IN THE COMMONWEALTH COURT OF PENNSYLVANIA

United Parcel Service, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Tomczak), Respondent	:	No. 1168 C.D. 2011 Submitted: October 28, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: November 30, 2011

United Parcel Service (Employer) petitions for review of the order of the Workers' Compensation Appeal Board (Board) affirming the portion of the Workers' Compensation Judge's (WCJ) decision that refused to suspend or modify Cindy Tomczak's (Claimant) workers' compensation benefits because Employer failed to establish her earning power by market survey work that took into consideration all of her injuries, did not offer her work that it had available, and did not properly raise Claimant's failure to address suitable alternative employment. Finding no error in the Board's decision, we affirm.

On January 8, 2007, Claimant was injured when she slipped on the wet steps in the cab of a package car at work. Pursuant to a Notice of Compensation Payable (NCP) dated April 3, 2007, describing her work injuries as a left shoulder sprain/strain and left wrist ganglion cyst, Claimant began receiving workers' compensation benefits. On December 19, 2008, Employer filed a petition to modify or suspend benefits which stated, "Claimant was released to work by John F. Perry, M.D. [(Dr. Perry)]. There being no work available for claimant at United Parcel Service, a Labor Market Survey establishes that [C]laimant has an earning capacity that would result in a suspension or modification of her benefits." (Reproduced Record [R.R.] at 3a-5a.) Claimant then filed a review petition on April 10, 2009, alleging that she had sustained injuries to her lower back as a result of rehabilitation of her accepted work injuries.

Before the WCJ, Employer offered the deposition testimony of Dr. Perry, a board-certified orthopedic surgeon, in which he stated that at an examination on September 4, 2008, Claimant complained of movement of the left shoulder and loss of range of motion, and his examination led him to diagnose a "SLAP tear of the left shoulder labrum and claimant was status-post repair," as well as "adhesive capsulitis or shoulder scarring." (R.R. at 18.) Dr. Perry opined that Claimant could return to work with limitations, namely, she could handle no more than 50 pounds and was restricted in reaching, pushing and pulling with her left upper extremity. Dr. Perry further opined that all the positions provided in a labor market survey by Denise Clark (Clark), a vocational case manager retained by Employer, were within Claimant's demonstrated physical capabilities.

Employer also offered the May 15, 2008 records of James Rochester, M.D. (Dr. Rochester), who noted a status-post labral tear with surgical repair and determined that Claimant had not reached maximum medical improvement. He also noted that Claimant had "a mild sciatica from her work hardening and left labral tear S/P repair," and recommended the same lifting restrictions as Dr. Perry. (R.R. at 20.) On July 11, 2008, Dr. Rochester's impression was "right quadratus lumborum strain from work hardening" and that her left shoulder labral tear was repairing well. *Id.* He opined that Claimant would be ready to go back to her package car job or at least attempt to after a couple weeks, and that this made Claimant very nervous. As of July 29, 2008, Dr. Rochester stated that "[C]laimant would return a half day at the package car driver and a half day at smalls sort," but that offer had been retracted by Employer and he was not going to let her return to full, unrestricted work. *Id.* He instead opined that Claimant's lifting restrictions should remain in place and stopped her work hardening program because of the right-sided sciatica issues.

Clark testified, stating that based on Claimant's work history, Claimant had "a number of transferable skills from her past education and employment." (R.R. at 9.) She discussed the eight jobs surveyed for the labor market survey and stated that they would average between $40,000 and $45,000 per year, but said that whether Claimant could earn that amount "depend[s] on the individual," and that Claimant had as good a chance as anybody else, or more, based on her education and work experience. (R.R. at 10.) Clark stated that she believed Claimant had an equal chance of being hired at each of the eight positions

set forth. Additionally, she denied knowing about Claimant's lower back injury and did not take it into consideration when making her labor market survey.

Employer also presented the deposition testimony of Stephen Katch (Katch), its district health and safety manager. Katch was aware of Claimant's injuries and of her lifting restrictions imposed by Dr. Perry. He testified that Employer had a transition work program which allowed employees to return to work for up to 29 days in a modified-duty capacity if their restrictions were temporary, but beyond that time period, no modified-duty was available. Katch testified that Employer also had a policy that union employees, such as Claimant, had to be able to lift up to 70 pounds individually and 150 pounds with assistance. He stated that the union contract provided that an employee was not required to handle over 70 pounds if the employee believed in good faith that it would be a safety hazard. He stated that all union employees, including those washing cars and doing "smalls sort," were subject to the requirement so there was no job at Employer for Claimant because of her restriction. He stated that Claimant would have to opt out of the union to be considered for a non-union position with Employer.

After recounting how her work-related injury occurred, Claimant testified that while receiving medical treatment but before she had surgery, she continued working for Employer cleaning the windows of the trucks at night with one hand. Employer only offered that light-duty work for 30 days. After a May or June 2008 functional capacity evaluation, Claimant testified that she began noticing pain on the right side of her lower back and down her right leg and was

referred to a chiropractor by her treating physician. Claimant further testified that she did not look into the jobs that Clark informed her of because she was "in too much pain" from physical therapy and seeing doctors "every day," but was not incapable of working in any capacity. (WCJ's opinion, dated May 4, 2010, at 13.) Claimant had contacted some employers, but stated that she had difficulty finding work due to the economy. She hoped Employer would offer her some work, even part-time.

Harold Rhinier (Rhinier), the secretary, treasurer and principal officer of Teamsters Local 771 in Lancaster (of which Claimant was a member) testified on behalf of Claimant. He stated that he was familiar with the master collective bargaining agreement with Employer and was familiar with jobs with Employer because he and his wife had both worked there. Rhinier testified that he observed every job and job title of Employer, and that there were numerous positions with Employer that were within Claimant's restrictions set by Dr. Perry. He stated that Employer had jobs it could offer Claimant because it was hiring in Lancaster and he could only remember one month in 12 years where Employer had not hired new employees. Rhinier did agree that Employer had a unilateral policy that employees who were injured could not return to work without a 70-pound lifting release, and Claimant had a 50-pound weight restriction.

Claimant offered the deposition testimony of Amir Katz, M.D. (Dr. Katz), board certified in physical medicine and rehabilitation and electrodiagnostic medicine, whom she was seeking treatment with for her lower back pain. He opined that Claimant had "a left shoulder internal derangement and left brachial

plexus injury versus a suprascapular nerve injury." (*Id.* at 21.) He also noted that Claimant suffered anxiety and depression due to the chronic pain and opined that Claimant had low back pain and radiation of that pain into her lower left leg, which was caused by the functional evaluation done as a result of her work-related injury. His most recent diagnosis was "left shoulder internal derangement with a SLAP lesion and low back pain with a lumbosacral radiculopathy." (*Id.* at 22.) Dr. Katz stated that two nerve studies performed on Claimant in February and March 2009 demonstrated left brachial plexopathy, lower truck, medial cord, and an L5 radiculopathy that was moderate in severity. He said that Clark's vocational report and Dr. Perry's evaluation did not take the lower back injury into account.

The WCJ denied Employer's petition to modify or suspend benefits. Finding Dr. Katz credible, the WCJ found that the NCP should be amended to include the SLAP tear, adhesive capsulitis and back and leg pain and amended the NCP accordingly. He also noted that Employer had no basis for contesting the expansion of the description of Claimant's recognized injury because Dr. Perry also agreed with the diagnosis of a SLAP tear in the left shoulder labrum and adhesive capsulitis or shoulder scarring. As to Dr. Perry's opinion of work that was within her capability, the WCJ found that portion of his testimony not credible because he failed to address Claimant's lower back pain, which was now a component of her injury.

The WCJ also found that Clark's opinion on earning power was determined to be not credible in part because she referred to an average of surveyed job opportunities, but also because she did not take Claimant's low back

and leg pain into account. The WCJ also questioned Clark's status as a vocational expert based on her statement that Claimant had an equal chance at any of the jobs surveyed because those with higher pay would certainly have more competition.

The WCJ also opined that Employer failed to prove that it did not have any job available to Claimant when it provided the notice of ability to return to work.[1] While Employer had a unilateral policy that an injured employee could not return to work until he or she was cleared to lift at least 70 pounds, the collective bargaining agreement between Teamsters Local 771 and Employer provides that an employee could not be required to handle over 70 pounds if he or she believed in good faith that it would be a safety hazard to himself or herself. The WCJ determined that this language did not establish that Employer could not offer a position to a union employee who was injured on the job, even if he or she was unable to lift 70 pounds. He also turned to Dr. Rochester's reports, which indicated that Claimant was going to be released to try a gradual return to her job, only to have the job retracted by Employer. The WCJ determined that the fact that there was a job available and it was retracted demonstrated bad faith by Employer.

Employer appealed to the Board, which affirmed the WCJ's decision, concluding that he did not err in rejecting Clark's testimony because "her opinion was based on assumptions contrary to the established facts, in that the medical report she relied on … did not consider Claimant's low back pain and radiating

[1] An employer must provide a specific job if one is available within 30 days of filing the notice of ability to return to work, or until the filing of the petitions for modification and suspension, whichever is longer. 34 Pa. Code. §123.301(b).

right leg pain," rendering her opinion "worthless." (Board's Opinion and Order, dated May 27, 2011, at 6.)[2] This appeal followed.[3]

On appeal, Employer contends that the WCJ erred in finding that it was not entitled to modification of benefits because it did not establish Claimant's earning capacity through Clark's labor market survey. The WCJ found Clark's testimony of earning power not credible for, among other reasons, "especially so since she did not take into account the low back pain and radiating right leg pain" which she "never addressed … in her preparation of labor market survey and [in] formulating her opinion of earning power." Acknowledging that Clark did not address those injuries in preparing her labor market survey, Employer contends that was irrelevant because all the jobs referred to were sedentary.

Ignoring that implicit in the position is that if a person has a back injury, they can sit for lengthy periods of time, a labor market survey is to determine residual earning power and all the injuries are required to be considered to determine "an employe's residual productive skill." Section 306(b) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77

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[2] The Board rejected Employer's argument that it was entitled to a modification or suspension because it referred Claimant to an open job. The Board reasoned that Employer sought modification and suspension based only on a labor market survey, which was rejected on credibility grounds. (Board's Opinion and Order, dated May 27, 2011, at 6-7.)

[3] 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 findings of fact. *Ward v. Workers' Compensation Appeal Board (City of Philadelphia)*, 966 A.2d 1159 (Pa. Cmwlth. 2009).

P.S. §512. In any event, because the WCJ specifically found Clark's testimony concerning her labor market analysis not credible,[4] there was no evidence at all upon which Employer can rely to establish earning power.

Employer also contends that the Board erred in not addressing the WCJ's interpretation of Section 306(b)(2) of the Act. That provision requires, among other things, that "if the employer has a specific job vacancy the employe is capable of performing, the employer shall offer such job to the employe." Employer had the duty to prove that it had no other available, suitable jobs for Claimant. *Rosenberg v. Workers' Compensation Appeal Board (Pike County)*, 942 A.2d 245 (Pa. Cmwlth. 2008) ("where, as here, the question of an available, suitable job with the employer is raised with evidence, the employer ignores the question at its peril. As with all other elements necessary to succeed in a modification petition, once the issue is raised by evidence of a possible opening with employer, the employer has the burden of proof.") Employer contends that it does not have "light-duty jobs" because persons who cannot perform their full job duties can only work in a light-duty capacity for 30 days, meaning that it does not have job duties available. The reason that the Board did not address this issue was because once it found that the WCJ properly rejected Clark's labor market survey, it was unnecessary to address whether or not Employer had a position available. For similar reasons, do we not address the issue of whether Employer's policy of

[4] The WCJ, as fact finder, has exclusive power over questions of credibility and evidentiary weight, and may reject the testimony of any witness in whole or in part. Such determinations are not subject to appellate review. *Joy Global, Inc. v. Workers' Compensation Appeal Board (Hogue)*, 876 A.2d 1098 (Pa. Cmwlth. 2005).

only allowing light-duty jobs for only 30 days when a person is on workers' compensation satisfies its burden under this provision.

Finally, Employer contends that the WCJ erred in not addressing Claimant's failure to act on job referrals because its petition for modification was only based on the labor market survey, not on the failure to seek suitable alternative employment. Where, as here, an employer does not formally amend its petition to seek relief to conform to the evidence, we have held that a WCJ has discretionary authority to grant relief *sua sponte*, but his decision not to do so is not reversible. *Ohm v. Workers' Compensation Appeal Board (Caloric Corporation)*, 663 A.2d 883 (Pa. Cmwlth. 1995); *Continental Insurance Group v. Workers' Compensation Appeal Board (Gerbino)*, 638 A.2d 419 (Pa. Cmwlth. 1994). In any event, to establish that a claimant has not sought out suitable alternative employment, an employer must show that the position to which a claimant was referred must be within the claimant's physical capacity. Because Dr. Perry's medical clearance did not take into consideration the back and leg injury, his testimony that these jobs were within Claimant's capability was irrelevant.

For all of the above reasons, the order of the Board is affirmed.

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DAN PELLEGRINI, JUDGE

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Petitioner	:	
	:	
v.	:	
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Workers' Compensation Appeal	:	
Board (Tomczak),	:	
Respondent	:	No. 1168 C.D. 2011

O R D E R

AND NOW, this 30th day of November, 2011, the order of the Workers' Compensation Appeal Board, at No. A10-0890, is affirmed.

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DAN PELLEGRINI, JUDGE