IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anthony E. Dougherty,	:	
Petitioner	:	
	:	No. 705 C.D. 2014
v.	:	
	:	Submitted: September 12, 2014
Workers' Compensation Appeal	:	
Board (City of Philadelphia),	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: January 13, 2015

Anthony E. Dougherty (Claimant) petitions for review of the April 21, 2014 order of the Workers' Compensation Appeal Board (Board) insofar as it affirmed the decision of a workers' compensation judge (WCJ) to deny Claimant's request for attorney's fees that he incurred in defending the termination petition filed by the City of Philadelphia Police Department (Employer). With respect to this issue, we reverse.

On August 23, 2009, during the course of his employment as a police officer, Claimant was in a motor vehicle accident. By way of a September 3, 2009 Notice of Compensation Payable (NCP), Employer acknowledged multiple work-related injuries, including "left shoulder pain to elbow strains and sprains; left hip

sprain, right thumb sprain, head concussion." (Reproduced Record (R.R.) at 2a; Finding of Fact No. 1.)

On April 18, 2011, Employer filed a termination petition, alleging that Claimant was able to return to his pre-injury job without restrictions based on the March 25, 2011 independent medical evaluation of David L. Glaser, M.D. (Dr. Glaser). (R.R. at 3a-5a.) Claimant filed an answer in which he denied Employer's allegations, asserted that Employer failed to address the disability arising from the concussion acknowledged by the NCP, and requested attorney's fees for an unreasonable contest. (R.R. at 6a-8a.)

At a hearing before the WCJ, Employer presented the deposition testimony of Dr. Glaser, an orthopedic surgeon. Dr. Glaser stated that he reviewed Claimant's medical records and the NCP and evaluated all of Claimant's accepted injuries. (Supplemental Reproduced Record (S.R.R.) at 12sa-13sa.) However, Dr. Glaser testified that he did not evaluate Claimant's head injury because Claimant did not complain of concussion symptoms during his examination and there was no documentation that Claimant was treated for a concussion. "[S]o, like the thumb, his mention of concussion was really unsubstantiated based upon the medical records. So I came to the conclusion that he had resolved." (S.R.R. at 37sa.)

Dr. Glaser testified that he was not an expert in concussions and if Claimant had complained of concussion symptoms during the examination, he would not have commented on Claimant's recovery from that condition. Dr. Glaser testified that there are fairly well-defined tests that can reveal sequelae from a closed head injury but he did not perform any of them. (S.R.R. at 38sa.) Dr. Glaser stated that he did not ask Claimant about the concussion, explaining as follows:

> The way I approach his evaluation is that if someone doesn't tell me what's wrong, I will never know in the sense that I review the records afterwards. So I examine the patient with a clean slate. I just listen to what they have to say. So if they – you know, I figure that if they can't remember something that was bothering them, then it's probably resolved or insignificant. So the medical records don't show any signs of concussion.

(S.R.R. at 40sa.) Based in part on Claimant's lack of complaints concerning his concussion and a lack of medical records indicating treatment, Dr. Glaser concluded that all of Claimant's accepted injuries, including the concussion, had resolved and Claimant could return to unrestricted work. (S.R.R. at 40sa-41sa, 44sa.)

In relevant part, Claimant testified that while working as a police officer on August 23, 2009, he was "T-boned" in an automobile accident, taken to the hospital, and treated for a concussion and injuries to his left shoulder, hip, and right thumb. Claimant stated that he received Heart and Lung benefits[1] for a period of time, and he treated with a number of physicians but was refused a neurological appointment by the Heart and Lung panel. By decision and award dated April 24, 2012, a panel terminated Claimant's Heart and Lung benefits; the decision reflects that the panel was not convinced there was a nexus between the 2009 work injury and Claimant's ongoing headaches and concluded that Claimant was no longer unable to perform his full police duties. (WCJ's Finding of Fact No. 7.)

Claimant testified that he has suffered from headaches since he struck his head on the steering wheel in the car accident and that he continues to suffer from symptoms in his left shoulder, right thumb, and left hip. Claimant had returned to

[1] Act of June 28, 1935, P.L. 477, *as amended*, 53 P.S. §§637-38.

work but left after having a seizure, falling unconscious, and striking his head at his brother's house in June 2011. Claimant denied having a history of seizure disorder.

Claimant also presented the deposition testimony of Eliot Wallack, M.D. (Dr. Wallack), a board-certified neurologist who first treated Claimant on August 17, 2011. Based on the history Claimant provided and his physical examination of Claimant, Dr. Wallack believed that the August 23, 2009 work injury was a substantial contributing factor to Claimant's ongoing headaches. On cross-examination, Dr. Wallack acknowledged that he based his opinions on Claimant's representations and had not reviewed Claimant's medical records.

In her decision dated August 7, 2012, the WCJ first rejected Employer's argument that the WCJ was bound by the determination of the Heart and Lung panel pursuant to *Department of Corrections v. Workers' Compensation Appeal Board (Wagner-Stover)*, 6 A.3d 603 (Pa. Cmwlth. 2010) (holding that evidence of full recovery satisfied the employer's burden of proof for purposes of terminating workers' compensation and Department of Corrections disability benefits). The WCJ concluded that this matter was factually distinguishable from *Wagner-Stover* but was similar to, and controlled by, the Supreme Court's decision in *Cohen v. Workers' Compensation Appeal Board (City of Philadelphia)*, 909 A.2d 1261 (Pa. 2006) (holding that a determination by the city civil service commission that a police officer was capable of returning to full-duty status did not preclude a WCJ's subsequent grant of the officer's petition to reinstate workers' compensation benefits).

The WCJ accepted Claimant's testimony as credible and convincing that he continues to suffer symptoms from all of his accepted injuries, including headaches related to the concussion. The WCJ also specifically credited Claimant's

testimony that he attempted to have his headaches addressed by a neurologist but was unable to do so until he treated with Dr. Wallack. (WCJ's Finding of Fact No. 11b.)

The WCJ found Dr. Wallack's testimony to be unpersuasive because Dr. Wallack did not review Claimant's medical records. The WCJ also rejected Dr. Glaser's testimony and found that it was insufficient to prove that Claimant was fully recovered from his work injuries, stating that Dr. Glaser did not examine Claimant's thumb or attempt to evaluate Claimant's accepted concussion injury. The WCJ noted that, although Dr. Glaser cited a lack of complaints and a lack of treatment records, Claimant testified that he continued to suffer from headaches and Claimant's medical records do evidence a history of headaches and MRI testing after the work incident.[2] The WCJ further noted that Dr. Glaser's opinions of full recovery were inconsistent with his medical report, in which he stated that Claimant had reached maximum medical improvement, not full recovery. (Finding of Fact No. 11c.)

Accordingly, the WCJ denied Employer's termination petition. However, the WCJ determined that Employer had a reasonable basis for the contest and denied Claimant's request for attorney's fees.[3] (Finding of Fact No. 11f.)

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[2] For example, Employer submitted City of Philadelphia Encounter forms concerning treatment provided to Claimant by Dennis Winkelman, D.O., between August 25, 2009, and September 3, 2010, (Ex. D-3), which document Claimant's complaints of headaches, dizziness, and nausea two days after the accident through December 3, 2009. (WCJ's Finding of Fact. No. 4.)

[3] Section 440 of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended,* added by section 3 of the Act of February 8, 1972, P.L. 25, 77 P.S. §996, provides that a claimant who prevails in whole or in part in a contested action is entitled to an award of reasonable attorney's fees, unless the employer establishes a reasonable basis for the contest. "The purpose behind awarding attorney's fees under Section 440 of the [Act] is to ensure that successful claimants receive compensation benefits that are undiminished by the cost of litigation, as well as to discourage unreasonable contests of workers' claims." *Wood v. Workers' Compensation Appeal Board (Country Care Private Nursing)*, 915 A.2d 181, 186 (Pa. Cmwlth. 2007) (citations and quotations omitted).

Both parties appealed to the Board. Citing *Striker v. Workmen's Compensation Appeal Board (California University of Pennsylvania)*, 650 A.2d 1109, 1112 (Pa. Cmwlth. 1994), the Board affirmed the WCJ's decision.

In *Striker*, the claimant filed a petition for benefits alleging that she suffered a lower back injury while at work, and the employer contested her claim. At a hearing before the WCJ, the claimant presented testimony from her treating physician that the claimant sustained numerous injuries resulting from the work-related incident. The employer presented the deposition testimony of its own medical expert, who testified that he examined all of the claimant's alleged work-related injuries and opined that the claimant had no condition that would prevent her from returning to work. Crediting the testimony of the claimant's treating physician, the WCJ granted the claimant's petition and her request for attorney's fees. On appeal, however, the Board found that the employer established a reasonable contest and reversed the award of attorney's fees. This Court affirmed the Board's decision on appeal; we noted that the testimony of the employer's medical expert conflicted with the testimony of the claimant's medical witness concerning the extent and duration of the claimant's disability and that, if accepted by the WCJ, the testimony of the employer's medical witness could have supported a decision in the employer's favor. *Id.* at 1112. Thus, under *Striker*, an employer's contest is reasonable where it presents medical evidence that, if found credible by the WCJ, could have supported a decision in its favor.

In this case, the Board concluded that although Dr. Glaser's testimony was rejected by the WCJ, "it was not so insufficient as to render Employer's contest

unreasonable." (Board opinion at 8.) Claimant then filed the instant petition for review.[4]

On appeal to this Court,[5] Claimant argues that Employer's contest was not reasonable because Employer relied solely on medical testimony that did not address all of the accepted work injuries. We agree.

In a termination proceeding, the employer bears the burden to prove by substantial evidence that the claimant has recovered from all accepted work-related injuries. *Metropolitan Ambulance, Inc. v. Workers' Compensation Appeal Board (Walker)*, 702 A.2d 881, 884 (Pa. Cmwlth. 1997). When an employer's medical expert fails to address whether a claimant recovered from all accepted injuries, his testimony is insufficient as a matter of law to satisfy the employer's burden of proof. *Gillyard v. Workers' Compensation Appeal Board (Pennsylvania Liquor Control Board)*, 865 A.2d 991, 996 (Pa. Cmwlth. 2005); *Central Park Lodge v. Workers' Compensation Appeal Board (Robinson)*, 718 A.2d 368, 370 (Pa. Cmwlth. 1998).

Pursuant to section 440 of the Act, a prevailing claimant is entitled to attorney's fees as a general rule; the denial of an award of attorney's fees is the exception to this rule and applies only where the record establishes that the employer has a reasonable basis for its contest. *Cunningham v. Workmen's Compensation Appeal Board (Franklin Steel Co.)*, 634 A.2d 267 (Pa. Cmwlth. 1993). The employer bears the burden of presenting sufficient evidence to establish the reasonable basis for

[4] In its brief, Employer notes that Claimant died in February 2013.

[5] Our scope of review is limited to determining whether constitutional rights were violated, an error of law was committed or findings of fact were supported by substantial evidence of record. *Linton v. Workers' Compensation Appeal Board (Amcast Industrial Corporation)*, 991 A.2d 376, 381 n.4 (Pa. Cmwlth. 2010).

its contest. *Id.* An employer establishes a reasonable contest when it is prompted to resolve a genuinely disputed issue and there is no evidence that the contest is intended to harass the claimant. *Kuney v. Workmen's Compensation Appeal Board (Continental Data Systems)*, 562 A.2d 931, 933 (Pa. Cmwlth. 1989). Whether a reasonable basis for an employer's contest exists is a question of law fully reviewable by this Court; thus, we may examine the record to determine whether the evidence supports the conclusion reached below. *Striker.*

Here, Claimant argues that Employer initiated this termination proceeding without possessing medical evidence that Claimant recovered from all of the acknowledged work injuries. In particular, Claimant notes Dr. Glaser's testimony that there are well-known tests to measure aftereffects of a closed head injury and that he did not perform any of those tests. Employer responds that the issue of whether Claimant recovered from all accepted injuries, including the concussion, was genuinely in dispute at the time Employer filed the termination petition. Employer contends that it offered sufficient evidence to support the filing of a termination petition and specifically, to establish that Claimant recovered from his concussion injury, because Dr. Glaser testified that he evaluated all of Claimant's injuries that were listed on the NCP and believed that Claimant's concussion had resolved.[6]

However, while Employer emphasizes Dr. Glaser's testimony that he "evaluate[d] [Claimant] regarding all the injuries listed on the NCP," (S.R.R. at 12sa-13sa), Employer disregards Dr. Glaser's subsequent acknowledgment that he neither examined Claimant with respect to the concussion nor asked Claimant any questions

[6] In arguing that its contest was reasonable, Employer does not rely on the Heart and Lung decision, which was rendered a year after Employer's termination petition was filed.

concerning that accepted injury. The transcript of Dr. Glaser's deposition includes the following:

> [Claimant's counsel]: Do you treat concussions?
>
> [Employer's counsel]: I'm just going to object to the extent that I didn't ask Dr. Glaser specifically about the concussion, and [Claimant] is going to be evaluated by a neurologist in July, and she'll deal with any issues regarding the concussion.

(S.R.R. at 35sa.) The record does not indicate that Claimant was evaluated by a neurologist.

In *Gillyard*, we held that when an employer relies solely on insufficient medical testimony in support of a termination petition, the employer fails to establish a reasonable contest. The employer in *Gillyard* issued an NCP accepting liability for a lower back sprain and strain. After the employer filed a termination petition, a WCJ found that the claimant continued to suffer from disabling "chronic sciatica at the L-5 S-1 distribution on the right side." 865 A.2d at 992. The employer did not appeal from that decision. Subsequently, the employer filed a second termination petition, relying on medical testimony that the claimant had only suffered from and had only recovered from a back sprain and strain. We held that the employer's medical testimony was insufficient to support its second termination petition where the doctor failed to determine whether the claimant had fully recovered from the judicially established injuries. 865 A.2d at 996. We further concluded in *Gillyard* that the employer's contest was not reasonable, noting that the employer was aware that the claimant's injury had been judicially established and based its second termination petition solely on testimony that failed to address the established work

injury. We held in *Gillyard* that the claimant was entitled to an award of attorney's fees under those circumstances.

> Because Employer based its Second Termination Petition solely on testimony that failed to acknowledge the established work injury, much less that Claimant had recovered from that injury, and because the only evidence Employer introduced to support its Second Termination Petition was insufficient, as a matter of law, to support an award in Employer's favor, we must conclude that Employer failed to establish that its Petition was reasonable. Accordingly, we conclude that Claimant is entitled to an award of attorney's fees . . . .

Id. at 997. The circumstances of this case are substantially similar to those in *Gillyard*, in that Employer based its termination petition on Dr. Glaser's testimony, and Dr. Glaser admittedly did not address the established work-related concussion injury during his examination of Claimant.

Employer contends that the Board properly relied on this Court's decision in *Striker* to determine that Employer's contest was reasonable, arguing that if the WCJ had credited Dr. Glaser's testimony, it would have satisfied Employer's burden of proving Claimant had fully recovered from all accepted work injuries. However, this case is factually distinguishable from *Striker* because Dr. Glaser did not evaluate all of Claimant's accepted injuries and, consequently, even if credited by the WCJ, Dr. Glaser's testimony was insufficient to meet Employer's burden of proof. *See Central Park Lodge*, 718 A.2d at 370. In *Central Park Lodge*, the employer's medical expert failed to evaluate the claimant's accepted concussion injury because the claimant did not complain of concussion symptoms during her examination and the claimant's own medical experts did not offer testimony concerning that injury. We observed that the burden is entirely on the employer in a termination proceeding to prove that all of the claimant's work-related injuries have

resolved, and we concluded that the medical testimony introduced by the employer was insufficient as a matter of law to support its termination petition. *Id.*

This Court has consistently held that a reasonable contest is one that is prompted by a genuinely disputed issue, "which genuine dispute can be found where the medical evidence is conflicting or susceptible to contrary inferences. For an employer to establish that its contest is reasonable, it must have in its possession at the time of the decision to contest, or shortly thereafter, medical evidence supporting that position." *U.S. Steel Corp. v. Workers' Compensation Appeal Board (Luczki)*, 887 A.2d 817, 823 (Pa. Cmwlth. 2005). In this case, at the time it filed the termination petition, Employer did not have medical evidence addressing all of the recognized injuries. Employer was on notice of that fact at least by way of Claimant's answer to the termination petition. Employer subsequently acknowledged that it was not relying upon Dr. Glaser's testimony to prove recovery from the concussion, and Employer presented no other evidence addressing that acknowledged injury. Therefore, Employer did not establish that its contest was reasonable, and Claimant is entitled to an award of attorney's fees under section 440 of the Act. *Gillyard*.

For the reasons set forth above, we reverse that part of the Board's order affirming the denial of Claimant's request for attorney's fees, and we remand this matter to the Board for further remand to the WCJ for consideration of an award of attorney fees.

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PATRICIA A. McCULLOUGH, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anthony E. Dougherty, Petitioner v. Workers' Compensation Appeal Board (City of Philadelphia), Respondent	: : : : : : : :	No. 705 C.D. 2014

ORDER

AND NOW, this 13th day of January, 2015, the April 21, 2014, order of the Workers' Compensation Appeal Board (Board) is reversed to the extent that it affirms the denial of Petitioner's request for attorney's fees, and this matter is remanded to the Board for further remand to the Workers' Compensation Judge for consideration of an award of attorney fees consistent with the foregoing opinion.

Jurisdiction relinquished.

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PATRICIA A. McCULLOUGH, Judge