IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Pittsburgh and UPMC Benefit Management Services, Inc., Petitioners	:	
	:	No. 1544 C.D. 2012
v.	:	
	:	Submitted: January 18, 2013
Workers' Compensation Appeal Board (Britton), Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: August 6, 2013

The City of Pittsburgh and UPMC Benefit Management Services, Inc. (together, Employer) petition for review of the July 18, 2012 order of the Workers' Compensation Appeal Board (Board), which affirmed as modified the decision of a Workers' Compensation Judge (WCJ) granting the review petition of Donald Britton (Claimant). We affirm.

Claimant worked for Employer as a firefighter for approximately 20 years. (WCJ's Finding of Fact No. 3(a).) In the course and scope of his employment on July 13, 1985, Claimant sustained injuries to his left knee and back when he fell approximately 15 feet from the tiller seat of a fire truck. Id. Although the record does not include a notice of compensation payable (NCP), the parties do not dispute

that Claimant sustained injuries in the nature of a "tri-compartmental traumatic arthritis of the left knee and a lumbosacral sprain syndrome." (WCJ's Finding of Fact No. 4(a).) Claimant remained totally disabled from July 13, 1985, through May 12, 1989, during which time Claimant received his full wages in lieu of compensation by virtue of his employment as a firefighter. (WCJ's Finding of Fact No. 1.)

Claimant returned to work for a period of 2 months. By supplemental agreement dated January 11, 1990, the parties agreed that Claimant again became totally disabled as of July 12, 1989, with compensation payable at the rate of $312.99 per week. However, this agreement reiterated that Claimant would receive his full wages in lieu of compensation. On October 23, 1991, Employer filed a petition to suspend Claimant's compensation benefits, alleging that Claimant failed to act in good faith with respect to the offer of an available, modified-duty job. Claimant denied Employer's allegation. By decision dated May 27, 1994, WCJ Nathan Cohen ultimately denied Employer's suspension petition, concluding that Claimant acted in good faith and was not capable of performing the offered job. In this decision, WCJ Cohen noted that a statement of wages relative to Claimant's July 13, 1985 work injury recited an average weekly wage (AWW) of $469.49, with a corresponding compensation rate of $312.99.[1] Employer appealed, but, by order dated July 30, 1996, the Board affirmed, and Employer did not appeal further. (WCJ's Finding of Fact No. 1.)

On November 13, 1995, while Employer's appeal to the Board was pending, the parties executed a second supplemental agreement reflecting that

[1] While this statement of wages was filed with the Bureau of Workers' Compensation, its present condition renders it illegible. A copy submitted in the present matter essentially reveals a blank page. (R.R. at 1a.)

Claimant had retired from active duty with Employer effective that day.[2] This agreement stated that, effective November 13, 1995, Claimant was entitled to compensation payable at the rate of $336.00 per week. Id.

Following an independent medical examination of Claimant on April 15, 2008, Charles Finn, M.D., opined that Claimant was capable of returning to light-duty work with a 20-pound lifting restriction. (WCJ's Finding of Fact No. 4(e).) Employer subsequently issued Claimant a notice of ability to return to work dated April 29, 2008. (WCJ's Finding of Fact No. 3(b).)

On May 28, 2008, Employer filed a new suspension petition, alleging that Claimant was physically capable of performing modified-duty work but had voluntarily removed himself from the work force. Claimant filed an answer denying Employer's allegations. On January 30, 2009, Claimant filed a petition to review and modify his compensation benefits, asserting that he was owed partial disability benefits for the period of time when he returned to light-duty work with Employer following his work injury. Employer filed an answer denying the assertions of this petition. Further, Employer alleged that Claimant's review/modification petition was barred by technical res judicata, collateral estoppel, and/or laches. (WCJ's Finding of Fact No. 2.)

At the same time, Claimant filed a petition for penalties, asserting that Employer and/or its workers' compensation insurance carrier had violated the Workers' Compensation Act (Act)[3] by failing to file either a NCP or notice of

[2] Following his retirement, Claimant relocated to Florida. While Claimant retired from active duty with Employer, Claimant did not retire from the workforce in general. Employer did not dispute Claimant's continued receipt of benefits.

[3] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§1-1041.4, 2501-2708.

compensation denial within 21 days of receiving notice of Claimant's work injury. Employer filed an answer denying Claimant's assertion. Claimant later filed a second review petition asserting that Employer had under-calculated his AWW. Employer again filed an answer denying this assertion. Id.

The petitions were assigned to a WCJ who held multiple hearings. Claimant testified that over the past 5 years, his condition had progressively worsened and curtailed many of his daily activities. Claimant stated that he takes narcotic pain medication, including morphine, anti-inflammatories, and nerve relaxers, in order to alleviate the pain in his knee and back, and that he frequently sits or lies down during the course of the day because of this pain. Claimant noted that he treats with a pain management specialist in Tampa, Florida, every 4 to 6 weeks. (WCJ's Finding of Fact No. 3(a).)

Claimant testified that he received the notice of ability to return to work, and thereafter he made efforts to seek employment and submitted several job applications. Claimant obtained part-time-employment, two days per week, as a parking lot attendant in July 2008. However, Claimant reduced his employment to one day a week upon the order of his treating physician, Paul Beebe, M.D., because of increased swelling in his knee and persistent back pain. Regarding the AWW issue, Claimant testified that in 1984 and 1985, in addition to his regular salary as a firefighter, he earned an additional $2,000.00 per year as a result of call-backs, i.e., covering the shifts of other firefighters. (WCJ's Findings of Fact Nos. 3(b)-(f).)

Claimant also presented the deposition testimony of Dr. Beebe, a board eligible pain management specialist. Dr. Beebe began treating Claimant in September 2008, and he sees Claimant on a monthly basis to monitor his pain condition and medication regiment. Dr. Beebe noted that Claimant experiences

significant left knee and lower back pain, including lumbar radiculopathy with neuropathic pain and back spasms, all related to his original work incident. Dr. Beebe limited Claimant's part-time employment to one day a week for 8 hours due to the worsening of his symptoms. While Dr. Beebe opined that Claimant's condition had rendered him totally disabled, he noted that Claimant continued to work one day a week. (WCJ's Finding of Fact No. 5.)

Finally, Claimant presented the deposition testimony of Joseph King (King), secretary/treasurer of Employer's pension office.[4] King explained the procedure utilized by his office to maintain records relative to the complete earnings of an individual firefighter. King identified and authenticated two forms, one entitled "Year by Year Pension Wages Recorded" and the other a bi-weekly wages form entitled "Record of Dues Received." King testified that these forms reflect an employee's complete W-2 wage earnings, including fixed salary and overtime pay. (WCJ's Finding of Fact No. 9.)

Dr. Finn, who is board-certified in orthopedic surgery, testified on behalf of Employer. Dr. Finn testified regarding his independent medical examination of Claimant on April 15, 2008, noting that he was not provided with any medical records to review. After obtaining a history from Claimant, Dr. Finn performed a lumbar spine examination, which revealed a "left positive straight-leg raise, positive popliteal stretch, bowstring sign and Lasegue sign." A left knee examination revealed a "positive Apley grind sign, but no gross instability…." While Dr. Finn recommended further diagnostic studies, including x-rays and a MRI, he opined that

[4] The WCJ noted that although the testimony of King was taken in a different workers' compensation proceeding, it addresses issues relevant to the present petitions and was admitted without objection.

Claimant was capable of performing light-duty work with a 20-pound lifting restriction. (WCJ's Finding of Fact No. 4.)

Michele Burch (Burch), Employer's assistant director of employee compensation, testified that after seven years, an employee's payroll records are destroyed. Burch confirmed that Claimant's payroll records for the relevant time period had indeed been destroyed. However, Burch stated that she requested and obtained Claimant's payroll records from Employer's pension office, including Claimant's "Year by Year Pension Wages Recorded" form and a form entitled "Record of Dues Received," reflecting Claimant's bi-weekly wages from January 1984 through December 1985. On cross-examination, Burch acknowledged that she had no reason to question the accuracy of the wages recorded on these forms. (WCJ's Finding of Fact No. 6.)

By decision circulated June 29, 2010, the WCJ denied Employer's suspension petition as well as Claimant's review/modification petition seeking partial disability benefits and Claimant's penalty petition. With regard to these petitions, the WCJ concluded that Claimant had not voluntarily left the work force, that Claimant failed to establish any entitlement to partial disability benefits, and that, while Employer did not issue a notice of compensation payable, Claimant did not sustain any prejudice by this failure.

The WCJ granted Claimant's second review petition and amended his AWW to $568.86 based upon Claimant's bi-weekly wages as set forth in the "Record of Dues Received" maintained by Employer's pension office. However, the WCJ noted that Claimant would continue to receive compensation benefits at the rate of $336.00 per week, the maximum rate payable under the Act for a 1985 work injury. In rendering her decision, the WCJ specifically credited the testimony of Claimant,

Dr. Beebe, and King. The WCJ also credited the testimony of Dr. Finn to the extent it did not contradict that of Dr. Beebe and noted that Burch did not dispute the validity of the earnings evidence presented by Claimant.

Employer appealed the WCJ's decision granting Claimant's second review petition, reiterating its allegation that the petition was barred by technical res judicata, collateral estoppel, and laches. Employer also alleged that the WCJ's findings with regard to Claimant's AWW were not supported by substantial evidence, since the evidence in support thereof was not properly authenticated and a collective bargaining agreement (CBA) excluded call-back pay, holiday pay, and longevity pay from the calculation of wages in determining an AWW. The Board rejected Employer's allegations. The Board noted that the doctrine of laches only applies where the Act does not specify a certain amount of time during which a party must assert its rights; whereas here, section 413(a) of the Act, 77 P.S. §772, limits the period during which a party may seek to correct a NCP or supplemental agreement to within 3 years from the date of the last payment of compensation. The Board held that laches cannot apply since Claimant continues to receive compensation benefits and he exercised his rights within the time specified by section 413(a).

The Board next noted that technical res judicata and collateral estoppel only apply where there has been a final judgment on the merits and the cause of action or issue decided in the prior case was identical to the one presented in the later case. The Board indicated that, here, neither supplemental agreement executed by the parties reflected an AWW and that WCJ Cohen merely mentioned Claimant's AWW in his decision denying Employer's original suspension petition. Hence, the Board held that neither the supplemental agreements nor WCJ Cohen's prior decision barred Claimant's second petition for review.

With respect to Claimant's earnings evidence, the Board rejected Employer's allegation that this evidence was never properly authenticated, noting that Employer objected to this evidence based upon relevancy, rather than authentication, and hence, Employer waived any issue regarding the latter. The Board concluded that a CBA's definition of wages was not binding on the WCJ and that pay for holidays and extra shifts or overtime has repeatedly been held to constitute wages.[5] The Board further concluded that a review of the first four of the last five completed quarters immediately preceding the date of injury, in accordance with section 309(f) of the Act, 77 P.S. §582, revealed a high quarter of $592.37. Thus, the Board affirmed as modified the WCJ's decision to reflect an AWW of $592.37.

On appeal to this Court,[6] Employer first argues that the Board erred in concluding that technical res judicata and collateral estoppel did not apply where the original suspension petition litigation and prior supplemental agreements directly implicated the AWW.[7] We disagree.

Technical res judicata and collateral estoppel are both encompassed within the parent doctrine of res judicata, which prevents the re-litigation of claims and issues in subsequent proceedings. Weney v. Workers' Compensation Appeal Board (Mac Sprinkler Systems, Inc.), 960 A.2d 949 (Pa. Cmwlth. 2008), appeal denied, 601 Pa. 691, 971 A.2d 494 (2009). Under the doctrine of technical res

[5] The Board noted King's testimony that longevity pay was not part of pension calculations until 2001, well after the 1984-1985 quarters relevant to Claimant's AWW calculation.

[6] Our scope of review is limited to determining whether findings of fact are supported by substantial evidence, whether an error of law has been committed, or whether constitutional rights have been violated. Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704.

[7] By order of this Court dated January 11, 2013, Claimant was precluded from filing a brief in this matter.

judicata, often referred to as claim preclusion, "when a final judgment on the merits exists, a future suit between the parties on the same cause of action is precluded." Henion v. Workers' Compensation Appeal Board (Firpo & Sons, Inc.), 776 A.2d 362, 365 (Pa. Cmwlth. 2001).

In order for technical res judicata to apply, there must be: (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. Id. at 366. Moreover, technical res judicata may be applied to bar "claims that were actually litigated as well as those matters that *should have been* litigated." Id. (Emphasis added). Generally, causes of action are identical when the subject matter and the ultimate issues are the same in both the old and the new proceedings.

The doctrine of collateral estoppel, often referred to as issue preclusion, "is designed to prevent relitigation of an issue in a later action, despite the fact that the later action is based on a cause of action different from the one previously litigated." Pucci v. Workers' Compensation Appeal Board (Woodville State Hospital), 707 A.2d 646, 647-48 (Pa. Cmwlth. 1998). Collateral estoppel applies 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 a 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.

In the present case, Employer asserts that the original suspension petition litigation and prior supplemental agreements directly implicated the AWW, such that Claimant's second review petition was barred by the doctrines of technical res

judicata and/or collateral estoppel. However, the issue with respect to Employer's original suspension petition involved whether Claimant acted in good faith with respect to the offer of a modified-duty job. The WCJ and the Board found that Claimant acted in good faith. In his decision in that case, the WCJ made a finding that "[a] statement of wages for a July 13, 1985 injury recites an average weekly wage of $469.49 and a $312.99 per week compensation rate." (R.R. at 7a.) However, the amount of Claimant's AWW was not a claim or issue that was actually litigated or decided therein. Rather, the WCJ simply noted the information contained on the statement of wages prepared by Employer.

Additionally, we note that neither of the supplemental agreements referenced by Employer reflected an AWW; instead, these agreements merely reflected Claimant's rate of compensation, which increased from $312.99 in 1990 to $336.00 in 1995. Moreover, as is evident from the very language of these supplemental agreements, the same are voluntary contracts between the parties regarding the status of Claimant's disability. As such, the purpose of these agreements is to avoid litigation and they cannot constitute a final judgment for res judicata purposes. Thus, the Board did not err in concluding that neither technical res judicata nor collateral estoppel was applicable to Claimant's second review petition.

Employer next argues that the Board erred in concluding that laches was limited to situations where the Act does not specify a certain amount of time during which a party must assert its rights. Again, we disagree.

This Court has held that the equitable doctrine of laches is available in administrative proceedings where no time limitation is applicable, where a complaining party failed to exercise due diligence in instituting an action, and where

there is prejudice to another party. Mino v. Workers' Compensation Appeal Board (Crime Prevention Association), 990 A.2d 832 (Pa. Cmwlth.), appeal denied, 607 Pa. 697, 4 A.3d 159 (2010) (considering whether laches applied to the filing of an offset petition by the employer); Schwabb v. Workers' Compensation Appeal Board (Schmidt Baking Company, Inc.), 832 A.2d 1164 (Pa. Cmwlth. 2003) (considering whether laches applied to a claim of subrogation by the employer); Roadway Express, Inc. v. Workmen's Compensation Appeal Board (Allen), 618 A.2d 1224 (Pa. Cmwlth. 1992) (considering whether laches applied to a modification petition filed by the employer).

However, in the present case, section 413(a) of the Act, provides that the WCJ "may, at any time, review and modify or set aside a notice of compensation payable and an original or supplemental agreement . . . if it be proved that such notice of compensation payable or agreement was in any material respect incorrect." 77 P.S. §771. In Fitzgibbons v. Workers' Compensation Appeal Board (City of Philadelphia), 999 A.2d 659 (Pa. Cmwlth. 2010), this Court held that a party seeking to correct a NCP or agreement under section 413(a) must do so within 3 years after the date of the most recent payment of compensation. Because a review petition filed under section 413(a) of the Act is governed by a strict time limitation, the doctrine of laches does not apply and the Board did not err in concluding that "laches only applies where the Act does not specify a certain amount of time during which a party must assert its rights." (Board op. at 7.).

Employer correctly notes that the Board relied on Mitchell v. Workers' Compensation Appeal Board (Devereux Foundation), 796 A.2d 1015 (Pa. Cmwlth. 2002), in reaching this conclusion. Employer also correctly notes that in Mitchell, this Court concluded that the doctrine of laches was applicable to a review petition

filed by the claimant seeking to amend her AWW and we remanded the matter to the WCJ for further findings as to any "possible prejudice" to the employer. Id. at 1018. However, Mitchell was decided well before this Court's decision in Fitzgibbons and, therefore, does not accurately reflect the state of the law on this issue. While the Board's conclusion was correct, the Board simply cited to the wrong authority in support thereof.

Finally, Employer argues that the Board's decision was not supported by substantial evidence and that the Board misapplied the burden of proof on the review petition. Once more, we disagree.

As noted above, section 413(a) of the Act imposes a burden on the party seeking to review a NCP or supplemental agreement to establish that the same were "in any material respect incorrect." 77 P.S. §771; see also Brimmer v. Workers' Compensation Appeal Board (North American Refractories), 749 A.2d 1010 (Pa. Cmwlth. 2000) (holding that the party seeking modification under section 413 bears the burden of proving that a material mistake of fact or law was made at the time the NCP or agreement was executed).

Contrary to Employer's assertion, the Board properly applied the burden of proof in this matter. The Board noted in its opinion that, pursuant to section 413(a) of the Act, "the party seeking to change the NCP or agreement bears the burden of proving that a material mistake of fact or law was made at the time it was issued." (Board op. at 3.) Later, the Board specifically indicated that "Claimant bore the burden of proving that his AWW was incorrect. . . ." (Board op. at 11.) The Board applied this burden throughout its reasoning.

Regarding support for the Board's decision, Employer contends that the "Record of Dues Received" form relied upon by the Board was insufficient to support

the Board's AWW calculation, especially in light of the CBA between Employer and its firefighters which specifically excluded certain earnings when calculating an employee's AWW. We cannot agree.

The Board noted that former section 309(f) of the Act, 77 P.S. §582(f),[8] provided that "[i]n no case shall an employee's average weekly wage be less than one-thirteenth of his highest calendar quarter wage amount in the first four of the last five completed calendar quarters immediately preceding the date of his injury. . . ." The term "calendar quarters" refers to "the four periods of three months beginning and ending on January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31." Connors v. Workmen's Compensation Appeal Board (BP Oil), 663 A.2d 887, 889 (Pa. Cmwlth. 1995).

Before the WCJ, Claimant introduced the "Record of Dues Received" form maintained by Employer's pension office, reflecting Claimant's bi-weekly wages from January 1984 through December 1985.[9] King, secretary/treasurer of the pension office, explained that his office maintains records of all earnings of every firefighter "from the day they entered the academy to the day of retirement," by way of biweekly payroll records obtained from Employer's Treasurer. (R.R. at 56a.) King noted that the pension office maintains these records to verify the firefighters' pension contributions. (R.R. at 58a-59a.) King testified that his office conducts an

[8] The Act of June 24, 1996, P.L. 350, No. 57 (commonly referred to as Act 57) changed the calculation of the AWW for claimants who sustained injuries on or after June 24, 1996. Because Claimant's injury occurred on July 13, 1985, the former provisions of the Act relating to AWW apply herein.

[9] Burch, Employer's assistant director of employee compensation, actually obtained this form from Joe Funaro, chief accounting clerk of Employer's pension office, in response to a direct request for wage information relating to Claimant. (R.R. at 220a.)

independent audit each year and verifies the earnings of each firefighter over the previous 12 months with Employer's payroll records. (R.R. at 59a.) King described the wage earnings as reflecting a firefighter's fixed salary as well as overtime pay, call-back pay, and holiday pay. (R.R. at 71a.)

On cross-examination, King reiterated that his office maintains both bi-weekly and annual wage records which are premised upon Employer's payroll records. (R.R. at 101a-02a.) King explained that, after verification that the appropriate pension deductions were made, the payroll/wage records are "filed and stored," as he believes the paper records represent "the most important part of the accuracy of a financial statement or earnings." (R.R. at 104a, 107a.) King described how, in the early years, his office maintained forms with a firefighter's bi-weekly earnings handwritten thereon.[10] (R.R. at 124a.) This testimony, coupled with the "Record of Dues Received" form, constitutes substantial evidence in support of the Board's AWW calculation.

Further, Employer asserts that the Board erred in failing to analyze Claimant's earnings in the context of the CBA. However, Employer fails to specify which aspects of Claimant's earnings were relevant to such an analysis or identify the pertinent sections of the CBA at issue. Additionally, we agree with the Board insofar as it concluded that the definition of "wages" in a CBA is not binding. Mullen v. Workers' Compensation Appeal Board (Mullen's Truck & Auto Repair), 945 A.2d 813 (Pa. Cmwlth.), appeal denied, 599 Pa. 713, 962 A.2d 1198 (2008). In Mullen, we held that the term "wages" is "generally recognized as compensation given to a hired person for his or her services, based on time worked or output of production" and

[10] Claimant's 1984-1985 "Record of Dues Received" does in fact include handwritten bi-weekly earnings. (R.R. at 186a.)

"should be broadly defined to include periodic monetary earnings and all compensation for services rendered without regard to the manner in which such compensation is computed." Id. at 818. With respect to a claimant's AWW, we noted in Mullen that "the Act was designed with an eye toward 'the economic reality of a claimant's pre-injury earning experience.'" Id. (Citation omitted.)

As noted above, King testified that wage records maintained by his office included a firefighter's regular pay plus any overtime pay, call-back pay, and holiday pay. Our courts have long held that these types of pay should be included in a claimant's AWW calculation. Harper & Collins v. Workmen's Compensation Appeal Board (Brown), 534 Pa. 484, 672 A.2d 1319 (1996); Eljer Industries v. Workmen's Compensation Appeal Board (Johnson), 670 A.2d 203 (Pa. Cmwlth. 1996); Devlin v. Iron Works Creek Construction Corp., 66 A.2d 221 (Pa. Super. 1949).

Accordingly, the order of the Board is affirmed.

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PATRICIA A. McCULLOUGH, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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	:	No. 1544 C.D. 2012
v.	:	
Workers' Compensation Appeal Board (Britton), Respondent	:	

ORDER

AND NOW, this 6th day of August, 2013, the order of the Workers' Compensation Appeal Board, dated July 18, 2012, is hereby affirmed.

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PATRICIA A. McCULLOUGH, Judge