IN THE COMMONWEALTH COURT OF PENNSYLVANIA

County of Allegheny (Shuman Center) and UPMC Benefits Management Services, Inc., Petitioners	:	
v.	:	
Workers' Compensation Appeal Board (Parker), Respondent	:	No. 2200 C.D. 2011
Harold Parker, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (County of Allegheny (Shuman Center) and UPMC Benefit Management Services, Inc.), Respondents	:	No. 2278 C.D. 2011 Argued: June 4, 2012

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: September 18, 2012

Allegheny County Shuman Center (Employer) petitions for review the decision of the Workers' Compensation Appeal Board (Board) which reversed and remanded the suspension of benefits awarded in the June 24, 2009, Decision and Order of the Workers' Compensation Judge (WCJ) and also awarded Harold Parker (Claimant) unreasonable contest attorney's fees.

Claimant cross-appeals the October 27, 2011, Opinion and Order of the Board which reversed the WCJ's November 17, 2009, remand order which awarded attorney's fees.

I. Procedural History

A. Prior Matters

Claimant served as Chief Supervisor for Employer. Pursuant to a Notice of Compensation Payable (NCP) issued on September 30, 1993, Claimant sustained a work-related "Strain Tear (L) Shoulder/Rotator Cuff" on September 12, 1993. Notice of Compensation Payable, September 30, 1993, at 1; Reproduced Record (R.R.) at 12a.

On June 13, 1994, Claimant returned to work and received partial disability benefits pursuant to a Supplemental Agreement because he was earning less than his Average Weekly Wage (AWW). Claimant subsequently suffered a recurrence of total disability on November 17, 1994, which was reflected in another Supplemental Agreement.

After Employer filed a Suspension Petition on January 16, 1996, Claimant elected to participate in Employer's voluntary separation program. Claimant resigned from employment due to his work injury and pain.

In a decision circulated on October 15, 1997, the WCJ concluded that Employer had failed to meet its burden of proving that it was entitled to a suspension of benefits. Employer did not appeal.

On February 20, 2002, Employer filed a second Petition which requested a suspension of benefits based again on Claimant's alleged voluntary withdrawal from the work force.

Employer submitted the medical testimony of Dr. Vincent Silvaggio (Dr. Silvaggio). Dr. Silvaggio examined Claimant on September 25, 2000, and opined that Claimant could not return to his pre-injury position as Chief Supervisor for Employer, but that Claimant was capable of working in a restricted duty capacity.

In a Decision circulated on June 19, 2003, the WCJ denied Employer's Suspension Petition. The WCJ determined that Claimant did not voluntarily remove himself from the workforce. Finding of Fact No. 7(a) at 3; Reproduced Record (R.R.) at 32a. Employer appealed.

On April 9, 2004, the Board remanded in part and affirmed in part. The Board remanded and instructed the WCJ to make necessary findings and conclusions regarding whether Claimant retired from the workforce in general, not merely from his former position. The Board affirmed the WCJ's determination that collateral estoppel and/or res judicata did not apply. Board's Opinion and Order, April 9, 2004, at 6; R.R. at 27a.

On December 22, 2004, the WCJ made additional findings of fact:

> (a) This Judge specifically finds that the claimant did not look for work outside of his pre-injury position due to the limitations related to the work injury he sustained on

> September 12, 1993 and his fear of re-injuring his shoulder;
>
> (b) This Judge only accepts Dr. Silvaggio's opinion to the extent that the claimant was unable to perform his pre-injury position. This Judge rejects Dr. Silvaggio's testimony to the extent that he indicated claimant could return to some restricted duty capacity. In so concluding, this Judge finds the testimony of the claimant to be credible regarding the limitations of his shoulder and his fear of re-injuring his shoulder;
>
> (c) This Judge finds the testimony of the claimant to be credible and persuasive that he was forced into retirement from the work force in general due to his work injury to his shoulder;
>
> (d) This Judge also finds as credible the testimony of the claimant that he was forced to accept the voluntary retirement incentive program offered by the employer due to the work injury in question. This Judge finds claimant's resignation letter of April 25, 1996 to his employer supports the reasons for his resignation.

WCJ's Decision, December 22, 2004, Findings of Fact 3(a)-3(d) at 1-2; R.R. at 19a-20a.

B. Present Controversy

On June 26, 2007, Employer filed a Petition to Suspend Compensation Benefits which alleged that Claimant was offered a specific job and again alleged that he voluntarily withdrew from the workforce. It also alleged that Claimant was not found to be totally and permanently disabled from any and all employment per the medical opinion of Dr. Silvaggio.

Employer presented the deposition testimony of Dr. Brian F. Jewell, M.D., (Dr. Jewell), a board-certified orthopedic surgeon licensed to practice medicine in the Commonwealth of Pennsylvania. Dr. Jewell opined that Claimant was capable of performing the job he was offered. Additionally, Dr. Jewell credibly testified that there was an improvement in Claimant's condition when compared with Dr. Silvaggio's evaluation in 2000 which was the basis of the prior litigation.

In further support of its Petition, Employer offered the deposition testimony of Lynette Drawn-Williamson (Ms. Drawn-Williamson), the Deputy Director for Employer. Ms. Drawn-Williamson's job duties included accommodating injured workers' restrictions and returning them to productive employment. Ms. Drawn-Williamson noted that Employer does have a light-duty program and that a modified-duty clerical receptionist position was available. Deposition of Ms. Drawn-Williamson, August 21, 2007, (Ms. Drawn-Williamson Deposition), at 6; R.R. at 184a. Ms. Drawn-Williamson reviewed the job description and stated that whoever manned this position was "responsible for the doors as the visitors or guests enter the building. So they're responsible for opening the doors and also securing any items in lockers primarily." Ms. Drawn-Williamson Deposition at 7; R.R. at 185a. Ms. Drawn-Williamson explained that this position was within the administrative area and that Claimant would not be expected to interact with Employer's residents in a crisis situation. Ms. Drawn-Williamson Deposition at 16; R.R. at 194a.

Claimant testified on his own behalf. Claimant explained that he injured his shoulder when he restrained a juvenile resident of Employer. Claimant recounted that he had five surgeries on his shoulder and eventually underwent a shoulder replacement. Claimant received a job offer from Employer for a modified-duty clerical/receptionist position, but explained that he did not accept the offer because there is "[a]lways a risk" that there will be physical contact or an altercation with a resident of Employer because "the kids, they're constantly trying to escape from there." Deposition of Claimant, December 11, 2007, (Claimant Deposition), at 6-7; R.R. at 79a-80a. Claimant conceded that he was not aware if there were any altercations with residents that occurred in the control room area between his retirement in 1996 and when he was offered the modified-duty position in 2007. Claimant Deposition at 19; R.R. at 92a.

By Decision and Order circulated April 23, 2008, the WCJ determined that Employer met its burden of proving that Claimant was offered work within his physical restrictions and that he failed to follow through on the job offer in good faith, which entitled it to a suspension of compensation effective June 11, 2007. The WCJ also found that Employer's contest of the Suspension Petition was reasonable:

> 6. Based upon the foregoing, and all the evidence of record, this WCJ finds the following as fact:
>
> A. The claimant failed to follow through, in good faith, on a job referral as of June 11, 2007. The claimant received the return to work letter of May 24, 2007 and responded that he was unable to accept this job offer. He did not and has not even attempted to perform the modified duty job of clerical receptionist, which is found to be within

his physical restrictions when taking into account his work injury

B. This job is lighter duty than the modified duty position he was previously offered…. The [Employer] was not barred by principles of *res judicata* or collateral estoppel from offering even lighter duty work in subsequent litigation. This especially holds true when there is a documented improvement in the claimant's physical condition.

C. The testimony of Dr. Jewell is credited in its entirety…. There was no medical opinion offered by the claimant in contradiction to the medical opinion expressed by Dr. Jewell, which, again, was based on several evaluations.

D. The testimony of Ms. Drawn-Williamson is also credited in its entirety. It is found as fact that the [Employer] offered the claimant sedentary duty work in which he would not have direct contact with residents and would not be placed in a situation where he would have to interact in any resident altercations….

E. The testimony of the claimant that he is incapable of performing *any* level of work *on account of his work injury* is rejected as not being credible. (It may be true due to a combination of the residual effects of other ailments and his age, but not the work injury.) The claimant did not offer the opinion of any medical expert to support his contention that he was incapable of performing a sedentary duty position, which basically required that he sit at a desk enclosed behind glass and buzz visitors into and out of the Center….

F. While the claimant previously attempted to return to work in a modified duty capacity as a Chief Supervisor, he was unable to continue to do so due to his work injury. As per the prior decision and Order, I find the claimant credible that he was "forced" to resign from his pre-injury position as

> well as from the position he was working in April of 1996. However, he has *not* shown that he was "forced" into retirement from the *entire labor market* as of June 11, 2007. As of this time, the claimant, who is eighty (80) years old, demonstrated that he has no intention of seeking any additional work and is voluntarily withdrawn from the workforce.

WCJ's Decision, April 23, 2008, Findings of Fact 6 A-F, at 7-8; Employer's Brief at A-9- A-10. (emphasis in original).

Claimant appealed to the Board.

In an Opinion and Order circulated June 24, 2009, the Board reversed and remanded the WCJ's Decision. First, the Board reversed the WCJ's grant of the Suspension Petition, and found that Employer was barred by collateral estoppel because the issue had been previously litigated when the WCJ determined that Claimant was forced out of the entire labor market in a Decision and Order circulated December 28, 2004. Additionally, the Board remanded for the WCJ to make the necessary findings of fact regarding unreasonable contest attorney's fees, because Employer had no basis for the Suspension Petition.

In a Decision and Order circulated November 17, 2009, the WCJ determined that Employer failed to meet its burden of proving a reasonable basis for contest of the Suspension Petition. The WCJ awarded attorney's fees in the amount of $8,525.00. Claimant and Employer appealed.

Before the Board, Employer maintained that the Board erred when it "encroached upon the sole province of the WCJ when it disregarded" the WCJ's

"factual determinations" that Dr. Jewell credibly established that Claimant's condition improved. Employer also argued that collateral estoppel did not apply because the present issue was not identical to the issues previously litigated.

Claimant argued that the WCJ erred when it awarded attorney's fees only for the underlying litigation and remand litigation before the WCJ. The Board agreed and determined:

> After careful review of the evidence, we believe the WCJ erred in limiting the attorney's fee award to work done before the WCJ. As the Commonwealth Court made clear in [Arnold v. Workers' Compensation Appeal Board (Baker Industries), 859 A.2d 866 (Pa. Cmwlth. 2004)], attorney's fees are appropriate when the attorney expends time to aid the claimant. Here, the Appeal from the April 23, 2008 WCJ Decision was successful in reinstating Claimant's benefits. As such, Claimant's counsel should be entitled to attorney's fees, because without the Appeal, Claimant would not be receiving benefits. Claimant also argues that Claimant's counsel is entitled to attorney's fees for work done on the present appeal. An award of attorney's fees for the present Appeal, however, would not aid the client, because Claimant would not have to pay his counsel any additional fees nor would Claimant's counsel take additional fees from Claimant's benefits. Therefore, we believe the WCJ erred in limiting the fees in her Decision, and Claimant is entitled to the quantum meruit attorney's fees sought on remand for counsel's work on the underlying litigation and the first Appeal but not on the present Appeal.

Board's Opinion, October 27, 2011, at 3-4; Employer's Brief at A-29- A-30.

II. Issues Presented

Employer raises[1] three issues on appeal: 1.) the Board erred in its June 24, 2009, Opinion and Order which reversed the WCJ's grant of a suspension of benefits based upon Claimant's refusal of suitable work within his residual work capabilities; 2.) the Board erred when it awarded unreasonable contest attorney's fees; and 3.) the Board erred when it determined that Employer waived its right to appeal the June 24, 2009, Opinion and Order, because the Employer did not raise issues in its first appeal to the Board, when Employer appealed that matter to the Commonwealth Court, which quashed that appeal as interlocutory and determined that "the issues…will not ultimately evade appellate review," and Employer preserved the matter before the WCJ on remand.[2]

On cross-appeal, Claimant contends that the WCJ erred when it determined that counsel may only be awarded unreasonable contest fees for the time expended on the underlying litigation before her. Claimant argues that the underlying appeal constituted work done for the benefit of the Claimant and therefore the WCJ's Finding was in error. Claimant also contends that counsel is entitled to attorney's fees for defending the Employer's present appeal. Claimant's Appeal from Judge's Findings of Fact and Conclusions of Law, December 11, 2009, at 1-2.

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[1] 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 (Penn Installation)*, 589 A.2d 291 (Pa. Cmwlth. 1991).

[2] This Court foregoes the order of arguments.

A. Whether the Board Erred When it Determined that Employer Waived its Right to Appeal the June 24, 2009, Opinion and Order, Because Employer Did Not Raise the Issues in its First Appeal to the Board?

Employer contends that the Board erred when it determined that Employer waived its right to appeal the June 24, 2009, Opinion and Order because Employer did not raise the issues in its first appeal to the Board.

After the Employer prevailed before the WCJ in the underlying Decision, in its June 24, 2009, Order, the Board reversed the WCJ's Decision. At that point, Employer appealed to this Court.

On August 20, 2009, this Court quashed the appeal as premature. The matter was then remanded to the WCJ for a hearing pursuant to the Board's Order for the sole purpose of determining the award of unreasonable contest fees. Counsel for Employer expressly stated on the record that the purpose of submitting all of the documents into evidence was "to make sure that the record preserves" its appeal. WCJ Hearing, October 27, 2009, at 11; R.R. at 109a.

The Board determined that Employer waived the issue of whether Claimant was forced from the labor market when it failed to raise it on their initial appeal to the Board.

> The strict doctrine of waiver is applicable to workers' compensation proceedings. Dobransky v. WCAB [Workers' Compensation Appeal Board] (Continental Baking Co.), 701 A.2d 597 (Pa. Cmwlth. 1997). Thus, an issue must be preserved at every stage in the proceeding, and any issues not properly preserved are waived. Nabisco Brands, Inc. v. WCAB [Workers' Compensation Appeal Board] (Tropello), 763 A.2d 555 (Pa. Cmwlth. 2000). To properly preserve an issue for

> appeal, an appellant must include in its notice of appeal form a statement of the particular grounds upon which its appeal is based, including reference to the specific findings of fact which are challenged and the errors of the law which are alleged. 34 Pa. Code §111.11. Merely listing the numbers of the WCJ's findings of fact and conclusions of law on the appeal form is insufficient to preserve an issue for appeal. Matticks v. WCAB [Workers' Compensation Appeal Board] (Thomas J. O'Hora, Co.), 872 A.2d 196 (Pa. Cmwlth. 2005). Any arguments not properly preserved with sufficient specificity in the notice of appeal form are waived. Id. Arguing issues in a brief to this Board does not cure the failure to properly preserve issues in the notice of appeal. Id.
>
> To raise the issue of whether Claimant was forced from the labor market in the present Appeal, [Employer] was required to preserve it at every stage of litigation. Dobransky. The Board determined that [Employer] was barred by collateral estoppel from re-litigating the issue of whether Claimant was forced from the entire labor market in its June 24, 2009 Opinion and [Employer] had standing to appeal that issue to the Commonwealth Court at that time. However, [Employer] did not file an appeal, on any issue. Thus, [Employer] has waived the issue of whether Claimant was forced from the labor market on appeal, and the Board's Opinion that collateral estoppel barred [Employer] from re-litigating the issue must stand.

Board's Opinion and Order, October 27, 2011, at 4-5; R.R. at A-30-A-31.

Therefore, a review of the record reveals that the second appeal was actually the Employer's first appeal to the Board. Employer would have lacked standing to appeal the first WCJ decision to the Board because it was not aggrieved. All issues were properly preserved at all levels of appeal and review.

B. Whether the Board Erred When it Reversed the WCJ's Grant of Suspension Based Upon Claimant's Refusal of Suitable Work Within His Residual Work Capacities?

Employer contends that the Board erred when it reversed the WCJ's grant of suspension based upon Claimant's refusal of suitable work within his residual work capacities.

Claimant responds that benefits will not be modified by an offer of other employment when the employer's medical witness does not "medically compare" the claimant's present physical condition with his physical condition during the earlier disability litigation.

Section 413 of the Workers' Compensation Act (Act),[3] 77 P.S. §772, provides that a claimant's benefits may be modified or terminated based upon a change in claimant's disability:

> A workers' compensation judge designated by the department may, at any time, modify, reinstate, suspend, or terminate a notice of compensation payable, an original or supplemental agreement or an award of the department or its workers' compensation judge, upon petition filed by either party with the department, *upon proof that the disability of an injured employee has increased, decreased, recurred, or has temporarily or finally ceased*… (emphasis added).

Thus, a WCJ may modify or terminate benefits when it has been demonstrated that the claimant's disability has changed.

[3] Act of June 2, 1915, P.L. 736, *as amended.*

In *Kachinski v. Workmens' Compensation Appeal Board (Vepco Construction Company)*, 516 Pa. 240, 532 A.2d 374 (1987), the Supreme Court of Pennsylvania outlined a four-part test that must be employed in order for an employer to modify or terminate workers' compensation benefits. The first part of the test states: "The employer who seeks to modify a claimant's benefits on the basis that he has recovered some or all of this ability must first produce medical evidence of a change in condition." *Kachinski*, 516 Pa. at 252, 532 A.2d at 380.[4] Therefore, where an employer seeks to modify or terminate benefits on the basis that the claimant's medical condition has improved, reducing his disability, the employer bears the burden of demonstrating actual physical improvement. *See Dillon v. Workmen's Compensation Appeal Board (Greenwich Collieries)*, 536 Pa. 490, 640 A.2d 386 (1994).

In order to meet its burden under the first prong of the *Kachinski* test, an employer need only adduce medical evidence that the claimant's current physical condition is different than it was at the time of the last disability adjudication.[5] It is not sufficient, nor is it proper, for an employer merely to

[4] The other three steps require that: 2) the employer must then produce evidence of a referral to a then open job, which fits in the occupational category for which the claimant has been given medical clearance; 3) the claimant must then demonstrate that he has in good faith followed through on the job referral(s); and 4) if the referral fails to result in a job, then the claimant's benefits should continue.

[5] As an initial matter, this Court reiterates our clarification of the ongoing viability of *Kachinski*. Those standards continue to apply where an employer seeks to modify benefits based on an offer of a specific job with the employer. The standards do not apply, however, in Act 57 cases allowing for modification upon proof of "earning power." *CRST v. Workers' Compensation Appeal Board (Boyles)*, 929 A.2d 703 (Pa. Cmwlth. 2007).

Section 306(b)(2) of the Act, 77 P.S. §512(b)(2) (Section 306(b)(2) was added by the Act of June 24, 1996, P.L. 350, No. 57), states:

(Footnote continued on next page…)

challenge the diagnosis of claimant's injuries as determined by a prior proceeding. To do so is insufficient to establish the change in condition required by the first prong of *Kachinski*.

In the present case, Employer relies on the medical testimony of Dr. Jewell who conducted three medical evaluations of Claimant between March 4, 2005, and April 27, 2007.

Dr. Jewell determined that Claimant reached maximum medical improvement (MMI) because he did not see any significant improvement or degradation in Claimant's condition. Dr. Jewell also opined that Claimant was capable of performing the duties of the available position.

(continued…)

> "Earning power" shall be determined by the work the employe is capable of performing and shall be based upon expert opinion evidence which includes job listings with agencies of the department, private job placement agencies and advertisements in the usual employment area. Disability partial in character shall apply if the employe is able to perform his previous work or can, considering the employe's residual productive skill, education, age and work experience, engage in any other kind of substantial gainful employment which exists in the usual employment area in which the employe lives within this Commonwealth.... If the employer has a specific job vacancy the employe is capable of performing, the employer shall offer such job to the employe. In order to accurately assess the earning power of the employe, the insurer may require the employe to submit to an interview by a vocational expert who is selected by the insurer and who meets the minimum qualifications established by the department through regulation....

77 P.S. §512(2).

[Employer's Counsel (EC)]: [On April 27, 2007,] did you obtain any additional interim history from the Claimant or from review of any medical records?

[Dr. Jewell]: The only history was I spoke to [Claimant] and his wife once again, and he again stated he had not had any further doctor visits or significant intervening care, and he had stated that he had no significant changes in his treatment. He had been taking Advil once every week or two. He is not working or been trying to get any new jobs, no prescription medications, and described again no significant changes in his treatment. We again kind of went over his symptomology. Very similar. Based on his pain, one to two on a scale of ten. Pain up to five on a scale of ten when he used his arm more. Short distance driving. Really pretty similar to prior.

[EC]: Did you conduct a physical examination of Mr. Parker on April 27, 2007?

[Dr. Jewell]: Yes.

[EC]: What did that reveal to you?

[Dr. Jewell]: To be blunt, very similar to prior. I did not see any significant difference in that examination.

[EC]: Would you expect to find any differences in examination?

[Dr. Jewell]: No.

[EC]: Why not?

[Dr. Jewell]: Again, he was at MMI. He had not sought further treatment and did not claim to have any significant changes either. So the examination was consistent with what he told me and what I gleaned from him.

….

> [EC]: Now, Doctor, relative to this last examination, were you furnished with any particular job analyses to review and consider whether [Claimant] would be capable of performing such a position?
>
> [Dr. Jewell]: Yes….
>
> [EC]: Did you consider that particular document relative to [Claimant's] condition?
>
> [Dr. Jewell]: Yes.
>
> [EC]: Did you feel based upon review of that document if it adequately summarized the job duties of that position, the physical requirements and whether or not [Claimant] would be capable of performing that type of position?
>
> [Dr. Jewell]: Yes… I reviewed it, and I felt that as long as it correlated and stayed within the restrictions I'd supplied over the three times I've seen [Claimant], he could perform that job safely.

Deposition of Dr. Brian F. Jewell, August 22, 2007, (Dr. Jewell Deposition), at 36-38; R.R. at 149a-151a.

Claimant argues that benefits will not be modified by an offer of other employment when Dr. Jewell did not "medically compare" the Claimant's present physical condition with his physical condition during the earlier disability litigation.

Dr. Jewell believed his medical examination was "very different" from Dr. Silvaggio's exam.

> [Claimant's Counsel (CC)]: Dr. Jewell, I'm going to talk with you for a minute about the report which you reviewed from Dr. Vincent Silvaggio. That was with

regard to his evaluation of August 26, 2000 which was the subject of some prior- - a prior proceeding in this case. You made a comment. You said that we were comparing apples to oranges or something to that effect. I want to just make sure I understand this. Is that because he did not document well his testing, for instance, with regard to what was active versus passive range of motion?

[Dr. Jewell]: That is one issue. Yes.

[CC]: What are some of the other issues that caused you to believe that comparing your exam to Dr. Silvaggio's was apples to oranges?

[Dr. Jewell]: The only thing you have is you have range of motion and strength. That's the extent of [his] exam.
….

[CC]: So not being critical of Dr. Silvaggio, but is it fair to say that your exam was a much more complete exam with regard to [Claimant's] left shoulder injury?

[Dr. Jewell]: In my opinion, and again, same thing you just stated, not being critical in any way. Just in my opinion they are two different examinations.

[CC]: For instance, in your exam you referred to some tests you did, and you've explained them to us. One was the Neer's, and was the other one Hawkins?

[Dr. Jewell]: Correct.

[CC]: Those are examinations that are specifically for shoulder-type injuries?

[Dr. Jewell]: Correct.

[CC]: I don't believe I saw those tests referred to in Dr. Silvaggio's report.

[Dr. Jewell]: Correct.

> [CC]: In fact, you said that as far as comparing the results of your exams from the results as far as we could realizing it's apples and oranges with Dr. Silvaggio's exam, basically they are the same?
>
> [Dr. Jewell]: No. I found more forward flexion. I found a different rotation. So I thought there was slight improvements in motion. So I wouldn't call them the same…. Medically, I don't think you can compare them all that closely. I think I saw some improvements. I also saw some things that I thought were maybe a little more negative, but they weren't documented on the other one…. From a medical standpoint, you can compare only what he did. What he didn't document as active or passive. I found slightly more motion. So there's some differences for the better.

Dr. Jewell Deposition at 43-45; R.R. at 156a-158a.

This Court concludes that Dr. Jewell's opinion is sufficient to establish that Claimant's medical condition changed. As such, Employer has predicated its Suspension Petition on medical evidence of a change in Claimant's condition as required by *Kachinski*. It was, consequently, properly considered by the WCJ.

Employer also challenges the Board's determination that Employer's Suspension Petition was barred by collateral estoppel and *res judicata* because the issues in the 2004-2005 litigation and the issues in the current litigation were not identical.

The Board reversed the WCJ's Decision and Order:

> In a December 28, 2004 Decision and Order issued by WCJ Cheryl Ignasiak, on remand, it was concluded that Claimant was forced to retire from the work force in general due to his September 12, 1993 work injury. (Decision and Order 12/28/04; Conclusion of Law No. 2). WCJ Ignasiak further found that Claimant did not voluntarily remove himself from the work force. (Id.; Conclusion of Law No. 3). Claimant maintains that the conclusions reached in this litigation preclude Defendant [Employer] from pursuing its present appeal regarding the issue of Claimant's retirement. We agree. The issue of whether Claimant retired had been previously litigated and determined in the December 28, 2004 Decision and Order. Accordingly, in the present litigation, the WCJ was precluded from finding that Claimant failed to show he was forced into retirement from the entire labor market as of June 11, 2007. Additionally, because it was previously determined that Claimant was forced out of the entire labor market[,] the WCJ was not required to reach the merits of Defendant's [Employer's] Suspension Petition. A previous determination as to whether a claimant's work injury was the cause of his leaving the labor force will act as collateral estoppel in a subsequent petition involving the same issue.

Board's Opinion and Order, June 24, 2009, at 4-5; Employer's Brief at A-16-A-17.

Collateral estoppel or "broad res judicata, prevents re-litigation in a later action of an issue of fact or law which was actually litigated and which was necessary to the original judgment." *City of Pittsburgh v. Zoning Board of Adjustment of Pittsburgh*, 522 Pa. 44, 55, 559 A.2d 896, 901 (1989).

> Collateral estoppel applies when:
>
> (1) the issue decided in the earlier case is identical to the one presented in the later action; (2) there was a final judgment on the merits in the earlier action; (3) the party against whom the plea is asserted was a party, or in

> privity with a party to an earlier adjudication; (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior action; and (5) the determination in the prior proceeding was essential to the judgment.

Cohen v. Workers' Compensation Appeal Board (City of Philadelphia), 589 Pa. 498, 503, 909 A.2d 1261, 1264 (2006).

The present matter is not barred by collateral estoppel because the issues in the 2004-2005 litigation and the issues before us now are not identical. In the earlier proceeding, the issue was whether Claimant was forced to retire from the workforce, in general, taking into consideration his physical condition at that time. Here, Employer presented new medical evidence that Claimant's condition improved since 2005 and that a light duty position was available within Claimant's work restrictions. Therefore, we conclude that the factors necessary for collateral estoppel are not present in this case and that the Board erroneously reversed the WCJ's suspension of benefits.[6]

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[6] The Board cited *Pucci v. Workers' Compensation Appeal Board (Woodville State Hospital)*, 707 A.2d 646 (Pa. Cmwlth. 1998) to support its contention that a "previous determination as to whether a claimant's work injury was the cause of his leaving the labor force will act as collateral estoppel in a subsequent petition involving the same issue." Board's Opinion at 5; Employer's Brief at A-17.

In *Pucci*, a Claimant's benefits were suspended based upon a return to work. Subsequently, the Claimant accepted a disability retirement relative to a non-work related heart condition. The Claimant filed a Reinstatement Petition, which was denied as the Claimant's disability was not related to his left wrist work injury. Rather, his wage loss was related to non-work related heart condition for which he applied for and was granted his pension. Three years later, the Claimant filed another Reinstatement Petition which alleged that he underwent surgery to his left arm relative to the work injury, and asserted entitlement to a reinstatement of benefits based upon disability due to that surgery.

In the proceedings on the second petition, the Claimant offered the report of Dr. William Hagberg, which was not admitted into evidence due to a hearsay objection. The Claimant did

(Footnote continued on next page…)

C. Whether the Board Erred When it Awarded Unreasonable Contest Attorney's Fees?

Employer contends that the Board erred when it awarded unreasonable contest attorney's fees.

Section 440(a) of the Act, 77 P.S. §996(a)[7], provides:

> In any contested case where the insurer has contested liability in whole or in part, including contested cases involving petitions to terminate, reinstate, increase, reduce or otherwise modify compensation awards, agreements or other payment arrangements or to set aside final receipts, the employe…in whose favor the matter at issue has been finally determined 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 the insurer. (emphasis added).

(continued…)

not have Dr. Hagberg testify or deposed. The Claimant did not secure the testimony of Dr. Hagberg even after the WCJ allowed additional time. The WCJ denied the Reinstatement Petition as the Claimant neither alleged nor offered any evidence that the reason he had left the labor force had changed.

On appeal, the Board affirmed and noted that the WCJ adequately discussed whether Claimant's non-work disabling condition "had changed."

On appeal to this Court, the Claimant essentially argued that the mere passage of time was sufficient to avoid application of collateral estoppel. This Court explained that "a party seeking to alter the status quo must prove that there has been a change of physical condition or circumstances since the last legal proceeding addressing the nature and extent of disability." *Id.* at 648 (emphasis added).

Accordingly, the Board's reliance on *Pucci* was misplaced because Employer proved not only a change in the Claimant's physical condition but also a change of circumstances.

[7] This Section was added by the Act of February 8, 1972, P.L. 25.

An employer's contest is reasonable if the contest was brought to resolve a genuinely disputed issue, not merely to harass the claimant. *Dworek v. Workmen's Compensation Appeal Board (Ragnar Benson, Inc.)*, 646 A.2d 713 (Pa. Cmwlth. 1994). The imposition of attorney fees is a question of law reviewable by the Board and this Court. *McGoldrick v. Workmen's Compensation Appeal Board (Acme Markets, Inc.)*, 597 A.2d 1254 (Pa. Cmwlth. 1991).

Because this Court has determined that Claimant did not prevail, Claimant is not entitled to attorney's fees.

D. Claimant's Cross-Appeal

On cross-appeal, Claimant contends that he is entitled to an award for unreasonable contest counsel fees for the time spent defending the instant appeal to this Court.

Again, this Court has determined that Claimant did not prevail so he is not entitled to attorney's fees.

Accordingly, the decision of the Board is reversed.

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BERNARD L. McGINLEY, Judge

Judge McCullough did not participate in the decision in this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

County of Allegheny (Shuman Center) and UPMC Benefits Management Services, Inc., Petitioners	:	
v.	:	
Workers' Compensation Appeal Board (Parker), Respondent	:	No. 2200 C.D. 2011
Harold Parker, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (County of Allegheny (Shuman Center) and UPMC Benefit Management Services, Inc.), Respondents	:	No. 2278 C.D. 2011

O R D E R

AND NOW, this 18th day of September, 2012, the Order of the Workers' Compensation Appeal Board is reversed.

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BERNARD L. McGINLEY, Judge