

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lorissa Sherman, :
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 Petitioner :
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 v. :
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 Workers' Compensation Appeal :
 Board (Albert Einstein Medical :
 Center), : No. 1674 C.D. 2012
 Respondent : Submitted: March 22, 2013

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

OPINION NOT REPORTED

MEMORANDUM OPINION BY
 PRESIDENT JUDGE PELLEGRINI FILED: April 10, 2013

Lorissa Sherman (Claimant) petitions for review of the order of the Workers' Compensation Appeal Board (Board) affirming that portion of the Workers' Compensation Judge's (WCJ's) decision not to grant her litigation costs. We affirm.

Claimant was injured while working as a patient care assistant for Albert Einstein Medical Center (Employer); a temporary Notice of Compensation Payable (NCP) identified her injury as a cervical, thoracic lumbar spine strain. Approximately a year after the injury, Employer filed a termination petition alleging that Claimant had fully recovered from her work injury. Claimant then

filed a review petition alleging an incorrect description of her injury, seeking to amend the injury to include “cervical, thoracic and lumbar myofascial injury, degenerative cervical and lumbar discs, rotator cuff injury to the right shoulder and right scapulothoracic injury to the musculature and rotator cuff of the right pectoral girdle.” (Reproduced Record [R.R.] at 216a.) After a hearing at which a number of witnesses testified, including medical witnesses for both Employer and Claimant, the WCJ granted Employer’s termination petition, finding that Claimant had fully recovered from her work injury but denied Claimant’s review petition to amend the description of her injury.¹

Claimant appealed to the Board, which determined that the WCJ erred in denying Claimant’s review petition because Employer’s medical expert testimony established a shoulder injury, but agreed with the opinion that benefits should be terminated because she had fully recovered from her work-related injury. However, even though it found that the shoulder injury should have been added, the Board found that Claimant was not entitled to litigation costs, opining that since Claimant unsuccessfully sought to add a number of other, more extensive injuries, she was not entitled to litigation costs. This appeal followed in which Claimant only contends that the Board erred in not awarding litigation costs.²

¹ Section 413 of the Workers’ Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §772, provides, in relevant part: “A workers’ compensation judge ... may, at any time, modify, reinstate, suspend, or terminate a notice of compensation payable ... upon petition filed by either party with the department, upon proof that the disability of an injured employe has increased, decreased, recurred, or has temporarily or finally ceased.”

² Our review of a decision of the Board is limited to determining whether errors of law were made, constitutional rights were violated or whether the record supports the necessary **(Footnote continued on next page...)**

On appeal, Claimant argues that once the Board granted her review petition to amend her recognized work injury to include a right shoulder sprain and strain, litigation costs should have been awarded under Section 440(a) of the Act, which provides, in relevant part:

In any contested case where the insurer has contested liability in whole or in part, ... the employe or his dependent, as the case may be, in whose favor the matter at issue has been finally determined in whole or in part shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred for attorney's fee, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend the proceedings.

77 P.S. §996(a). This Court has repeatedly stressed that a claimant must prevail on a contested issue to be awarded litigation costs. *See Jones v. Workers' Compensation Appeal Board (Steris Corp.)*, 874 A.2d 717, 720-22 (Pa. Cmwlth. 2005). The question in this case, therefore, is what it means to prevail on a contested issue to give rise to an award of counsel fees.

In *Minicozzi v. Workers' Compensation Appeal Board (Industrial Metal Plating, Inc.)*, 873 A.2d 25 (Pa. Cmwlth. 2005), a claimant was successful because he delayed the onset of a modification of his benefits, thereby receiving 26 weeks of benefits. We noted that the claimant "achieved a practical, quantifiable

(continued...)

findings of fact. *Ward v. Workers' Compensation Appeal Board (City of Philadelphia)*, 966 A.2d 1159, 1162 n.4 (Pa. Cmwlth.), *appeal denied*, 603 Pa. 687, 982 A.2d 1229 (2009).

benefit as a result of his defense to the modification petition.” *Id.* at 31. In reaching this conclusion, we contrasted that case with an instance where, although the WCJ ruled in favor of the claimant on a minor matter, “all the matters at issue were finally determined in the employer’s favor, resulting in no financial benefit to the claimant.” *Id.* More recently, in *Watson v. Workers’ Compensation Appeal Board (Special People in Northeast and Eagle Trust Management)*, 949 A.2d 949 (Pa. Cmwlth. 2008), we held that a claimant was not entitled to litigation costs where she only established that she suffered a concussion rather than a head contusion because the change in injury description did not result in any financial benefit to the claimant. *Id.* at 955-56 (“Claimant did not prevail on any disputed issue before the WCJ. Stated otherwise, the WCJ awarded Claimant no financial benefit beyond the medical expenses Employer previously agreed to pay.”)

Here, the Board’s decision to grant Claimant’s petition with regard to the shoulder injury did not result in any practical, quantifiable benefit, because it did not disturb the finding that Claimant had fully recovered from the work injury and the Board agreed with the WCJ that benefits were overpaid and Employer was entitled to a credit.

Accordingly, we affirm the decision of the Board.

DAN PELLEGRINI, President Judge

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ORDER

AND NOW, this 10th day of April, 2013, the order of the Workers' Compensation Appeal Board dated August 6, 2012, is affirmed.

DAN PELLEGRINI, President Judge