IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Steven Smith, Petitioner | : | |
| | : | No. 2737 C.D. 2010 |
| v. | : | |
| | : | Submitted: April 8, 2011 |
| Workers' Compensation Appeal Board (Consolidated Freightways, Inc.), Respondent | : | |

***OPINION NOT REPORTED***

MEMORANDUM OPINION
PER CURIAM

FILED: December 1, 2011

Steven Smith (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) dated November 30, 2010, which affirmed the decisions of a workers' compensation judge (WCJ) dismissing six review petitions filed by Claimant. We affirm.

This case arises from an incident which occurred over fifteen years ago, on February 28, 1996, in which Claimant was briefly exposed to the chemical trichloroethane in the course of his employment as a driver for Consolidated Freightways, Inc. (Employer). Claimant filed a claim petition on May 15, 1996, alleging he was disabled as a result of this chemical exposure. After holding two hearings on the matter, and reviewing expert medical reports submitted by both parties, WCJ Kathleen Vallely dismissed the claim petition. WCJ Vallely found that Claimant was exposed to a chemical on the alleged date, but she accepted the testimony of Employer's medical experts that the exposure was brief and did not cause any injury or disability over that of Claimant's medical expert, who opined that

Claimant's chemical exposure "possibly" caused respiratory ailments. (WCJ Vallely's 10/15/1997 order, Findings of Fact, Nos. 14-16.)

On October 31, 1997, Claimant filed a petition to review medical treatment, seeking to recover certain medical expenses he alleged were causally related to the February 28, 1996, incident. The WCJ denied Claimant's petition, finding that Claimant's complaints were caused by a non-work-related hiatal hernia rather than exposure to a hazardous chemical. (WCJ Vallely's 11/30/1997 order, Findings of Fact, Nos. 3, 4, 5.) The Board affirmed both the October 15, 1997, and November 30, 1997, orders by WCJ Vallely, and Claimant took no further appeals.

Nearly four years later, in 2001, Claimant filed three additional claim petitions that were based on the same February 28, 1996, incident and were legally indistinguishable from one another. Employer denied all material allegations and asserted that the new claim petitions were precluded by WCJ Vallely's earlier determination. WCJ David Henry, who generously assumed that these were "duplicate assignments by the Bureau" rather than duplicate filings by Claimant based on a lack of understanding of and/or respect for the Act, consolidated the three claim petitions and held a hearing on the matter. At the hearing, Claimant's counsel argued that Claimant's petitions should not be dismissed because Employer had not turned over the material safety data sheet (MSDS) related to Claimant's chemical exposure. According to Claimant's counsel, the outcome of the original claim proceeding would have been different if Employer had provided the MSDS to Claimant. In a decision and order dated March 15, 2002, WCJ Henry dismissed the claim petitions, finding Claimant's arguments to be entirely without merit. WCJ Henry specifically found that even if Claimant had a copy of the MSDS at the original proceeding, the outcome of the case would not have been different because,

regardless of what might be listed as potential effects of trichloroethane on the MSDS, Claimant suffered no injury as a result of the exposure. (WCJ Henry's 3/15/2002 op. at 1-2, Findings of Fact, No. 5.) The Board affirmed.

Claimant appealed to this Court, arguing that he should have had a rehearing on the issue of causation once Employer had made the MSDS available to him. This Court affirmed the Board in a memorandum opinion, concluding that Claimant's new claim petitions were merely attempts to re-litigate the same claim and, therefore, were barred by res judicata and collateral estoppel. Smith v. Workers' Compensation Appeal Board (Consolidated Freightways), (No. 1828 C.D. 2003, filed December 17, 2003). We also concluded that Claimant was time-barred from re-litigating the issue of causation, as a petition for rehearing cannot be granted if it is filed more than eighteen months after a decision by the Board.[1] Section 426 of the Act.[2] The Pennsylvania Supreme Court refused to hear the matter, denying allocator and reconsideration March 23, 2005, and April 19, 2005, respectively. The United States Supreme Court denied certiorari and rehearing by order dated November 14, 2005.

During the pendency of that appeal process, Claimant filed a fifth claim petition on September 23, 2004. By order dated December 16, 2004, WCJ Rosalia G. Parker denied and dismissed that claim petition, concluding that the allegations contained therein arose from the same February 28, 1996, incident and that she had no jurisdiction to consider them while Claimant's appeal was pending before the Pennsylvania Supreme Court. The Board affirmed, as did this Court, agreeing that

[1] The original decision of WCJ Vallely was sustained by the Board on December 31, 1999. Claimant did not file his new claim petitions until September 2001.

[2] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §871.

the claim was barred by res judicata and collateral estoppel. Smith v. Workers' Compensation Appeal Board (Consolidated Freightways), (No. 795 C.D. 2006, filed November 15, 2006). In addition, we denied Employer's request for counsel fees pursuant to Pa. R.A.P. 2744,[3] noting that in Phillips v. Workmen's Compensation Appeal Board (Century Steel), 554 Pa. 504, 721 A.2d 1091 (1999), our Supreme Court held that counsel fees may not be imposed against a workers' compensation claimant.

Thereafter, both parties filed petitions for allowance of appeal to the Pennsylvania Supreme Court; both petitions were denied. During that appeal process, Claimant filed yet another petition—this time, a penalty petition—alleging that Employer had improperly refused to pay costs, attorney's fees, lost wages and medical bills. After a hearing on the matter, WCJ Persifor S. Oliver, Jr. dismissed Claimant's penalty petition by order dated December 19, 2005, concluding that Claimant failed to produce any controlling document or WCJ's order which Employer had violated. The Board affirmed, and this Court dismissed Claimant's appeal of the Board's decision for failure to file a brief that conformed to the

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[3] Pa. R.A.P. 2744 provides:

> In addition to other costs allowable by general rule or Act of Assembly, an appellate court may award as further costs damages as may be just, including
>
> > (1) a reasonable counsel fee and
> > (2) damages for delay at the rate of 6% per annum in addition to legal interest,
>
> if it determines that an appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious . . . .

Pennsylvania Rules of Appellate Procedure. Smith v. Workers' Compensation Appeal Board (Consolidated Freightways), (No. 64 C.D. 2007, filed, May 24, 2007). The Pennsylvania Supreme Court denied allocator.

Claimant meanwhile filed a sixth claim petition. This petition was dismissed as barred by res judicata and time-barred by WCJ David Torrey on August 21, 2006. The Board affirmed. Claimant did not file a petition for review with this Court, but instead attempted to appeal directly to the Pennsylvania Supreme Court. The Supreme Court refused to docket the appeal and admonished Claimant's counsel in a letter dated June 12, 2007, that her improper appeal was "not the first time that [she had] presented documents for filing that do not comply with or are plainly not authorized by the rules." (Certified Record.)

Claimant filed a seventh claim petition on November 20, 2006, and a motion for judgment on the pleadings on January 17, 2007. By order dated January 30, 2007, WCJ Oliver denied Claimant's motion for judgment on the pleadings and dismissed the claim petition as time-barred, as well as barred by res judicata and collateral estoppel. The Board affirmed. Next, Claimant filed an Application for Extraordinary Relief with the Pennsylvania Supreme Court, which was denied in June 2008. Subsequently, Claimant petitioned for a writ of certiorari from the United States Supreme Court, which was denied on December 5, 2008.

After being denied certiorari by the United States Supreme Court for the second time, Claimant filed six additional review petitions on December 15, 2008; May 4, 2009; June 1, 2009; June 17, 2009; July 27, 2009; and August 18, 2009. Without holding a hearing, WCJ David Torrey dismissed each of the six petitions on the basis that they failed to set forth a cognizable claim. Claimant appealed all six of WCJ Torrey's orders, and, after consolidating them for review, the Board affirmed,

noting that Claimant's newest onslaught of review petitions was nothing more than an effort to re-litigate Claimant's alleged 1996 injury. The Board also denied Claimant's request for attorney's fees.

Claimant now appeals the dismissal of his six review petitions to this court, alleging that the Board erred in affirming the WCJ.[4] Employer responds that all six review petitions are time-barred and precluded by res judicata and collateral estoppel. Further, Employer seeks attorney's fees and costs under Pa. R.A.P. 2744, as well as "such assistance as may be feasible to bring this ongoing harassment of [Employer] by constant repeated frivolous actions and appeals to an end." (Employer's Brief at 15.)

After reviewing Claimant's six review petitions, it is clear that the Board was correct in affirming the WCJ's dismissals. No Notice of Compensation Payable, Agreement for Compensation, or Supplemental Agreement for Compensation has ever been filed in this matter, nor has Claimant ever been awarded benefits by a WCJ for his alleged injury of February 28, 1996. To the contrary, WCJ Vallely determined that, although Claimant had brief exposure to a chemical, he suffered no injury as a result. The Board affirmed, and Claimant did not pursue an appeal. Four years later, when Claimant again sought benefits based on the fact that Employer had failed to provide Claimant with a copy of the MSDS on trichloroethane, WCJ Henry determined that, even if Employer had provided Claimant with a copy of the MSDS at the original proceeding, the outcome of the case would have been the same because Claimant was not injured as a result of the exposure. Claimant appealed WCJ

[4] Our scope of review is limited to determining whether findings of fact are supported by substantial evidence, whether an error of law has been committed, or whether constitutional rights have been violated. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

Henry's decision all the way to the United States Supreme Court without success, and all litigation over this matter should have ended at that point.

In other words, although Claimant has filed six review petitions, there is no work-related injury and nothing to review. The question of whether Claimant suffered a work injury was fully litigated and decided in 1997, and Claimant was unsuccessful in arguing that misconduct by Employer entitled him to have the case reopened. Accordingly, WCJ Torrey committed no error in dismissing the six petitions without holding a hearing, and the Board committed no error in affirming those decisions.

It is clear that Claimant is, once again, seeking to re-litigate the same claim he has been trying to re-litigate for over a decade. However, there is no doubt that consideration of any issue related to the February 28, 1996, incident is barred by the doctrines of res judicata[5] and collateral estoppel.[6] Accordingly, we affirm the Board's order.[7]

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[5] Under the principle of technical res judicata, a final judgment on the merits of a claim bars a future suit between the same parties on the same cause of action. Henion v. Workers' Compensation Appeal Board (Firpo & Sons, Inc.), 776 A.2d 362 (Pa. Cmwlth. 2001). The principle of technical res judicata applies when the following four factors are present:

> (1) identity of the thing sued upon or for; (2) identity of the causes 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 365-66.

[6] Collateral estoppel provides that issues previously litigated and decided may not be relitigated in a subsequent action. The principle applies when the following four factors are met:

> (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 a party in the prior case and had a full and fair opportunity to litigate the issue;

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

We turn now to Employer's request for attorney's fees and costs. The law is well-settled that while a claimant may be entitled to attorney's fees and costs under the Act, employers are not. Section 440 of the Act, 77 P.S. §996 added by the Act of February 8, 1972 P.L. 25;[8] United States Steel Corporation v. Workers' Compensation Appeal Board (Mehalovich), 457 A.2d 155 (Pa. Cmwlth.1983). Employer acknowledges that this is the law, but argues that where, as here, the claimant's conduct has been extreme and reprehensible, costs and attorney's fees should be available pursuant to Rule 2744.

We agree with Employer that the appeal is frivolous and that the conduct of both Claimant and his counsel has been "obdurate and vexatious." Claimant has, over a period of fifteen years, filed approximately fifteen petitions, all based on the

**(continued…)**

> and (4) the determination in the prior proceeding was essential to the final judgment.

C.D.G., Inc. v. Workers' Compensation Appeal Board (McAllister), 702 A.2d 873, 875 (Pa. Cmwlth. 1997) (footnote omitted).

[7] Claimant has also filed a "Motion to Enter an Order" with this Court, requesting an order in his favor. Based on our disposition of Claimant's appeal, this motion is moot, and, therefore, dismissed.

[8] Section 440 of the Act, 77 P.S. §996, provides as follows:

> In any contested case where the insurer has contested liability in whole or in part, the employe or his dependent, as the case may be, in whose favor the matter at issue has been finally determined 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 extend the proceedings: Provided, That cost for attorney fees may be excluded when a reasonable basis for the contest has been established....

same incident which, back in 1997, was determined by WCJ Vallely not to have caused any injury or disability to Claimant. At least five hearings have been held by four different WCJs. This is the fourth time that Claimant has been before this Court. Claimant has appealed unsuccessfully to the Pennsylvania Supreme Court four times and to the United States Supreme Court twice. Public funds have been extensively expended as Claimant repeatedly attempts to re-litigate a case that was decided many years ago. Moreover, Claimant's actions are, at the very least, unfair and unduly burdensome to Employer, who has been forced to defend against each of these unreasonable petitions.

Although the behavior of Claimant and his counsel is precisely the type of obdurate and vexatious conduct which Rule 2744 was designed to prevent, our Supreme Court specifically addressed the issue of whether an employer may recover attorney's fees when the claimant pursues a frivolous appeal in Philips. In that case, a divided court concluded that to award attorney's fees to an employer would thwart the declared intent of the Act, which is to give claimants but not employers the opportunity to receive attorney's fees in the event of an unreasonable contest by the opposing party.[9]

Based on the foregoing, we affirm the Board's order.

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[9] Justice Saylor filed a dissenting opinion in which Justices Zappala, and Cappy joined, agreeing with the majority that section 440 of the Act precludes an Employer from recovering attorney's fees, but stating that, in his view, "it does not follow that the substantive provisions of Section 440 extend to the appellate process and supersede Appellate Rule 2744, which accords appellate courts the ability to impose sanctions as a means to control and supervise their dockets." Philips 554 Pa. at 511, 721 A.2d at 1095.

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| (Consolidated Freightways, Inc.), | : | |
| Respondent | : | |

***PER CURIAM*** ***ORDER***

AND NOW, this 1st day of December, 2011, the order of the Workers' Compensation Appeal Board, dated November 30, 2010, is hereby affirmed.