IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Westmoreland Technical Testing & Research, Inc., Petitioner	:	
v.	:	No. 1397 C.D. 2009
	:	SUBMITTED: January 8, 2010
Workers' Compensation Appeal Board (Lopes), Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** February 24, 2010

Employer Westmoreland Technical Testing & Research, Inc. petitions for review of the order of the Workers' Compensation Appeal Board (Board) that affirmed the order of the Workers' Compensation Judge (WCJ) denying Employer's petition for modification of Joshua Lopes' workers' compensation benefits. For the reasons that follow, we affirm.

Lopes suffered a work-related severe crush injury to his left hand June 3, 2006, for which he is receiving workers' compensation benefits. His treating physician, Dr. Kodi Azari, performed surgery on Lopes' hand the day after the accident to correct swelling pressure and set a number of metacarpal fractures. He

continued to treat Lopes after the surgery, examining him on several occasions, before releasing him for work without restrictions in November 2006. Employer, several months later, offered Lopes a job as an "Assistant Custodian/Saw operator." Reproduced Record (R.R.) at 86a. The letter did not include any description of the job or its physical requirements, but did state that "[i]f you would prefer a part time or light duty arrangement, we are willing to accommodate that also." *Id*. Lopes did not respond to this letter.

Shortly after the offer letter was sent, Lopes returned to Dr. Azari for a follow-up exam. Dr. Azari noted that Lopes was no longer in pain, and that sensation had mostly returned to his hand, but he still had a limited motion in several fingers and one fracture that had not healed. Dr. Azari recommended a second surgery to separate scar tissue from tendons and improve range of motion. That surgery was performed on March 8, 2007. In an evaluation several weeks after the surgery, Dr. Azari noted that range of motion was improved, but Lopes still could not fully extend two of his fingers, and had an extensor lag in one finger. He recommended Lopes attend an aggressive hand therapy program and again released him to work without restrictions.

In response to Dr. Azari's second release, Employer reoffered Lopes the Assistant Custodian/Saw Operator job, in a letter nearly identical to the first. Again, Lopes did not respond. A month later, Employer filed the Petition for Modification at issue in this case, asserting that because Lopes had been offered an available job and had not taken it, Employer was entitled to cease paying benefits. Shortly after filing the petition, Employer sent Lopes a third offer letter, this time for the position of Assistant Custodian. Again, Employer failed to include a job

description, and, again, the letter included language offering to accommodate part-time or light-duty work.

At the hearing in front of the WCJ, Employer presented deposition testimony from Dr. Azari, on which much of this appeal focuses. Dr. Azari related much of the above medical history and the reasoning behind his two work releases. Dr. Azari was unable to recall if Lopes' injury was to his dominant hand without referring to another doctor's report. At the time of the first work release, Dr. Azari conceded that Lopes would have been unable to lift any weight, had diminished range of motion in two fingers, and extrinsic tightness and diminished range of motion of his metacarpal phalangeal joints. Dr. Azari testified that he always asks patients if they can return to work before issuing a work release, but was unable to recall if he had such a discussion with Lopes.

Discussing the second release, Dr. Azari conceded that at the time in question, Lopes could not extend his index and middle fingers to the neutral position. He also acknowledged that he failed to conduct formal strength testing and had not consulted the impairment guide, even though he admitted that taking those steps would lead to a more accurate assessment. He testified that at the time of the second release, Lopes was still in aggressive hand therapy five days a week. He again stated it was his procedure to ask patients if they felt ready to work before releasing them, but was unable to testify that he had had that discussion with Lopes before the second release. He gave no indication that he had any knowledge of the jobs Lopes was offered, or their work requirements.

Employer's Human Resources Administrator testified about the three job offer letters he had sent to Lopes. He acknowledged that while written job descriptions for the offered positions existed, they were not sent to Lopes or Dr.

Azari, nor were the descriptions admitted into evidence. Lopes testified briefly on his own behalf, offering no evidence about his physical condition, but denying that he had ever had discussions with Dr. Azari about returning to work.

The WCJ found Dr. Azari's work releases "speculative" and "not supported by the doctors' own testimony." WCJ Opinion at 4-5. In his findings of fact, the WCJ noted the above particulars of Dr. Azari's testimony, putting emphasis on the doctor's inability to remember if he had spoken to Lopes about returning to work, the failure to conduct strength testing or consult the impairment guide and his lack of familiarity with the offered jobs. In addition, he found Lopes' testimony that there had been no discussions about returning to work credible. After finding that the work releases were not justified, the WCJ concluded that because there was no medical testimony that Lopes could perform the offered jobs, the jobs could not be considered available, and denied Employer's modification petition. The Board affirmed, and an appeal to this court followed.

On appeal, Employer raises a number of issues: (1) whether the WCJ capriciously disregarded evidence that Lopes could return to work; (2) whether the WCJ capriciously disregarded evidence that the positions Employer offered Lopes were consistent with Lopes' physical abilities; and (3) whether the WCJ erred as a matter of law in concluding that Employer had not offered Lopes an available job.

Our Supreme Court has set out a three step procedure for cases in which employers seek modification of benefits:

> 1. The employer who seeks to modify a claimant's benefits on the basis that he has recovered some or all of his ability must first produce medical evidence of a change in condition.
>
> 2. The employer must then produce evidence of a referral (or referrals) to a then open job (or jobs), which fits in the

> occupational category for which the claimant has been given medical clearance, e.g., light work, sedentary work, etc.
>
> 3. The claimant must then demonstrate that he has in good faith followed through on the job referral(s).

Kachinski v. Workers' Comp. Appeal Bd. (Vepco Const. Co.), 516 Pa. 240, 252, 532 A.2d 374, 380 (1987). When the referrals at issue are to jobs with the employer itself, the burden is on the employer to show that it offered to the claimant a specific job that it has available, which the claimant is capable of performing. *South Hills Health Sys. v. Workers' Comp. Appeal Bd. (Kiefer)*, 806 A.2d 962 **(**Pa. Cmwlth. 2002).

In workers' compensation cases, the WCJ is the ultimate finder of fact, and as such, the WCJ can accept or reject, in whole or in part, the testimony of any witness, including an uncontradicted expert medical witness. *Prot. Tech., Inc. v. Workers' Comp. Appeal Bd. (Dengler)*, 665 A.2d 557 (Pa. Cmwlth. 1995). This court's role in reviewing a WCJ's factual findings is limited to determining if they are supported by substantial evidence, or if they are in capricious disregard of the evidence. *Leon E. Wintermyer, Inc. v. Workers' Comp. Appeal Bd. (Marlowe)*, 571 Pa. 189, 812 A.2d 478 (2002); *Davis v. Workers' Comp. Appeal Bd. (Swarthmore Borough)*, 561 Pa. 462, 751 A.2d 168 (2000).

In cases where the WCJ has rejected the testimony of an uncontradicted expert medical witness, this court has reversed when it has found "deliberate disregard of competent evidence that logically could not have been avoided," *Higgins v. Workers' Comp. Appeal Bd. (City of Philadelphia)*, 854 A.2d 1002, 1006 (Pa. Cmwlth. 2004), and when a decision focused only on a minor concession the doctor made in cross examination, while not giving weight to the

main thrust of the testimony. *Farquhar v. Workers' Comp. Appeal Bd. (Corning Glass Works)*, 515 Pa. 315, 528 A.2d 580 (1987).

This case is unlike either of the above cases, because the WCJ articulated cogent reasons why he was not accepting Dr. Azari's conclusions. Unlike *Higgins*, in which the WCJ simply ignored the doctor's testimony, the WCJ in this case listed many reasons, included above, for not crediting the doctor's conclusions. And unlike *Farquhar*, where the WCJ found that the claimant's injury was due to a preexisting condition, despite testimony to the contrary, in this case, the WCJ did not attempt to draw his own conclusions about Lopes' medical condition, but rather found that there were not sufficient facts to justify Dr. Azari's work releases. When, as in this case, the doctor was unfamiliar with some of the facts of the case, failed to conduct strength testing or other formal evaluation of the claimant's abilities, is unable to remember if he discussed with the claimant whether he was able to return to work, and lacked any information at all about the jobs he was releasing the claimant to, it is not capricious to refuse to credit that doctor's conclusions.

After deciding not to credit Dr. Azari's release, the WCJ was correct in concluding that Employer's case cannot succeed. Having found that the release to full work was not justified, there was no other evidence to fall back upon to determine what type of work, if any, Lopes was physically able to perform. Without that information, it is impossible to ascertain if the proffered jobs were appropriate. In addition, because the job descriptions were not put into evidence, Employer failed to establish both Lopes' physical condition and the requirements

of the jobs he was offered.[1] Without this information, the WCJ could not conclude that Lopes had been offered a job that he was capable of performing.[2]

For all the forgoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

[1] Employer claims that it was not required to provide a job description, because it was reoffering Lopes his pre-injury job. Lopes' original job title appears nowhere in the record, however, so the court cannot accept that argument. Even if that were the case, Employer would still have to show that Lopes was capable of performing the offered job, either by proving that he had made a full recovery, or by showing that the demands of the job were not beyond Lopes' physical capacity. In this case, Employer has done neither.

[2]The text of Employer's offer letters, which offered to accommodate part-time or light-duty work, does not overcome this failure of proof. Employer bears the burden of establishing what Lopes' restrictions are and proving that it offered a job within those restrictions. Making a vague offer of accommodation does not meet that burden.

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O R D E R

AND NOW, this 24th day of February, 2010, the order of the Workers' Compensation Appeal Board in the above captioned matter is hereby AFFIRMED.

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BONNIE BRIGANCE LEADBETTER,
President Judge