**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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| LOUISE NORRIS, | : | |
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| Petitioner | : | |
| | : | |
| v. | : | No. 249 C.D. 1998 |
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| WORKERS' COMPENSATION APPEAL BOARD (HAHNEMANN HOSPITAL), | : | Submitted: June 12, 1998 |
| | : | |
| Respondent | : | |

BEFORE: HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE EMIL E. NARICK, Senior Judge

**OPINION BY JUDGE DOYLE** **FILED: January 21, 1999**

Louise Norris (Claimant) appeals from an order of the Workers' Compensation Appeal Board (Board) which affirmed a decision of a Workers' Compensation Judge (WCJ), which granted a Petition to Terminate Compensation Benefits filed on behalf of Hahnemann Hospital (Employer).

Pursuant to a Notice of Compensation Payable dated March 2, 1994, Claimant has been receiving weekly compensation benefits in the amount of $353.14 as a result of an injury sustained on January 28, 1994. On that date Claimant, who was a "medis group abstractor," sustained an injury to her back and knees when she slipped and fell at work. Claimant returned to work for Employer

on June 9, 1994, but at a reduced number of hours to reflect her continuing work-related disability. Pursuant to the provisions of the Workers' Compensation Act (Act),[1] on June 17, 1994, Employer filed a Termination Petition, a Modification Petition and a Suspension Petition, alleging that as of May 5, 1994, Claimant had fully recovered from her work-related injury and was capable of returning to her time-of-injury position. Claimant filed a timely answer denying all material allegations contained within Employer's petitions.

On five separate occasions between September 1994, and February 1995, while Employer's various petitions were pending, the Notice of Compensation Payable was modified by the parties to reflect changes in Claimant's earnings due to the increasing number of hours she was able to work following her return to work on June 9, 1994.

The WCJ conducted multiple hearings between October 1994 and June 1995 and in a decision dated October 27, 1995, concluded that Employer had met its burden of proving that Claimant had fully recovered from her work-related injury as of March 29, 1994, and granted Employer's termination petition. The WCJ further concluded that Employer had a reasonable basis to file the petition to terminate and, accordingly, denied the Claimant's request for counsel fees under Section 440 of the Act, 77 P.S. §996, for an unreasonable contest. The Claimant had requested Section 440 counsel fees in response to the several amendments by

[1] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§1-1041.4.

Employer, amendments which the Employer had made to its multiple petitions.[2] Claimant appealed to the Board, which affirmed the WCJ's decision by an order dated January 14, 1998. This appealed followed.

On appeal to this Court,[3] Claimant argues that the Board committed an error of law when it affirmed the WCJ's decision terminating her compensation benefits because of the various supplemental agreements signed by the parties. Claimant further asserts that the Board also committed an error of law when it affirmed the WCJ's decision denying Claimant's request for attorney fees based upon Claimant's contention that Employer's appeal was not reasonable.

Claimant argues first that, because she and Employer entered into supplemental agreements while Employer's termination petition was pending and because her counsel and Employer's counsel stipulated to a suspension of benefits, the WCJ committed an error of law when he granted Employer's termination petition effective as of March 29, 1994. In support of this view Claimant directs our attention to Department of Labor and Industry v. Workmen's Compensation

[2] Employer, at the June 13, 1995 hearing amended its petitions, seeking a termination of benefits as of March 29, 1994, the date of Claimant's medical evaluation by Dr. Williams, one of Employer's medical witnesses. In the alternative, Employer sought a suspension as of November 15, 1994, the date of Claimant's examination by Employer's other medical witness, Dr. Fabiani. Further in the alternative, Employer sought a suspension as of November 29, 1994, the date Dr. Fabiani released Claimant to return to her time-of-injury position without restriction.

[3] This Court's review is limited to determining whether necessary findings of fact are supported by substantial evidence, whether constitutional rights were violated, or whether an error of law was committed. Morey v. Workers' Compensation Appeal Board (Bethenergy Mines, Inc.), 684 A.2d 673 (Pa. Cmwlth. 1996).

Appeal Board (Allstate Insurance Co.), 406 A.2d 354 (Pa. Cmwlth. 1979), for the proposition that "Compensation Agreements are Stipulations of Fact and are binding on the parties." (Claimant's Brief at 8.) The Board, when it addressed this issue below, stated:

> Claimant argues that the Supplemental Agreements entered into by both parties are actually Stipulations which supersede this Termination Petition litigation, citing Department of Labor & Industry v. W. C. A. B. (Allstate Insurance Company), 406 A.2d 354 (Pa. Cmwlth. 1979). However, the facts of [Allstate Insurance Co.] are distinguishable from the matter at hand. In that case, Defendant's Modification Petition was withdrawn and a Supplemental Agreement submitted to the Department of Labor & Industry. [Allstate Insurance Co.] at 355. There, the issue was whether, under §407 of the Act, a Supplemental Agreement was void for illegality.
>
> In the instant case, the issue is whether Supplemental Agreements to modify or suspend, issued during the pendency of the litigation, preclude Defendant from arguing in the alternative that Claimant has fully recovered. This issue is controlled in §413(a) of the Act which states, in pertinent part, as follows:
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> > 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 [Judge], upon petition filed by either party with the department, upon proof that the disability of an injured employe has increased, decreased, recurred, or has temporarily or finally ceased, or that the status of any dependent has changed.
>
> 77 P.S. §772[.]
>
> Thus, it was clearly within the power of the Judge to grant Defendant's Termination Petition. In so doing, the Judge effectively set aside the Supplemental Agreements when he found that Defendant supplied sufficient proof, within the meaning of §413, that Claimant's disability had ceased.

(Board's 1/14/98 Decision at 2-3.) Claimant also presented her testimony, as well as statements from Employer's attorney, during the June 13, 1995 hearing before the WCJ, as evidence of a stipulation between the parties that Claimant returned to her time-of-injury position on May 22, 1995, without loss of earnings.[4]

We agree with and adopt the reasoning of the Board on this issue and hold that an employer is not precluded from establishing that a claimant could have returned to work without restriction, and thus be entitled to a termination, on the grounds that the parties had voluntarily stipulated that the claimant was entitled to partial disability benefits **because** he or she had actually returned to work earning less than his or her time-of-injury wages. Such a stipulation, in this case at least, was nothing more than an acknowledgment of an undisputed fact, entitling

[4] The following colloquy took place between Claimant, her counsel and Employer's counsel at the June 13, 1995 hearing:

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| Claimant's counsel: | And the job you've been doing since May 22nd of '95, is the same job that you were doing at the time of your injury on January 28th of '94, is that correct? |
| Claimant: | Correct. |
| Claimant's counsel: | Have you signed any supplemental agreement similar to the ones that we've already referred to, with regard to your returning to work on May 22nd of '95? |
| Claimant: | No. |
| Employer's counsel: | Okay. Can we stipulate that a suspension's appropriate as of May 22nd, '95? |
| Claimant's counsel: | Sure. |
| Employer's counsel: | Okay. |

(Notes of Testimony (N.T.) at 30; Reproduced Record (R.R.) at 256a.)

Claimant to partial disability benefits. It was not tantamount to an admission by Employer that Claimant was partially disabled and had not totally recovered; nor does the stipulation preclude or contradict a finding by the WCJ that Claimant could have returned to work without restriction at an earlier date.

Here, the WCJ found as fact that Claimant had fully recovered from her work injury effective March 29, 1994, and based this finding on the testimony of Employer's medical witnesses, Dr. John Williams, M.D., a Board Certified Orthopedic Surgeon, and Dr. Joseph A. Fabiani, M.D., also Board Certified as an Orthopedic Surgeon, that Claimant's work-related disability ceased as of that date, i.e., March 29, 1994. (WCJ's 10/27/95 Decision at 5; Finding of Fact No. 18.) After a thorough review of the record, this Court finds substantial evidence to support such a determination.

Claimant's final argument is that the Board committed an error of law when it affirmed the WCJ's determination that Employer had a reasonable basis to file a petition to terminate and therefore denied Claimant's request for counsel fees under Section 440 of the Act.[5] It is self-evident, of course, that Claimant's contention

[5] Section 440 of the Act provides, in pertinent part:

> (a) 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 or his dependent, as the case may be, 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:

**(Footnote continued on next page…)**

lacks merit, because the WCJ **granted** the Employer's termination petition, thus establishing the legitimacy of Employer's "reasonable contest." If an employer **is successful** in establishing its argument that a claimant's benefits should be terminated, it is illogical to argue that employer engaged in an unreasonable contest.

Order affirmed.

**JOSEPH T. DOYLE, Judge**

Judge Smith dissents.

**(continued…)**

> 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.

77 P.S. §996.

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**O R D E R**

**NOW**, January 21, 1999 , the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby affirmed.

**JOSEPH T. DOYLE, Judge**