo**).¹

Claimant testified that he injured “[m]y right shoulder and my C [cervical] spine.” Hearing Transcript (H.T.), October 11, 2007, at 3; R.R. at 92a. Claimant stated that he testified before **WCJ Liebau** that he injured his right shoulder and neck. H.T. at 6; R.R. at 95a. Claimant stated that his medical condition improved following his neck surgery. H.T. at 7; R.R. at 96a.

Claimant presented the medical deposition of Steven Grossinger, M.D. (Dr. Grossinger), board-certified in psychiatry, neurology, and pain management. Dr. Grossinger first examined Claimant on June 16, 2006, and diagnosed him with “[c]ervical radiculopathy, brachial plexopathy, reflex sympathetic dystrophy [and] right shoulder injuries, status-post two surgical procedures.” Deposition of Dr. Steven Grossinger, February 5, 2008, (Dr. Grossinger Deposition) at 11; R.R. at 110a. Dr. Grossinger opined that the source of these injuries was his April 7, 2005, work-related injury. Dr. Grossinger Deposition at 11; R.R. at 110a. Dr. Grossinger last examined Claimant on January

¹ **WCJ DiLorenzo** determined that “[s]ince the type of the filed Petition is not controlling and since relief may be granted on the basis of the evidence and law, the Judge concludes that the Petition to Review Medical Treatment and/or Billing should be and therefore is considered as a Petition to Review Compensation Benefits and a Claim Petition. **WCJ DiLorenzo’s** Decision, October 21, 2008, Conclusion of Law (C.L.) No. 2 at 13; R.R. at 31a. Therefore, this Court shall refer to Claimant’s petition as a review compensation/claim petitions.

31, 2008, and found that Claimant “had neck pain with stiffness in the shoulder and arms, tenderness in the thoracic spine.” Dr. Grossinger Deposition at 17; R.R. at 116a. Dr. Grossinger opined that Claimant suffered from “[c]ervical radiculopathy, status-post cervical surgery, right shoulder dysfunction, thoracic disc changes - - well, RSD, which I held related all to the incident of April 7th, 2005.” Dr. Grossinger Deposition at 17-18; R.R. at 116a-17a.

Employer presented the medical deposition of Noubar A. Didizian, M.D. (Dr. Didizian), board-certified in orthopedic surgery. Dr. Didizian first examined Claimant on May 9, 2006, at which time Dr. Didizian queried whether Claimant had any neck pain and Claimant responded in the negative. Medical Deposition of Dr. Noubar A. Didizian, February 8, 2008, (Dr. Didizian Deposition) at 7; R.R. at 145a. Dr. Didizian again examined Claimant on November 27, 2007, and opined that “based on my two examinations, review of the records, history personally taken from the patient, was that he did not sustain an injury to his neck as a result of the 4/7/05 date of injury.” Dr. Didizian Deposition at 15; R.R. at 147a. Dr. Didizian continued:

Rationale for my opinion is that if you follow the medical records after 4/7/05, you will see that all the treatment rendered by Dr. Mendez has been strictly to the right shoulder. There was absolutely no mention of any neck complaints or neck injury The neck did not get into the picture until later on. And so chronologically it was not related, historically it was not related, and the operative report indicates doing the surgery for degenerative diseases, not for any traumatic pathology . .

..

Dr. Didizian Deposition at 16; R.R. at 147a.

WCJ DiLorenzo made the following relevant findings of fact:

12. Based on the record, particularly the aforesaid Decision and Order [WCJ Liebau], the Judge finds that the occurrence of an injury to the Claimant's neck was not essential to the final judgment in the prior proceeding, that the occurrence and/or aggravation of a pre-existing condition in the course of the Claimant's employment was essential to the final judgment in the prior proceeding, that the legal and factual issues in the litigation of the Claim Petition and of this Petition are not identical, that there was no litigation of the same issue, specifically an occurrence of a work injury to the Claimant's neck (emphasis added).

. . . .

33. Based on the evidence, particularly the testimony of Dr. Grossinger and the Claimant, the Judge finds that the Claimant sustained an injury to his neck on April 7, 2005 although Dr. Didizan testified that the Claimant did not sustain an injury to his neck on April 7, 2005 (emphasis added).

. . . .

38. Based on the evidence, particularly the testimony of the Claimant and Dr. Grossinger, the Judge finds that the description of the Claimant's work injury is materially incorrect on the basis of its lack of inclusion of injuries in the nature of cervical radiculopathy, status-post cervical surgery, right shoulder dysfunction, thoracic disc changes, and reflex sympathetic dystrophy, with clinical findings of recurrent swelling and pain, hypersensitivity, and continued numbness with an extension of it to the right arm, as a result of the work injury of April 7, 2005, in addition to right shoulder injury and reflex sympathetic dystrophy. (emphasis added).

39. The Judge finds that the Claimant had medical treatment for the work injury of April 7, 2005, inclusive of that by Drs. Grossinger, Mendez, Stellabotte, Isaacson, Wisdo, and Yablon and in the nature of the evaluations, therapies, injections, medications, diagnostic tests, orthopedic devices, and surgery to the cervical spine.

WCJ DiLorenzo’s Decision, October 21, 2008, Findings of Fact (F.F.) Nos.12, 33, and 38-39 at 6, 11, and 12; R.R. at 24a, 29a, and 30a. **WCJ DiLorenzo** concluded that Claimant sustained his “burden, particularly an entitlement to Workers’ Compensation Benefits for the work injury of April 7, 2005 and in the nature of cervical radiculopathy, status-post cervical surgery” **WCJ DiLorenzo’s Decision**, C.L. No. 5 at 13; R.R. at 31a. **WCJ DiLorenzo** granted Claimant’s review compensation/claim petitions.

The Board reversed in part:

We observe that there is no NCP of record in this proceeding, and that the record in the first Claim Petition proceeding indicates that no NCP was issued Thus, the description of injury was initially determined by litigation. Claimant pled a right shoulder and neck injury in his first Claim Petition He therefore had the burden of proving that he sustained a neck injury in the course and scope of his employment on April 7, 2005. He testified to neck pain, attributed it to his work injury, and stated that he’d been advised by doctors that he had a neck injury. However, the original judge [WCJ Liebau] determined that Claimant sustained a right shoulder injury, and did not include a neck injury in the description of injury.

. . . .
Claimant thus was aware of neck symptoms in April 2005, pled a neck injury in his Claim Petition in December 2005, and did not prove it in the litigation of the first Claim Petition The ultimate and controlling issue, that is, the nature and extent of Claimant’s April 7, 2005, work injury, was decided in the prior proceeding between the same parties. Claimant is thus barred by technical res judicata from relitigating the occurrence of a work-related injury on April 7, 2005

We reverse in part, and delete ‘cervical radculopathy, status post cervical surgery’ from the description of

Claimant's injury. (footnote and citations omitted and emphasis added).

Board Opinion, September 17, 2009, at 8-9; R.R. at 43a-44a.

III. Whether Claimant Presented The Identical Issue Of A Neck Injury In His Review Compensation/Claim Petitions?

Initially, Claimant contends² that he was not precluded from seeking a clarification of the description of his work injury which was incorrectly found in his prior claim petition proceeding.³ Essentially, Claimant asserts that he initially filed his original claim petition to seek contested workers' compensation benefits. Here, in these current petitions Claimant seeks payment of the medical bills associated with his alleged neck injury.

In Weney v. Workers' Compensation Appeal Board (Mac Sprinkler Systems, Inc.), 960 A.2d 949 (Pa. Cmwlth. 2008), appeal denied, 601 Pa. 691, 971 A.2d 494 (2009), this Court recounted the criteria necessary to establish res judicata and collateral estoppel:

Initially, we note that technical res judicata and collateral estoppel are both encompassed within the parent doctrine of res judicata, which 'prevents the relitigation of claims and issues in subsequent proceedings.' Henion [v. Workers' Compensation Appeal Board (Firpo & Sons, Inc.)], 776 A.2d at 365 [(Pa. Cmwlth. 2001)].

Under the doctrine of technical res judicata, often referred to as claim preclusion, 'when a final judgment

² This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board, 589 A.2d 291 (Pa. Cmwlth. 1991).

³ This Court has foregone the sequence of Claimant's arguments.

on the merits exists, a future suit between the parties on the same cause of action is precluded.’ Id. In order for technical res judicata to apply, there must be: ‘(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 sued.’ Id. at 366. Technical res judicata may be applied to bar ‘claims that were actually litigated as well as those matters that should have been litigated.’ Id. . . . ‘Generally, causes of action are identical when the subject matter and the ultimate issues are the same in both the old and the new proceedings.’ Id.

The doctrine of collateral estoppel often referred to as issue preclusion, ‘is designed to prevent relitigation of an issue in a later action, despite the fact that the later action is based on a cause of action different from the one previously litigated.’ Pucci v. Workers’ Compensation Appeal Board (Woodville State Hosp.), 707 A.2d 646, 647-48 (Pa. Cmwlth. 1998). Collateral estoppel applies where:

(1) the issue decided in the prior case is identical to the one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the doctrine is asserted was a party or in privity with the party in the prior case and had a full and fair opportunity to litigate the issue; and (4) the determination in the prior proceeding was essential to the judgment. Id. at 648.

Weney, 960 A.2d at 954 (emphasis in original and added).

Here, the criteria for res judicata and collateral estoppel have been satisfied. First, the issues decided in the prior claim petition were identical to the issues presented in the current review compensation/claim petitions. Claimant filed his original claim petition on December 22, 2005, and alleged that he suffered a work-related injury on April 7, 2005, to his right shoulder and neck. At the

original claim petition hearing, **WCJ Liebau** found that Claimant testified that his “right shoulder pain was going into his neck . . . [h]is first surgery did not relieve his right shoulder and neck pain . . . [h]e still has pain in the front of his right shoulder and in the right side of his neck.” **WCJ Liebau’s** Decision, F.F. No. 2.d and c at 1; R.R. at 9a. (emphasis added). Critically, **WCJ Liebau** found that Claimant only sustained a compensable right shoulder injury on April 7, 2005, and **WCJ Liebau** did not include a cervical spine/neck injury as compensable. On September 4, 2007, when Claimant filed these review compensation/claim petitions and sought to amend **WCJ Liebau’s** previously adjudicated work injury to include cervical/neck injury the first prong of collateral estoppel was satisfied.

Second, there had been a final judgment on the merits which resulted in an award of ongoing compensation benefits for a compensable right shoulder injury. The second prong of collateral estoppel was satisfied.

Third, Claimant is the same party who filed the claim petition and then the review compensation/claim petitions. In the original hearing before **WCJ Liebau**, Claimant was provided a full and fair opportunity to litigate whether he sustained a compensable injury to his neck. Claimant was represented by counsel, testified on his own behalf, and presented the medical testimony of Dr. Isaacson. Claimant also was extended the opportunity to cross-examine Employer’s medical witness, Dr. Didizian and Joseph Gricco, Employer’s fact witness. The third prong of collateral estoppel was satisfied.

Last, the determination in the prior claim petition proceeding that Claimant only sustained a right shoulder injury, not a neck injury, was essential to the **WCJ DiLorenzo's** present decision.

In conclusion, as in Weney, the subject matter of both the claim petition and the review compensation/claim petitions “was the nature and extent of the injuries that Claimant sustained as a result of” his April 7, 2005, work incident, and “the ultimate issue in both proceedings” was whether **WCJ Liebau's** decision “accurately reflected the nature and extent of Claimant’s injuries.” Weney, 960 A.2d at 955. Here, Claimant had testified before **WCJ Liebau** that he experienced neck pain in addition to his right shoulder injury. **WCJ Liebau** only found that Claimant credibly testified that he injured his right shoulder. **WCJ Liebau** did not find that Claimant suffered a neck injury. Claimant is attempting to re-litigate whether he suffered a neck injury in his review compensation/claim petitions.⁴ This Court is constrained to conclude the Board properly determined that technical res judicata/collateral estoppel applied.

BERNARD L. MCGINLEY, Judge

⁴ Claimant contends that because he was the successful party before **WCJ Liebau** he was precluded from appealing to the Board. This issue is without merit. Before **WCJ Liebau**, Claimant had attempted to establish that he suffered a neck injury in addition to his right shoulder injury. **WCJ Liebau** only found Claimant suffered a right shoulder injury. The Board concluded that “[m]oreover, even if he [Claimant] had not actually litigated a neck injury in the first Claim Petition proceeding, he should have done so.” Board’s Opinion at 9. See Weney, 960 A.2d at 956

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ORDER

AND NOW, this 18th day of August, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

BERNARD L. MCGINLEY, Judge