IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mid City Towers (National Development Corporation) and Zurich American Insurance Company, Petitioners	:	
v.	:	
Workers' Compensation Appeal Board (Green), Respondent	:	No. 2021 C.D. 2014
	:	Submitted: April 24, 2015

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: July 10, 2015

Mid City Towers (Employer) petitions for review from the order of the Workers' Compensation Appeal Board (Board) that affirmed the Workers' Compensation Judge's (WCJ) denial of Employer's Termination and Review Petitions and reversed the WCJ's determination that Employer's contest was reasonable. For the reasons stated below, this Court affirms the Board's decision to affirm the denial of Employer's Review and Termination Petitions and reverses the Board's determination that Employer's contest was unreasonable.

James Green (Claimant) was employed with Employer as an assistant maintenance supervisor. On February 22, 2009, Claimant slipped on a patch of ice while using a snow blower to remove snow from a walkway in the course and scope of his employment and twisted his right ankle. Employer issued a NCP

(NCP) indicating a ruptured right ankle tendon. Claimant eventually underwent surgery in an attempt to repair the damage.

On September 12, 2011, Employer petitioned to terminate compensation benefits. Employer claimed Claimant was fully recovered from his work-related injury as of August 4, 2011, the date Claimant underwent an independent medical evaluation (IME) by Jeffery N. Kann, M.D. (Dr. Kann), a board certified orthopedic surgeon. Employer also filed a Review Petition to modify the injury listed on the NCP to a sprained ankle. Hearings were held on September 28, 2011, and on June 26, 2012.

Employer submitted the deposition testimony of Dr. Kann. Dr. Kann testified Claimant's foot and ankle pain were from "longstanding severe hind foot arthritis with significant deformity." Deposition of Jeffery N. Kann, M.D., February 12, 2012, (Dr. Kann Deposition) at 12; Reproduced Record (R.R.) at 67. This ankle and foot pain was the result of congenital flat feet. Dr. Kann Deposition at 17; R.R. at 72. Dr. Kann opined that the work injury Claimant suffered was a sprained ankle rather than a ruptured right ankle tendon and the work-related injury was not the cause of Claimant's current ankle pain. Dr. Kann Deposition at 30; R.R. at 85. Dr. Kann opined Claimant recovered from the ankle sprain, and there was "nothing here that points to the fact that this gentleman tore a tendon." Dr. Kann Deposition at 25, 28; R.R. at 80, 83. He also denied the existence of a causal link between Claimant's sprained ankle and his current disability. Dr. Kann Deposition at 26-27; R.R. at 81-82.

Claimant testified he did not have any pain associated with his feet until after the February 22, 2009, accident. Notes of Testimony, September 28, 2011, (N.T.) at 33-34; R.R. at 33-34. Claimant had swelling and pain in his right ankle and foot after the work injury, but not before the surgery. N.T. at 49; R.R. at 49. Claimant neither believed he was fully recovered, nor did he believe he was able to work without restrictions. N.T. at 25; R.R. at 25.

Claimant presented the deposition testimony of Jay Moritz, D.P.M. (Dr. Moritz), a board-certified podiatric surgeon. Dr. Moritz admitted on cross-examination that he could not say for certain that Claimant's current foot problems were the result of the February 22, 2009, accident. Deposition of Jay Moritz, D.P.M., June 12, 2012, (Dr. Moritz Deposition) at 29; R.R. at 145. Dr. Moritz testified the Claimant did have hereditary flat feet, but flat feet may be symptomatic and cause pain or be asymptomatic and not be painful. Dr. Moritz Deposition at 14; R.R. at 130. Dr. Moritz opined that Claimant was unable to return to work. Dr. Moritz Deposition at 21; R.R. at 137.

The WCJ denied the Termination and Review Petitions, but found the contest was reasonable. WCJ's Decision, October 24, 2012, Findings of Law Nos. 5 and 6 at 5 and 6.

The WCJ made the following findings of fact:

> 8. The testimony of Claimant is credible. He testified in a forthright and factual manner. He maintained that he had no pre-injury pain complaints and there were no pre-injury records demonstrating differently. There were several times where the Claimant reported that he had no

pain in spite of his flat feet diagnosis. The one medical record relied on by the defendant was disputed by the Claimant and could easily have been in error given there were no pre-injury records to support pain complaints. The Claimant's testimony regarding his pre and post injury pain complaints (or lack thereof) is credible despite Dr. Kann's skepticism.

9. The opinions of Dr. Moritz are found to be more credible than the opinions of Dr. Kann. Dr. Moritz did not examine the Claimant until July 6, 2010 and Dr. Kann did not examine the Claimant until August 4, 2011. Dr. Moritz was refreshingly candid in his acknowledgement that there were initial findings consistent with an ankle sprain, initial findings that were consistent with a posterior tibial tendon dysfunction. He also testified that the description of injury of "ruptured right ankle tendon" would be a fair description of the injury Claimant suffered on February 22, 2009.

Although Dr. Kann was willing to base his opinion on the findings he read in the original medical records finding that they were consistent with ankle sprain and recovery therefrom, he did not examine the Claimant until more than 2 years after his work injury. Dr. Kann's opinion as to a diagnosis more than 2 years before his examination is not credible. He did not consider the fact that the [sic] there were no records of any ankle or foot pain predating the work injury, he did not give any explanation of the initial area of swelling in the Claimant's ankle being the same area of concern that is currently being addressed and he did not consider that he might have misinterpreted the Claimant's remarks about foot pain without treatment being the time between March 2009 and April 2010 (rather than pre-injury), as this is consistent with the testimony and evidence presented. He also did not give much credence to his own findings that the Claimant's foot problems are symmetric while the Claimant only has pain in the injured foot.

WCJ's Decision, October 24, 2012, Findings of Facts (F.F.) Nos. 8 and 9 at 4.

Employer appealed the WCJ's denial of the Termination Petition and Review Petition. Claimant cross-appealed the WCJ's finding of reasonable contest. The Board affirmed the denial of the Termination and Review Petitions.

The Board found Employer's contest was unreasonable as a matter of law, and reversed the WCJ's determination that Employer's contest was reasonable:

> As to the Termination Petition, we acknowledge that a defendant's contest is reasonable where it presents medical evidence that, if found credible by the WCJ, could have supported a decision in its favor. However, Dr. Kann did not address whether Claimant had fully recovered from a ruptured tendon and only testified that Claimant merely sustained an ankle sprain, which was contrary to the accepted injury. Such testimony is incompetent as a matter of law to support a termination of benefits. As such, [Employer's] contest as to the Termination Petition was unreasonable.
>
> [Employer's] contest as to the Review Petition is also unreasonable. Under applicable case law, which was available before [Employer] filed its Review Petition, [Employer] was precluded, as a matter of law, from seeking to litigate its prior admission that Claimant sustained a ruptured tendon as a result of her [sic] employment with [Employer].

Board Opinion, October 8, 2014, at 9 (citations omitted).

Employer submits three questions to this Court for review.[1] Whether the WCJ capriciously disregarded material evidence, whether the WCJ erred as a matter of law in denying the Termination and Review Petitions, and whether the Board erred when it determined Employer's contest was unreasonable.

The first question is whether the WCJ erred in denying the Employer's Termination Petition. The Employer claims the WCJ rejected Dr. Kann's testimony for arbitrary and capricious reasons.

In order to successfully terminate benefits, an employer must prove that all disability from a compensable injury has ceased. Udvari v. Workmen's Compensation Appeal Board (US Air, Inc.), 758 A.2d 1290, 1291 (Pa. 1997) citing Pieper v. Amtek-Thermox Instruments Division, 584 A.2d 301 (Pa. 1990). In a case where the claimant complains of continued pain, the employer's burden of proof is met when 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. Id. at 1293. A credibility determination is the exclusive province of the WCJ, and such a rejection of testimony is not a disregard, but simply a rejection. Williams v. Workers' Compensation Appeal Board (USX

[1] This Court's review of an order of the Board is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether Board procedures were violated, whether constitutional rights were violated or whether an error of law was committed. Furnari v. Workers' Compensation Appeal Board (Temple Island), 90 A.3d 53, 58 n.2 (Pa. Cmwlth. 2014) citing World Kitchen, Inc. v. Workers' Compensation Appeal Board (Rideout), 981 A.2d 342, 346 n.5 (Pa. Cmwlth. 2009).

Corporation – Fairless Works), 862 A.2d 137, 145 (Pa. Cmwlth. 2004). A capricious disregard of evidence occurs only when the fact finder deliberately ignores relevant, competent evidence. Id. citing Capasso v. Workers' Compensation Appeal Board (RACS Associates, Inc.), 851 A.2d 997 (Pa. Cmwlth 2004).

The WCJ did not "capriciously disregard" the evidence. All that is required is that the WCJ consider the evidence and state the reasons for rejection. Williams, 862 A.2d at 144, 145. The WCJ noted the details of Dr. Kann's testimony in her opinion:

> He testified regarding a history of the Claimant's work injury, the treatment records he reviewed and his physical examination of the Claimant. He noted that the Claimant had congenital type of flat feet and explained that this is someone whose feet never developed an appropriate arch … He said patients with this condition will develop premature arthritis in their foot. He testified that the x-rays of the Claimant's foot from September 2010 showed that the Claimant had long standing severe hind foot arthritis with significant deformity.

WCJ's Decision, F.F. No. 6, at 2. The WCJ stated her reasons for rejecting Dr. Kann's testimony:

> [H]e did not examine the Claimant until more than 2 years after his work injury. Dr. Kann's opinion as to a diagnosis more than 2 years before his examination is not credible. He did not consider the fact that the [sic] there were no records of any ankle or foot pain predating the work injury, he did not give any explanation of the initial area of swelling in the Claimant's ankle being the same area of concern that is currently being addressed and he did not consider that he might have misinterpreted the

> Claimant's remarks about foot pain…. He also did not give much credence to his own findings that the Claimant's foot problems are symmetric while Claimant only has pain in the injured foot.

WCJ's Decision, F.F. No. 6, at 4; Employer's Brief. Based on this, the WCJ met the standard for considering and rejecting evidence.

Employer also argues the WCJ erred as a matter of law in denying the Employer's Review Petition on the basis that the opinion of Dr. Kann was insufficient to meet the Employer's burden of proof.

The NCP is an admission by the employer of the claimant's employment, occurrence of the accident, and the nature of the injuries caused by the accident, while the claimant was employed. Beissel v. Workmen's Compensation Appeal Board, 465 A.2d 969, 972 n.6 (Pa. 1983). The Employer has the burden of proving that an independent cause of an employee's disability after the filing of a NCP if the petitioner is seeking to justify a termination on the ground that the employee's disability is no longer work-related. Id. at 972.

Here, the Employer filed NCPs listing "ruptured right ankle tendon" on October 8, 2010, and on October 13, 2010, about a year and a half after the occurrence of the injury. Board Opinion at 11. Employer admitted that there was an accident on February 22, 2009, which resulted in a ruptured right tendon of the Claimant. Employer filed a Review Petition under Section 413 of the Workers'

Compensation Act[2] (Act), 77 P.S. § 771, to modify or set aside the NCP. Section 413 of the Act states:

> A workers' compensation judge may, at any time, review and modify or set aside a notice of compensation payable and an original or supplement agreement or upon petition filed by either party with the department, or in the course of the proceeding under any petition pending before such workers' compensation judge, if it be proved that such notice of compensation payable or agreement was in any material respect incorrect.

The testimony of Dr. Kann was the only evidence adduced by the Employer to prove the NCP was materially incorrect. Again, the WCJ may accept or reject the testimony of any witness, including a medical witness, in whole or in part. A&J Builders Inc. v. Workers' Compensation Appeal Board (Verdi), 78 A.3d 1233 (Pa. Cmwlth. 2013) citing Minicozzi v. Workers' Compensation Appeal Board (Industrial Metal Plating Inc.), 873 A.2d 25 (Pa. Cmwlth. 2005). Since the WCJ rejected Dr. Kann's testimony as not credible, there was no credited evidence to prove the NCP was materially incorrect. The Employer failed to meet its burden of proof. Additionally, the WCJ found there was no mistake in the NCP at the time it was executed. WCJ's Decision, F.F. No. 10, at 5.

Finally, Employer contends that the Board erred in holding the Employer's contest was unreasonable under Section 440 of the Act[3], 77 P.S. § 996. The employer bears the burden of presenting sufficient evidence to establish a

[2] Act of June 2, 1915, P.L. 736 *as amended*.
[3] Added February 8, 1972, P.L. 25.

reasonable basis for contesting a claim. Crouse v. Workers' Compensation Appeal Board (NPS Energy Services), 801 A.2d 655, 657 (Pa. Cmwlth. 2001) citing Lemon v. Workmen's Compensation Appeal Board (Mercy Nursing Connections), 742 A.2d 223 (Pa. Cmwlth. 1999). The reasonableness of an employer's contest depends on whether the contest was prompted to resolve a genuinely disputed issue or to merely harass the claimant. Yespelkis v. Workers' Compensation Appeal Board (Pulmonology Associates), 986 A.2d 194 (Pa. Cmwlth. 2009) citing City of Philadelphia v. Workers' Compensation Appeal Board (Cospelich), 893 A.2d 171 (Pa. Cmwlth. 2006). A "genuine dispute" may be found where the medical evidence is conflicting or susceptible to contrary influences. Costa v. Workers' Compensation Appeal Board (Carlisle Corp.), 958 A.2d 596, 602 (Pa. Cmwlth. 2008) citing LaChina v. Workmen's Compensation Appeal Board (Dana Corp.), 664 A.2d 204 (Pa. Cmwlth. 1995).

When an employer seeks to terminate a claimant's benefits neither party can relitigate the nature of the accepted injury at a subsequent proceeding without following the proper procedure, which is to file a Review Petition, and seek to have the description of the injury changed. GA & FC Wagman, Inc. v. Workers' Compensation Appeal Board (Aucker), 785 A.2d 1087, 1092 (Pa. Cmwlth. 2001) citing Commercial Credit Claims v. Workmen's Compensation Appeal Board (Lancaster), 728 A.2d 902 (Pa. 1999). If the employer fails to follow this procedure, the contest is unreasonable. Id. An NCP can be modified up to three years after the date of the most recent payment of compensation. Section 413 of the Act, 71 P.S. § 772.

In many controversies, there is a dispute between medical experts concerning the source of the claimant's injuries. Costa v. Workers' Compensation Appeal Board (Carlisle Corp.), 958 A.2d 596, 602 (Pa. Cmwlth. 2008). In Costa, both experts recognized the existence of a spinal injury, but disagreed on whether it was work-related. Id. This Court held this was a reasonable contest because of a direct conflict between the testimony and evidence presented by the parties. Id.

The Board in its opinion discussed Gillyard v. Workers' Compensation Appeal Board (Pennsylvania Liquor Control Board), 865 A.2d 991 (Pa. Cmwlth. 2005) and Westmoreland County v. Workers' Compensation Appeal Board (Fuller), 942 A.2d 213 (Pa. Cmwlth. 2008), to justify the award of attorney fees to the Claimant under Section 440 of the Act. In Gillyard, this Court held the medical expert must establish that the claimant recovered from the accepted work-related injuries in order to terminate benefits. Gillyard, 865 A.2d at 996. Gillyard is distinguishable from the present controversy because the employer in Gillyard tried to change the accepted injury in a second Termination Petition after it was established as the accepted work related injury in an earlier termination proceeding. Id. at 997. This Court determined that the employer was estopped from trying to change the accepted injury. Id. A similar situation was present in Westmoreland County, where there had been two separate termination proceedings, one in 2000, and another in 2003. Westmoreland County, 942 A.2d at 215. The WCJ noted there were additional injuries addressed during the first termination proceeding, but there was no formal modification of the NCP under Section 413. Id. This Court held once the WCJ had determined that the claimant had additional back injuries in addition to the ones listed on the NCP, those injuries

became the accepted injuries and the employer was barred from challenging the accepted work injury. Id.

This case is distinguishable from Gillyard and Westmoreland County because there was no prior adjudication that determined Claimant's injury. The employers in those cases were barred from contesting the accepted injury not because there was a NCP that listed a particular injury, but because there was a prior judicial adjudication which identified the injuries. If listing a particular injury on a NCP means it may never be changed or challenged, then it would render Section 413 of the Act meaningless, which would be an absurd result. In addition, Employer has followed the proper procedure for seeking to change the description of an injury on the NCP by filing a Review Petition. GA & FC Wagman, Inc., 785 A.2d at 1092.

In this case, there was no prior adjudication. Employer submitted evidence to show that the work-related injury suffered by the Claimant was not the cause of Claimant's current disabilities. Claimant's own medical expert, Dr. Moritz, admitted that Claimant's current disability may have been caused by the accident on February 22, 2009, or may have arisen from the underlying condition of Claimant's feet. Dr. Moritz Deposition at 24 - 29; R.R. at 140 - 145. This conflicts in part with the testimony of Dr. Kann, who testified the cause of Claimant's current disability was the result of arthritis caused by hereditary flat feet and not the accident on February 22, 2009. Dr. Kann Deposition at 19 and 20; R.R. at 74 and 75. This is a dispute between medical professionals that concerned Claimant's injuries and is similar to the situation in Costa. The fact the WCJ

rejected Dr. Kann's testimony as not credible was irrelevant for the purposes of determining whether the Employer's contest was reasonable. Simply, the rejection of testimony by a WCJ does not necessarily make the contest unreasonable. Cleave v. Workmen's Compensation Appeal Board (Wiley), 456 A.2d 1162, 1163 (Pa. Cmwlth. 1983). The question is not whether the WCJ believed the witness, but whether the witness' opinion provided a reasonable basis for the contest. Id. at 1163 – 1164. As discussed earlier, a "reasonable contest" may be found where there is conflicting medical evidence. Costa, 958 A.2d at 602. Since the testimonies of Dr. Kann and Dr. Moritz conflicted, there was still a reasonable basis for the Employer to contest the Claimant's injury.

Accordingly, this Court affirms the Board's affirmance of the WCJ's denial of the Termination and Review Petitions. This Court reverses the Board's determination that Employer's contest was unreasonable.

BERNARD L. McGINLEY, Judge

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O R D E R

AND NOW, this 10th day of July, 2015, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed in part and reversed in part. This Court affirms the Board's decision to affirm the denial of the Termination and Review Petitions. This Court reverses the Board's determination that Mid City Towers' contest was unreasonable.

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BERNARD L. McGINLEY, Judge