Channellock, Inc., v. Workers' Compensation Appeal Board (Reynolds), No. 2027 C.D. 2011 (Cmwlth Ct. May 8 2013)

Issues:

1. Did the Workers' Compensation Appeal Board err by relying upon the doctrine of Collateral Estoppel to reinstate the benefits of the Claimant?

2. Did the Workers' Compensation Appeal Board exceed their standard of review by finding that claimant was incapable of performing modified work duties thereby causing his total disability benefits to be reinstated?

3. Did the Workers' Compensation Appeal Board err when they found that Employer had violated the Workers' Compensation Act when they assessed penalties due to an alleged nonpayment of indemnity benefits?

Answer:

1. No. When the subject matter and ultimate issues are identical in a prior case collateral estoppel will apply. By way of introduction, technical res judicata and collateral estoppel are encompassed within the doctrine of res judicata, which serves to prevent the re-litigation of claims and issues in future proceedings. Henion v. Workers' Compensation Appeal Board (Firpo & Sons, Inc., 776 A.2d 362, at 365 (Pa. Cmwlth. 2001). Technical res judicata will apply when these circumstances are the same as a prior litigation: (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. Henion, 776 A.2d at 366. Stated differently, technical res judicata, or claim preclusion, will apply to prevent claims that were previously litigated, or should have been litigated. Similar to this concept is the doctrine of collateral estoppel, also known as issue preclusion. Collateral estoppel serves to prevent re-litigation of an issue in a later action despite the fact the later action is based on a cause of action different from the one previously litigated. Collateral Estoppel will apply where: (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 the party in the prior case and had a full and fair opportunity to litigate the issue; and (4) the determination in the prior proceeding was essential to the judgment. Id. at 648. The court determined in the original litigation that the original No Duty Job was not available to Claimant because Employer required him to stay awake at his post or be terminated and the medications he was prescribed as a result of his work injury caused him to fall asleep. On appeal, Employer argued that the situation was different because Employer now implemented a policy where employees who fell asleep at work would only be terminated after four instances. The court stated that the issues were still same: whether the claimant, who had a problem

staying awake due to medications associated with his work related injury could be terminated as a result of falling asleep. As such, this No Duty Job was not available to the Claimant and the Board did not err in making this finding.

2. No. In order to reinstate his benefits the claimant must show a continuation of his disability, coupled with a loss of earnings. Pieper v. Amtek-Thermox Instruments Div. and Workmen's Compensation Appeal Board, 526 Pa. 25 (1990). The claimant is required to meet the burden of production and persuasion in regards to both of these elements. In this case, Claimant proved a loss of earnings by showing he could not perform the No Duty Job without risk of falling asleep and facing disciplinary action. He then established loss of earning power by showing he could not perform the No Duty Job and further that he continued to have pain and symptoms associated with the work-injury he was not fully recovered from. Since the board made legal determination that re-litigating the availability of a No Duty Job position was barred by the doctrine of collateral estoppel, they did not overstep their authority.

3. No. Even though Employer ultimately paid any benefits owed to Claimant it will still be assessed penalties because it did not pay these benefits when obligated to do so. An Employer is not permitted to unilaterally suspend benefits when he returned to the No Duty Job. An employer is only permitted to suspend benefits when it follows proper statutory procedures. Robb, Leonard & Mulvihill v. Workers' Compensation Appeal BoARD (Hooper), 746 A.2d 1175 (Pa. Cmwlth. 2000).

Analysis:

Claimant was injured on July 31, 2001 while working for Defendant. On May 25, 2005 it was determined he had sustained an annular tear and a herniated disc at the L5-S1 level he was then awarded a period of Temporary Total Disability benefits followed by ongoing partial disability benefits. Claimant returned to work for Defendant in May of 2002 in a modified duty position in a different part of employer's plant which then closed. He then returned to the section of the plant he had worked prior to his work injury. In this position the claimant was not required to do any work, his job duties consisted of reading and performing crossword puzzles. In December of 2003 he was disciplined for falling asleep at work. He then requested to be moved to a position which would keep him awake. He was transferred to this position however, it exceeded his medically imposed restrictions and ultimately caused him to withdraw in March 2004 at the instruction of his doctor.

Defendant filed a Termination Petition alleging a full recovery. Claimant filed a reinstatement petition due to a recurrence of his total disability as of March 24, 2004. The WCJ denied the termination petition and granted reinstatement of disability benefits as of March 24, 2004 onward. The Board Affirmed. Employer filed a Petition for Review with the Commonwealth Court and argued that the Board committed an error when re-instating the claimant's benefits. The Commonwealth Court affirmed the lower court ruling holding that the

WCJ had concluded the No Duty Position was not within Claimant's capabilities because Claimant had difficulty staying awake due to his prescribed medication.

Conclusion and Practical Advice:

The facts of this case show that it is rather bizarre. The claimant had a position within his medical restrictions however, that section of his plant closed and he was transferred to his prior section where he had a No Duty Job, primarily consisting of cross-word puzzles. Once he was reprimanded for falling asleep, he blamed it on his prescriptions.

A word of practical advice for defense attorney's would be when deposing Claimant's medical expert to discuss the prescriptions, rather than just asking him or her what medications the claimant is taking. Further, if the doctor has placed the claimant on light or modified duty ask the doctor whether this prescriptions would prevent them from being able to work.

Graham v. Workers' Compensation Appeal Board (Wordsworth Academy), No. 1755 C.D. 2012 (Cmwlth Ct. May 3, 2013)

Issue(s):

(1) Did the Board err when it reversed the WCJ's decision that the employer failed to meet its burden of demonstrating that the Claimant's work related contusions resolved?

(2) Did the WCJ err by failing to grant the Claimant's Reinstatement Petition because the only evidence of record shows that she suffered a total work-related wage loss on June 2, 2009?

Answer:

(1) No. The Board's decision that the WCJ had erred in denying the Termination Petition was based upon the holding in Jackson v. Workers' Compensation Appeal Board (Resources for Human Development), 877 A.2d 498 (Pa. Cmwlth. 2005). In Jackson, Defendant filed a termination petition arguing the claimant recovered from her work injures which included back, knee, and arm injuries, including a bruised elbow. The WCJ granted the Petition however the claimant argued Defendant did not carry its burden because employer's expert never addressed the arm injury or even examined the claimant's arms. Despite this the Court held there was enough evidence to find a complete recovery since the claimant's treating doctor had testified he did not see any arm injury and this was not contradicted by the employer's expert. The court stated in essence that she did not continue to suffer from the bruised elbow and therefore there was nothing for the employer to prove in that regard. The rationale of Jackson was then extended to this matter. Even though Defendant's expert did not address the face, scalp, or neck contusions, since the claimant admitted she had no cuts, bruises, scrapes or scars on her face there was no need for Defendant's expert to address these in order to prove a full recovery in this regard.

(2) No. The WCJ rejected the testimony of the Claimant and Claimant's expert that she was not able to work two hours per day due to her work related injury. Since the WCJ is the ultimate fact finder in workers' compensation cases, he or she has exclusive province over questions of credibility and evidentiary weight, including medical witnesses, in whole or in part. Greenwich Collieries v. Workmen's Compensation Appeal Board (Buck), 664 A.2d 703, 706 (Pa. Cmwlth. 1995).

Analysis:

The Claimant in this matter sustained a work related injury when she tripped and fell, resulting in hitting her head on the concrete. Her injuries consisted of contusions to her face, scalp and neck all of which were noted in a Notice of Compensation Payable. She returned to work approximately three months later. She worked for a period of three months until her family doctor took her out of work. Soon thereafter, she filed a Review Petition seeking to add a brain injury and concussion to the Notice of Compensation Payable as well as a Reinstatement

Petition. A number of months later, Defendant filed a Termination Petition as a result of a full recovery opinion.

After hearing the relevant evidence the WCJ denied the Review Petition which sought to add the additional injuries, and also denied the Reinstatement Petition concluding that Claimant had not met her burden of proving that her benefits should be reinstated. The WCJ only granted the Termination in part stating that Employer had proved Claimant fully recovered from any concussion she may have sustained but did not prove Claimant had recovered from any face, neck and scalp contusions.

Claimant and Employer appealed and the Board affirmed the denial of the Reinstatement and Review Petition and Reversed the Termination Petition stating that Defendant had satisfied its burden. Claimant then appealed the Board's decision raising the two issues on appeal noted above.

The Court noted that there was no need for Defendant to present any evidence in regards to the Claimant's face, neck and scalp as the Claimant and Claimant's doctor had already stated she was recovered from this. Additionally, the notion that Defendant's expert need not comment to something which is admittedly healed is supported by prior case law. Finally, in regards to issue number two, the court stated that finding the claimant and her doctor not credible was based on the fact finding of the WCJ, something which cannot be overturned.

Conclusion and Practical Advice:

This is a common-sense and practical decision. The Court supported the fact that when there is an injury which either the claimant or claimant's doctor states is completely healed, there is no need for defendant's expert to also note that it is healed. Citing this line of case law can save significant time and money for a Defendant and Employer in litigating a case. For example if there is a compensable injury for a knee as well as a mental injury the need for two expert's, two IME's, and two depositions may be necessary unless in the course of litigation the claimant or the claimant's doctor states they have recovered from one of these.

Carter v. Workers' Compensation Appeal Board (GenCorp, Inc.), No. 1172 C.D. 2012 (Cmwlth. Ct. May 7, 2013).

Issues:

(1) Must an employer offer proof that Claimant has reached maximum medical improvement prior to requesting an Impairment Rating Evaluation?

(2) Did the Board err in ordering the Claimant to attend an IRE?

Answer:

(1) & (2): Groller v. Workers' Compensation Appeal Board (Alstrom Energy Systems), 873 A.2d 787 (Pa. Cmwlth. 2005), appeal denied, 587 Pa. 708, 897 A.2d1185 (2006) clearly held that an order which requires a Claimant to submit to an Impairment Rating Evaluation is a non-appealable, interlocutory order. Id. at 789; see Kuzo v. Workers' Compensation Appeal Board (St. Luke's Miner's Memorial Med. Center), 936 A.2d 1216, 1218 (Pa. Cmwlth. 2007) (quashing the appeal of an Order to submit to an IRE citing lack of Jurisdiction). As such, the Board's order in this matter in a non-appealable, interlocutory order, and the board lacks any jurisdiction to consider this matter.

Analysis:

Claimant suffered a work related injury on 9/29/1999 and received workers' compensation benefits accordingly. On 8/13/2010 Defendant filed an Examination Petition, requesting the WCJ order claimant to submit to an Impairment Rating Evaluation alleging that Claimant refused or failed to appear at a physical examination on July 27, 2010. Claimant argued that Employer was not entitled to this evaluation because they had not yet obtained an opinion with respect to whether or not the claimant had reached maximum medical improvement.

The WCJ denied and dismissed Employer's examination petition. In the Decision the WCJ cited Section 206(a.2) of the Act as well the Commonwealth Court decision from Combine v. Workers' Compensation Appeal Board (National Fuel Gas Distribution Corp.), 954 A.2d 776 (Pa. Cmwlth. 2008), appeal denied, 600 Pa. 765, 967 A.2d 961 (2009) and stated that Combine and Section 306(a.2) of the Act make it clear that Defendant is first required to independently show Claimant has reached MMI by means of an examination performed by a doctor other than an IRE doctor prior to requesting Claimant undergo an IRE. Defendant appealed.

The Board reversed the WCJ's decision noting the WCJ's interpretation of Combine and Section 306(a.2) of the Act was incorrect. The Board noted that Combine stands for the notion that an IRE doctor may opine as to whether a Claimant has reached maximum medical improvement prior to conducting an IRE and further stated that an IRE was required to conduct an MMI evaluation prior to evaluating the claimant's impairment rating. Additionally, Section

306(a.2)(1) of the Act imposes a mandatory obligation on the Claimant to submit to an IRE requested by Defendant. Claimant appealed arguing Employer must offer proof of MMI prior to requesting an IRE and that the Board erred in ordering Claimant attend the IRE.

Since the case law clearly states than an order which requires the claimant to submit to an IRE is a non-appealable, interlocutory order the Claimant's appeal was quashed.

Conclusion and Practical Advice:

Clearly the WCJ in this matter erred in making the decision which resulted in continued litigation stretched out over a period of three years. Perhaps there is a way this could be avoided. One way would be to emphasize better brief writing and arguments. By clearly stating what the case law is, and providing fair and clear readings of the law to the facts at hand one can avoid a number of instances where the WCJ misinterprets the law. Another way to avoid this litigation would be to speak with opposing counsel prior to the extended litigation and explain what the law clearly states.

Madden v. Workers' Compensation Appeal Board (Gutter Guard), No. 2218 C.D. 2012 (Cmwlth. Cr. May 20, 2013).

Issue:

(1) When Defendant fails to submit a timely answer to a Claim Petition is a WCJ barred from considering any evidence of Defendant?

Answer:

(1) No. While an Employer will be precluded from asserting affirmative defenses when they fail to file a timely answer they are not barred from presenting evidence which serves to rebut the presumption that the claimant has a disability which continues into the indefinite future. Chik-Fil-A v. Workers' Compensation Appeal Board (Mollick), 792 A.2d 678, 689 (Pa. Cmwlth. 2002). Claimant is only entitled to a rebuttable presumption that his or her disability continues after the last date that the Defendant should have filed their Answer.

Analysis:

Claimant filed a Claim Petition on August 13, 2003 alleging a July 24, 2003 injury. Employer filed a notice of compensation denial on the same date citing Claimant was intoxicated during the injury but did not file an Answer to the Claim Petition until the response period had expired. As a result Claimant field a motion to have all allegations in the Claim admitted for lack of timely Answer in accordance with Yellow Freight Systems, Inc. v. Workmen's Compensation Appeal Board (Madara), 423 A.2d 1125 (Pa. Cmwlth. 1981).

The WCJ did not address the "Yellow Freight" motion but instead accepted evidence offered by Defendant on Claimant's intoxication, and denied benefits based on Claimant failure to show he sustained a work injury. Additionally, the WCJ also found that Defendant's medical expert showed that Claimant had failed to prove he had any ongoing disability as of January 8, 2004. Claimant appealed, arguing the WCJ erred in not considering his Yellow Freight motion. The Board agreed, vacated the lower decision, and remanded the matter back to the WCJ to issue a determination on the Claimant's motion.

On remand the WCJ denied the Yellow Freight motion and determined that since Claimant was intoxicated he was not within the course and scope of his employment. The WCJ therefore denied the Claim Petition and the Claimant appealed the matter to the Board, who affirmed. Claimant then appealed to the Commonwealth Court.

In an unreported opinion, the Commonwealth Court found that the Employer was precluded from asserting affirmative defenses as to the scope of employment issue. Madden v. Workers' Compensation Appeal Board (Gutter Guard ("Madden I"), (PA. Cmwlth., No 1335 C.D. 2007, filed December 24, 2007), slip op. at. 4. As such, the court ruled that the Board erred in affirming the WCJ's decision because it was based on evidence Defendant submitted in

support of its affirmative defense. However, the court did note that although a timely answer was not filed, this did not prevent employer from seeking to establish that Claimant had fully recovered from his injuries. An employer is not barred from presenting evidence or attempting to discredit a Claimant's evidence in order to rebut the presumption that Claimant has a continuing disability. Therefore, the Court held there was enough evidence to support a finding by the WCJ that the claimant was fully recovered. The matter was then remanded to the Board to remand to the WCJ to determine the date at which Claimant's disability ceased.

On remand (again), the WCJ held that Claimant had fully recovered from his work injuries as of January 8, 2004, the date he was examined by Defendant's medical doctor. Claimant appealed to the Board and the ruling was affirmed. However, it was remanded once more to determine the period of benefits the Claimant was owed. On Remand, the WCJ concluded Claimant was entitled to benefits from July 24, 2003 until January 8, 2004. Claimant appealed this to the Board again, arguing there was no substantial evidence to terminate benefits as of January 8, 2004. The Board affirmed its' decision that the January 8, 2004, termination was supported by substantial evidence. Claimant then appealed to the Commonwealth Court contending the Board erred because the WCJ should have been barred from considering any evidence submitted by employer due to its failure to file a timely answer to the claim petition and, as such, the WCJ was required to accept claimant's medical expert's diagnosis.

Since it was previously determined by the Commonwealth Court that that the failure to file an answer did not preclude the defendant from submitting evidence of a full recovery of the claimant which thereby resulted in a termination of benefits, the Commonwealth Court decided it would not reconsider this issue. Specifically: "the law of the case doctrine sets forth various rules that embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter." Ario v. Reliance Ins. Co., 602 Pa. 490, 505, 980 A.2d 588, 597 (2009). As such, the Court determined claimant's appeal was without merit as they had previously decided this matter.

Conclusion and Practical Advice:

A "Yellow Freight" motion or determination is oftentimes seen as a "loss" for a defendant where people may initially think the entire claim must be accepted and benefits will be paid for an extended period of time. Clearly this case stands for the proposition this is not true. Medical evidence showing that the Claimant is fully recovered from a work related injury can serve to limit the claim and as such, should be submitted as soon as possible.