

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Eugene Citowicz, :
Petitioner :
v. :
: No. 500 C.D. 2008
: Submitted: October 17, 2008
Workers' Compensation Appeal :
Board (Keystone Hospice), :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: November 20, 2008

Eugene Citowicz (Claimant) appeals from an order of the Workers' Compensation Appeal Board (Board) affirming the order of the Workers' Compensation Judge (WCJ) denying his claim petition and granting Keystone Hospice (Employer) a petition to terminate benefits. Claimant maintains that such an order was in error because the WCJ concluded that Claimant had suffered a work-related injury and the termination of benefits was unwarranted because Employer had not filed a termination petition. Claimant also maintains that the WCJ erred by not awarding unreasonable contest attorneys' fees and litigation costs.

Claimant worked for Employer as a maintenance person. His duties included maintaining everything inside Employer's building as well as shoveling snow, cutting grass and other landscaping duties. He was also responsible for checking the temperatures of the hot water boilers. On December 13, 2004, his Supervisor, Kathy Perretta (Supervisor Perretta), while driving Claimant to Home Depot to purchase materials needed for building maintenance, was involved in a motor vehicle accident which resulted in Claimant being taken to the hospital. Claimant missed one to two weeks of work and returned with restrictions regarding walking, lifting and general activities. On January 4, 2005, Employer discharged Claimant for allegedly falsifying boiler water temperature readings in the building.

On January 31, 2005, Employer then filed a notice of workers' compensation denial. The basis for the denial was that Claimant did not suffer a work-related injury, that the injury was not within the scope of his employment, and that Claimant was not an employee of Employer; that he was not disabled as a result of the injury; and that Claimant's December 13, 2004 injury did not cause him to miss more than seven days of work. It ended by stating that "all reasonable and necessary medical bills relating to the injury on 12/13/04 **will be considered** for payment." (Emphasis added.)

In March 2005, Claimant filed a claim petition alleging injuries to his neck, head, left and right shoulders and spine; that he suffered from partial disability from December 13, 2004, through December 17, 2004; and that as of January 4, 2005, he was completely disabled. In its answer to the claim petition,

Employer denied each allegation, demanded strict proof, and reserved the right to assert additional defenses as the investigation proceeded.

Before the WCJ, after describing the motor vehicle accident, Claimant testified that he was transported from the scene by ambulance to Abington Hospital from which he was discharged later that day. He stated that he felt better while at the hospital, but when he returned home, he began to experience extreme pain. He stated that he received a call from Employer the following day, and Employer told him if he needed additional medical treatment to go to Grandview Hospital. He received additional treatment at Grandview Hospital on December 16 and 20, 2004.

Claimant further testified that he returned to work with restrictions sometime after December 16, 2004. According to Claimant, he was instructed not to lift anything heavy, was to slow down at work and reduce his walking, but Employer did not respect those restrictions, instead giving him additional tasks. Claimant stated that he last worked for Employer on January 4, 2005, when he was discharged for falsifying hot water boiler temperature readings. While admitting previous disciplinary problems prior to December 13, 2004, he testified that he thought the discharge for falsifying water temperature readings was unwarranted. In support of that contention, he introduced an unemployment compensation referee decision dated April 6, 2005, which indicated that Claimant was eligible for unemployment compensation benefits because he had accurately reported the hot water temperature readings in January 2005. At the time of the hearing, Claimant stated that he still suffered from headaches, dizziness and numbness in his neck

that radiated into his shoulder. He testified that he was receiving medical and chiropractic care and was also taking pain medication. Claimant stated that he believed that he was unable to return to his pre-injury position, but could perform light-duty work.

Claimant also introduced the February 21, 2006 medical report of Danny Hernandez, M.D. (Dr. Hernandez), which stated that Claimant was involved in a motor vehicle accident on December 13, 2004, and that during the accident, Claimant struck his head on the roof of the car. Claimant's complaints as of January 5, 2005, included cervical pain, bilateral shoulder pain to the elbows, and thoracic/lumbar pain with radicular pain into the buttocks. A CAT scan of the head and cervical spine and x-rays of the cervical, thoracic and lumbar spine, knees and hips, were all normal. On January 5, 2005, Claimant was diagnosed with cervical and lumbar sprain/strain, cervicocranial syndrome, muscle hypertonicity and segmental dysfunction. Treatment included medication, joint manipulation, physiotherapy and therapeutic exercises.

Dr. Hernandez recorded Claimant's prognosis as fair, with Claimant suffering soft tissue injuries to his neck and back due to the accident. He opined that Claimant suffered small tears of the annulus of his cervical discs, which caused the loss of nuclear fluid. No diagnostic test confirmed that diagnosis. Claimant was discharged from care on December 14, 2005, and Dr. Hernandez opined that Claimant's injuries were causally related to the motor vehicle accident of December 13, 2004. Dr. Hernandez did not provide an opinion concerning Claimant's ability to return to work.

In opposition, Employer presented the testimony of Supervisor Perretta who stated that after the accident, Claimant missed about one week of work, and that on December 20, 2004, Claimant returned to work and provided her with medical documentation and work restriction notes from Grandview Hospital. Supervisor Perretta said that the work restrictions included no carrying or lifting, and, therefore, Claimant was only required to check call bells, water temperatures, perform bed maintenance and other preventative maintenance and was not asked to perform any work outside those restrictions. Concerning his discharge on January 4, 2005, for falsifying water temperature readings, Supervisor Perretta testified that she had checked the water temperature readings immediately after Claimant had checked them and that there was a discrepancy in the readings. She also testified that Claimant had previously been reprimanded for being continuously late and extending his lunch breaks. Claimant had also received written reprimands for failing to follow directions, losing the keys to Keystone Hospice on several occasions and telling a supervisor to “shut up.”

Employer also presented the testimony of Executive Director Gail Inderweis (Director Inderweis). She testified that she had been a registered nurse for 23 years and was responsible for the entire operations of Employer. She stated that she would see Claimant on a daily basis and had noted problems with his work in the past. She testified that after the December 13, 2004 motor vehicle accident, Claimant did not appear to have difficulty performing his duties and did not request any different duties, and that he never complained that he was given work outside his restrictions. Director Inderweis also indicated that Claimant had

disciplinary problems in the past, and that after he returned to work in December 2004, he would disappear for long periods of time without any explanation.

Finally, Employer presented the deposition testimony of William Spellman, M.D. (Dr. Spellman), board certified in orthopedic surgery. He examined Claimant on September 15, 2005, and testified that at the time of the examination, Claimant complained of pain on both sides of his neck and on both sides of his lower back. Claimant's pain level was rated as a four out of 10. According to Dr. Spellman, Claimant's treatments at the time of the examination included seeing a chiropractor once every two weeks and daily pain medication.

Dr. Spellman testified that his examination of Claimant's neck, upper back and shoulders revealed a normal range of motion, no asymmetry or atrophy, no tenderness, muscle spasms or trigger points, and that the soft muscle had normal tone, tenor, suppleness and elasticity, which was inconsistent with an ongoing neck injury. A lower back examination revealed no abnormalities, again inconsistent with an ongoing lower back problem. Dr. Spellman noted that Claimant could not bend forward more than 10 degrees without complaints of pain. However, sitting and straight leg raises were inconsistent because Claimant's complaints of pain at 30 degrees were not supported by any muscle spasm or tissue change. Additionally, Dr. Spellman testified that he reviewed Claimant's medical records, which also indicated that Claimant had no lower back injury and only showed age appropriate degenerative damages in his cervical spine. Based on his examination and review, Dr. Spellman opined that Claimant suffered from a moderate soft tissue injury in his neck and back as a result of the motor vehicle accident, but that

he had fully recovered from those injuries as of September 15, 2005, and could return to work without restrictions.

The WCJ accepted as credible only that portion of Claimant's testimony that established that he sustained a work-related injury on December 13, 2004, but rejected his testimony regarding whether work was provided within the prescribed restrictions, instead accepting Supervisor Perretta's testimony that he was not asked to perform work outside his medical restrictions. Regarding the medical testimony, the WCJ found the opinion of Employer's medical expert, Dr. Spellman, more persuasive than that of Dr. Hernandez. Based on Dr. Spellman's testimony, the WCJ found Claimant had incurred work-related soft tissue injuries to his neck and back including a cervical strain, but went on to find that Claimant had fully recovered from the work-related injuries as of September 15, 2005, and terminated benefits as of that date. Rejecting the unemployment compensation referee's decision that Claimant was not terminated for willful misconduct, the WCJ found that Employer's discharge of Claimant on January 4, 2005, for willful misconduct and any loss of earning power after that date was not due to his work-related injury, even if Employer had not made suitable work available. Finally, while finding that Claimant had incurred litigation costs of \$1,689.44, the WCJ did not award those costs because Employer had issued a notice of compensation denial acknowledging liability for medical bills only. Claimant then appealed to the Board, which affirmed the decision of the WCJ, and this appeal followed.¹

¹ Our scope of review in a workers' compensation appeal is limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed, or whether constitutional rights were violated. *City of Scranton v. Workers' Compensation Appeal Board (Roche)*, 909 A.2d 485 (Pa. Cmwlth. 2006).

Claimant contends that the WCJ erred in not granting his claim petition because he found that Claimant suffered a work-related injury, and once he found that he suffered a work-related injury, it was improper for the WCJ to terminate benefits because Employer had not filed a termination petition. However, in an original claim petition, the claimant bears the burden of proving not only that a compensable injury occurred, but that the alleged disability continues throughout the pendency of the action. *Inglis House v. Workmen's Compensation Appeal Board (Reedy)*, 535 Pa. 135, 634 A.2d 592 (1993). In a claim petition then, a WCJ can award benefits for the period of disability that is established and terminate benefits even where no termination petition has been filed. *Southern Chester County Hospital v. Workmen's Compensation Appeal Board (Sinsheimer)*, 676 A.2d 315 (Pa. Cmwlth. 1996), citing *Innovative Spaces v. Workmen's Compensation Appeal Board (DeAngelis)*, 646 A.2d 51 (Pa. Cmwlth. 1994). By finding that Claimant had suffered a work-related injury, in effect, the WCJ granted the claim petition until September 15, 2005, when he terminated all worker's compensation benefits based on Employer's credible medical testimony.

Claimant also maintains that the WCJ erred in failing to award litigation costs because he prevailed on the issue of proving that he had suffered a work-related injury.

Under Section 440(a) of the Workers' Compensation Act (Act):²

² Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §996(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 fees, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend the proceedings: Provided, That cost for attorney's fees may be excluded when a reasonable basis for the contest has been established by the employer or the insurer. (Emphasis added.)

We have interpreted this section to mean that a claimant must prevail on a contested issue in order to be awarded litigation costs. *See Jones v. Workers' Compensation Appeal Board (Steris Corp.)*, 874 A.2d 717 (Pa. Cmwlth, 2005). We have also indicated that the claimant must prevail on the particular issue or petition for which he seeks costs. *Hayduk v. Workers' Compensation Appeal Board (Bemis Co., Inc.)*, 906 A.2d 622 (Pa. Cmwlth. 2006).

In this case, even accepting the WCJ's characterization of Employer's statement that "reasonable and necessary medical bills will be considered for payment" as acknowledging liability for Claimant's medical bills, Claimant was successful on contested issues. The basis for Employer's notice of compensation denial was that Claimant did not suffer a work-related injury, that the injury was not incurred within the scope of his employment and that Claimant was not an employee of Employer, and that he was not disabled because of the injury. In a similar vein, Employer denied each allegation contained in the claim petition.

Because the WCJ found that Claimant incurred work-related soft tissue injuries to his neck and back, including a cervical strain, Claimant was successful on multiple contested issues and is entitled to an award of litigation costs.³

Accordingly, the Board order is affirmed except as to that portion of the order denying Claimant litigation costs, which is reversed and remanded.

DAN PELLEGRINI, JUDGE

³ Claimant contends that he is entitled to counsel fees because Employer failed to file his notice of compensation denial timely. This issue was not raised before the WCJ or the Board and, hence, is waived. He also contends that Employer did not have a reasonable basis to contest the claim petition. Given that it contended that Claimant was not entitled to benefits because all loss of earning power was due to his discharge from employment due to his willful misconduct, Employer had a reasonable basis for contesting the claim petition, and, therefore, we deny any award of attorneys' fees pursuant to Section 440(a) of the Act, 77 P.S. §996(a).

