IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ronald Kasper,	:	
Petitioner	:	
	:	
v.	:	No. 2676 C.D. 2010
	:	
Workers' Compensation Appeal Board (Guyette Communications, Inc.),	:	Submitted: April 1, 20ll
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: July 12, 2011

Ronald Kasper petitions for review of an order of the Workers' Compensation Appeal Board (Board) that affirmed in part, and reversed in part, an order of a Workers' Compensation Judge (WCJ). Pursuant to the Pennsylvania Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1 - 1041.4; 2501 – 2708, the Board reversed the WCJ's grant of Claimant's Review Petition, affirmed the WCJ's grant of Claimant's Utilization Review Petition, affirmed the WCJ's dismissal of Guyette Communications, Inc.'s

(Employer) Modification Petition, and affirmed the WCJ's dismissal of Employer's Utilization Review Petition. We affirm.

On February 6, 2006, Claimant was injured in the course and scope of his work when his vehicle was rear-ended by another vehicle. Via Notice of Compensation Payable (NCP), Employer accepted Claimant's injury as a cervical and lumbar sprain/strain, and Claimant thereafter began receiving benefits under the Act.

On April 24, 2007, Claimant filed a Petition to Review Compensation Benefits (Review Petition I) seeking to add to the description of his injuries the additional injuries of bilateral sacroiliac dysfunction, aggravation of pre-existing arthritis in the neck and lumbosacral region resulting in Facet syndrome and protrusions at the T5-6 and T6-7 disc levels. The WCJ granted Claimant's Review Petition I, and the description of his work-related injuries was expanded to include the injuries noted above.[1] See Reproduced Record (R.R.) at 3a.

On April 9, 2008, Employer filed a Utilization Review (UR) Request seeking review of Claimant's ongoing pain management services including acupuncture, soft tissue massage, and infrared heat provided by Dr. Emmanuel Jacob, which treatments commenced on March 6, 2008. A Determination was

[1] Additionally, the WCJ's opinion on Review Petition I denied Employer's Termination Petition. That opinion is not at issue herein.

thereafter rendered, dated June 25, 2008, finding the treatment to be reasonable and necessary. Employer subsequently filed a Petition for Review of UR Determination (Employer's UR Review Petition).

On April 9, 2008, Employer also filed a UR Request seeking review of physical therapy treatment provided by Sean Foley, P.T., at Phoenix Rehab from March 10, 2008, and ongoing. A Determination thereon was subsequently rendered, dated June 30, 2008, finding that the treatment was not reasonable or necessary. Claimant subsequently filed a Petition for Review of UR Determination (Claimant's UR Review Petition).

On June 30, 2008, Claimant filed a second Petition to Review Compensation Benefits (Review Petition II) alleging that, as of the date of filing, there was an incorrect injury description; Claimant sought amendment of the NCP to include major depressive disorder associated with chronic pain disorder, as diagnosed by Claimant's treating psychiatrist. Employer timely filed an Answer, denying the material allegations therein.

On December 9, 2008, Employer filed a Petition to Modify Compensation Benefits (Modification Petition) alleging that as of November 19, 2008, work was generally available to Claimant resulting in a corresponding residual earning capacity. Claimant timely filed an Answer, denying the material allegations therein.

Employer's UR Review and Modification Petitions, and Claimant's UR Review and Review Petitions, were consolidated for hearings before the WCJ. By Decision and Order dated March 30, 2010, the WCJ granted Claimant's Review Petition II, and amended the NCP to include the asserted psychological injuries. The WCJ also granted Claimant's UR Review Petition, and denied Employer's UR Review Petition, based on his findings that the treatments by Sean Foley and Dr. Jacob were reasonable and necessary. Additionally, the WCJ denied Employer's Modification Petition after concluding that Claimant could not return to gainful employment. Employer appealed to the Board.

The Board concluded, *inter alia*, that the WCJ erred in his conclusion that Employer had waived its argument before the WCJ that the issue of Claimant's compensable psychological injuries in the instant matter was precluded under the doctrine of *res judicata*. The Board noted that Employer had raised the *res judicata* issue during the June 9, 2009, hearing before the WCJ, and that the WCJ afforded both parties an opportunity to address that argument in their respective briefs. Accordingly, the Board addressed Employer's argument on this issue under our precedent in Weney v. Workers' Compensation Appeal Board (Mac Sprinkler Systems, Inc.), 960 A.2d 949 (Pa. Cmwlth. 2008), petition for allowance of appeal denied, 601 Pa. 691, 971 A.2d 494 (2009).

In Weney, we held that the res judicata doctrine[2] precluded a claimant from amending an injury description to include an ongoing injury in a Review Petition proceeding where the claimant, while being treated for the ongoing injury during prior proceedings to amend an NCP injury description, failed to raise the ongoing injury while litigating the accuracy of the NCP in relation to other treatment and injuries. Weney, 960 A.2d at 954-57. In that precedent, the claimant was injured in a fall from a ladder, and filed a second review petition seeking to further amend an NCP to include a neck injury after the WCJ had adopted a stipulation between the parties to include shoulder injuries that the claimant had asserted in his first review petition. Id. at 951-52. We held that the claimant should have litigated the issue of the neck injury during the proceedings

[2] In Weney, we summarized as follows:

> Under the doctrine of technical res judicata, often referred to as claim preclusion, "when a final judgment on the merits exists, a future suit between the parties on the same cause of action is precluded." … 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." … Technical res judicata may be applied to bar "claims that were actually litigated as well as those matters that *should have been* litigated." … (emphasis added). "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." …

Weney, 960 A.2d at 954 (additional citation omitted; emphasis in original).

on the first review petition, and thus the claimant's second review petition was barred by technical *res judicata*. Id. at 955-57. In Weney, the treating physician's testimony indicated that the claimant was aware of his neck injury during the earlier proceedings, and the ultimate issue in both proceedings was whether the NCP accurately reflected claimant's injuries. Id. We concluded that technical *res judicata* applied under the facts at issue, and that the claimant's second Review Petition seeking additional amendment to the NCP for the previously known condition was barred. Id. at 956-57.

Applying Weney to the facts *sub judice*, the Board concluded that the addition of Claimant's alleged psychological injuries in the instant matter was precluded because, at the time of Claimant's previous amendment of the NCP during the litigation of Review Petition I, Claimant was both aware of, and treating for, the psychological injuries that he now seeks to add to the NCP. Accordingly, as Claimant should have raised that injury description amendment during the prior proceedings, Claimant was barred from raising it in the instant litigation. The Board concluded that the WCJ erred in granting Claimant's Review Petition II while failing to apply the *res judicata* doctrine.

By order dated November 22, 2010, the Board reversed the WCJ's grant of Claimant's Review Petition II, affirmed the WCJ's grant of Claimant's UR

Review Petition, and affirmed the WCJ's denial of Employer's Modification and UR Review Petitions. Claimant now petitions for review of the Board's order.

This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of Board procedures, and whether necessary findings of fact are supported by substantial evidence. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

Claimant presents two issues herein, which we have reordered in the interests of clarity. First, we will address Claimant's assertion that Employer waived the defense of *res judicata* by failing to raise it as an affirmative defense in its Answer, or in any other pleading, as is required under the Pennsylvania Rules of Civil Procedure. Claimant notes that his Review Petition II, seeking recognition of Claimant's psychological injuries, was filed on June 30, 2008, prior to our decision in Weney. Employer's Answer thereto, Claimant argues, failed to raise a *res judicata* affirmative defense, and at no time thereafter did Employer seek to amend its Answer to raise an affirmative defense, in contrast to the employer in Weney. Claimant acknowledges that Employer did enter the Weney opinion into evidence during the WCJ proceedings,[3] but argues that Pa.R.C.P. No. 1030(a)[4] requires that

[3] We reject Claimant's related argument that even if the Rules of Civil Procedure do not require Employer to have filed its *res judicata* affirmative defense via pleading, Employer still *(Continued....)*

the affirmative defense of *res judicata* be raised in a pleading, and that Pa.R.C.P. No. 1032(a)[5] states that a defense required to be raised in a pleading, but not so raised, is deemed waived.

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failed to properly raise a *res judicata* defense during the proceedings before the WCJ, notwithstanding Employer's mere entry of the Weney precedent into evidence therein. However. the record plainly shows that Employer raised a *res judicata* defense before the WCJ, and did not merely enter the precedent into evidence:

> [Employer's Attorney]: … AND, IN FACT, DR. FISHBEIN FOUND A PSYCHIATRIC INJURY BUT **MY ARGUMENT IS UNDER THE WENEY W-E-N-E-Y CASE THAT WAS A TECHNICAL RES JUDICATA.** IT WAS A PRIOR DECISION FROM [WCJ] KATZ ON A REVIEW PETITION. THERE WAS DIAGNOSIS AND TREATMENT FOR THE PSYCHIATRIC CONDITION BACK THEN AND IT WAS NEVER RAISED UNTIL THE SECOND REVIEW PETITION.

Hearing Transcript of June 9, 2009, R.R. at 56a (emphasis added).

[4] Pa.R.C.P. No. 1030(a) states, in relevant part:

> New Matter
>
> (a) Except as provided by subdivision (b), all affirmative defenses including but not limited to the defenses of … res judicata … shall be pleaded in a responsive pleading under the heading "New Matter". A party may set forth as new matter any other material facts which are not merely denials of the averments of the preceding pleading.

[5] Pa.R.C.P. No. 1032(a) states:

> Waiver of Defenses. Exceptions. Suggestion of Lack of Subject Matter Jurisdiction or Failure to Join Indispensable Party
>
> (a) A party waives all defenses and objections which are not presented either by preliminary objection, answer or reply, except a defense which is not required to be pleaded under Rule 1030(b), the defense of failure to state a claim upon which relief can be

(Continued....)

In his argument on this issue, Claimant seems to confuse the rules governing, respectively, judicial and administrative proceedings. It has long been recognized that administrative Workers' Compensation proceedings under the Act are procedurally distinct from judicial civil actions. Reyes v. Workers' Compensation Appeal Board (AMTEC), 967 A.2d 1071 (Pa. Cmwlth.), petition for allowance of appeal denied, 602 Pa. 671, 980 A.2d 611 (2009). It is axiomatic that "the rules governing pleadings in workmen's compensation cases do not mirror the Pennsylvania Rules of Civil Procedure" and should be applied loosely, not strictly. Anzaldo v. Workmen's Compensation Appeal Board (M & M Restaurant Supply Co.), 667 A.2d 488, 491 (Pa. Cmwlth. 1995), petition for allowance of appeal denied, 544 Pa. 676, 678 A.2d 366 (1996).

Consonant with that axiom, the Special Rules of Administrative Practice and Procedure Before Workers' Compensation Judges specifically provide that:

> A party has the right to amend a pleading *at any time in a proceeding before a judge*, unless the judge determines that another party has established prejudice as a result of the amendment.

> granted, the defense of failure to join an indispensable party, the objection of failure to state a legal defense to a claim, the defenses of failure to exercise or exhaust a statutory remedy and an adequate remedy at law and any other nonwaivable defense or objection.

34 Pa. Code § 131.35(a) (emphasis added). As such, and notwithstanding the affirmative defense rules set forth in the Pennsylvania Rules of Civil Procedure, an employer is permitted to add defenses during proceedings before a WCJ which were not contained within the employer's answer, or within any other written pleadings. Accord Ross v. Workers' Compensation Appeal Board (International Paper), 859 A.2d 856 (Pa. Cmwlth. 2004) (employer that failed to raise a statute of limitations defense in its answer did not waive the issue where the issue was asserted at the pre-trial conference before the WCJ). Accordingly, Claimant's reliance upon the strict pleading requirements of the Pennsylvania Rules of Civil Procedure is without merit, and the Board did not err in concluding that Employer did not waive its defense of *res judicata*.

Claimant next argues that the evidence of psychological injury in this case, particularly the medical expert opinions offered by Employer itself, was sufficient to grant Claimant's Review Petition II seeking to have the psychological injuries added to the NCP description of the injuries herein. Claimant argues that the results of two Independent Medical Examinations obtained by Employer, Employer's acknowledgement of the psychological injuries during the hearings before the WCJ, and Employer's insurance carrier's prior coverage of Claimant's psychological treatment and prescriptions dating back as far as July 13, 2008, all constitute evidence to support Claimant's claim on this issue. Claimant, however,

fails to address the preclusive effect of the application of the *res judicata* doctrine herein under Weney.

> The Board, in its cogent opinion in this matter, wrote:
>
> > We must agree with [Employer] that the holding in Weney is applicable to the instant matter. Here, Claimant testified that Dr. Berger is currently treating him for depression and that he started treating with him in late 2006. (N.T. 1/6/09, p.8). Thus, at the time that he litigated his first Review Petition between April 24, 2007 and February 14, 2008, Claimant was treating for depression as a result of the work injury. Like in Weney, this testimony "provides evidence that Claimant was aware of the injury" in the nature of depression and its relatedness to the February 6, 2006 work incident during the earlier proceeding on his first Review Petition filed on April 24, 2007.[] Therefore, also like in Weney, Claimant was barred by the doctrine of *res judicata* from filing the second Review Petition seeking to add the psychological injury since this matter could have, *or should have*, been raised in the earlier review petition proceeding. Therefore, we must reverse that part of the [WCJ] Decision granting Claimant's Review Petition.

Board Opinion at 6-7 (footnote omitted; emphasis in original). Claimant has not challenged any of the facts upon which the Board's analysis is based. As noted in our foregoing analysis, the Board did not err in applying the doctrine of *res judicata* to the instant matter. That doctrine preempts Claimant's argument on this

issue, operates to preclude the issue from review in the wake of the doctrine's proper application, and renders the evidence cited by Claimant on this issue of no moment.

Accordingly, we affirm.

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JAMES R. KELLEY, Senior Judge

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O R D E R

AND NOW, this 12th day of July, 2011, the order of the Workers' Compensation Appeal Board dated November 22, 2010, at A10-0639, is affirmed.

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JAMES R. KELLEY, Senior Judge