[J-120-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ROBERT LEWIS,	: No. 6 EAP 2006
	:
Appellant	: Appeal from the Order of the
	: Commonwealth Court at 720 C.D. 2005
	: dated September 26, 2005, affirming the
v.	: Order of the Workers' Compensation
	: Appeal Board at A04-1945 dated March
	: 31, 2005
WORKERS' COMPENSATION APPEAL	:
BOARD (GILES & RANSOME, INC.),	:
	:
Appellee	: ARGUED: October 16, 2006

CONCURRING OPINION

MADAME JUSTICE BALDWIN **DECIDED: April 18, 2007**

While I join the majority’s opinion and agree to vacate the order of the Commonwealth Court, I write separately as I believe that the majority’s opinion is overbroad. The majority’s holding precludes an employer from successfully demonstrating, absent a change in physical condition, that a claimant’s purely subjective physical complaints are unsubstantiated.

The Workers’ Compensation Act provides that an employee may at any time file a petition to modify, reinstate, suspend, or terminate a claimants receipt of benefits on grounds that the disability of an injured employee has increased, decreased, recurred, or has temporarily or finally ceased. 77 P.S. § 772. The majority holds that in order to terminate or modify benefits, an employer must provide medical evidence that the claimant’s current physical condition is different than it was at the time of the last disability adjudication. The majority’s holding is functional in those circumstances where the

claimant's injuries are readily demonstrable by objective physical evidence. However, the majority renders it impossible for an employer to succeed on a petition to terminate or modify benefits where there is no objective evidence to support the existence of a claimant's subjective complaints. Although the employer may establish that there is no objective basis for a claimant's subjective complaints of continuing pain, under the majority's reasoning, the employer is precluded from asserting that the claimant has recovered, absent evidence of a change in physical condition from the previous adjudication. If there is no initial evidence of a claimant's physical condition, how can an employer provide evidence of a change in physical condition? Only a change in disability can be shown.

In Udvari v WCAB (U.S.Air), 550 Pa. 319, 327, 705 A.2d 1290, 1293 (1997), we held:

> The determination of whether a claimant's *subjective* complaints of pain are accepted is a question of fact for the WCJ. In the absence of *objective* medical testimony, the WCJ is neither required to accept the claimant's assertions nor prohibited from doing so. . . . A contrary conclusion would lead to the absurd result that a claimant could forever preclude the termination of benefits by merely complaining of continuing pain.

Id. (emphasis added).

An employer meets its burden of proving that the work injury has ceased where "an employer's medical expert unequivocally testifies that it is his opinion, within a reasonable degree of medical certainty, that the claimant is fully recovered, can return to work without restrictions and that there are no objective medical findings which either substantiate the claims of pain or connect them to the work injury." Udvari, 550 Pa. at 327, 705 A.2d at 1293. Contrary to Udvari, the majority's opinion in the instant case would foreclose an employer from being able to succeed on a termination or modification petition by

demonstrating that despite there being no physical evidence of a change in condition since the prior adjudication, the claimant's subjective physical complaints are unsubstantiated.

In Hebden v. WCAB (Bethenergy Mines Inc.), 534 Pa. 327, 331, 632 A.2d 1302, 1304 (1994), we acknowledged that res judicata or issue preclusion prevents an employer from relitigating, by way of a petition to modify or terminate benefits, the original medical diagnosis underlying a referee's finding of a claimant's disability as of the date of the compensation award. However, we added in Hebden that "[w]e do not lose sight of the fact that the Workmen's Compensation Act at section 413 (77 P.S. § 772) expressly provides that an award may be terminated based upon changes in the employees disability." We held that where an employee's condition is changeable, that condition may be re-examined at a later time to see if he is still disabled, but where the condition is irreversible, an attempt to re-examine the employee's condition is precluded by res judicata and constitutes an attempt to re-litigate what has already been settled. Id.

In requiring a change in physical condition in order to terminate or modify benefits, the majority disregards the holdings of Udvari and Hebden which permit the filing of such modification or termination petitions based on evidence that a claimant's changeable condition has healed, and that there are no objective medical findings that either substantiate the claims of pain or connect them to the work injury. Where a Workers' Compensation Judge makes an adjudication of disability based on a claimant's subjective complaints of pain, the majority effectively makes such an adjudication irreversible and unassailable.

I agree with the majority that it is not sufficient for an employer merely to challenge the diagnosis of the claimant's injuries as determined by a prior proceeding, or to recharacterize the claimant's injuries in a manner inconsistent with prior adjudications. However, where an employer is unable to provide objective evidence of a change in physical condition, but asserts that there is no evidence to support a claimant's purely

subjective complaints, it is for the Workers' Compensation Judge to make a determination as to whether to accept or reject the claimant's subjective ailments.

Because in the instant case Dr. Stein merely challenged previous diagnoses and attempted to recharacterize several of the claimant's complaints in a manner inconsistent with prior adjudications, I agree with the decision of the majority to vacate the order of the Commonwealth Court affirming the termination of the claimant's workers' compensation benefits.