IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Donald Buchanan,	:	
Petitioner	:	
	:	No. 1460 C.D. 2010
v.	:	
	:	Submitted: November 12, 2010
Workers' Compensation Appeal Board	:	
(Beacon Container Corporation),	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: May 19, 2011

Donald Buchanan (Claimant) petitions for review of the June 30, 2010, order of the Workers' Compensation Appeal Board (Board), which affirmed the decision of a workers' compensation judge (WCJ) granting the termination petition filed by Beacon Container Corporation (Employer). We affirm.

Claimant worked for Employer as a tractor trailer driver since 1992,[1] delivering merchandise to clients and loading and unloading trucks. (Finding of Fact No. 9.) On February 23, 2007, while delivering merchandise to a client, Claimant slipped and fell on ice fracturing his left hip. Id. Claimant's hip fracture necessitated

[1] While the WCJ's findings referenced 1992, other evidence of record indicates that Claimant worked for Employer since 1982. (R.R. at 71.) We note that Claimant's reproduced record fails to include the lower case "a" following the page number as required by Pa. R.A.P. 2173.

surgery, including the insertion of hardware into his left leg and hip area. Id. On March 12, 2007, Employer issued a notice of compensation payable accepting liability for Claimant's work injury. (Finding of Fact No. 2.) Claimant twice attempted to return to work, in June and October of 2007, but he was unable to drive his truck due to pain and a lack of strength in his left leg. (R.R. at 73-74.)

On August 8, 2008, L. Richard Trabulsi, M.D., a board-certified orthopedic surgeon, performed an independent medical examination (IME) of Claimant. (Finding of Fact No. 4.) On September 15, 2008, Employer issued Claimant a notice of ability to return to work advising Claimant that Dr. Trabulsi had cleared him to return to full duty. (Finding of Fact No. 5.) This notice indicated that a copy of Dr. Trabulsi's IME report and an affidavit of recovery was attached thereto. Id. On September 29, 2008, Employer filed a termination petition alleging that Claimant had fully recovered from his work injury and could return to work without restrictions. (Finding of Fact No. 6.) Claimant filed an answer denying this allegation, and the case proceeded with hearings before the WCJ.

Employer presented the deposition testimony of Dr. Trabulsi, who noted that Claimant presented with left hip pain. (Finding of Fact No. 7.) Dr. Trabulsi testified that the August 8, 2008, IME revealed that Claimant's range of motion in both hips was symmetric and within normal range and his hip flexion was normal. Id. Dr. Trabulsi also indicated that he found no weakness on strength testing of the hip musculature. Id. Further, Dr. Trabulsi observed no evidence of a limp and no apparent pain or discomfort during the examination. Id. Dr. Trabulsi described Claimant's complaints of pain as subjective. Id. Based upon a review of Claimant's medical records and the IME, Dr. Trabulsi opined that Claimant had fully recovered and was capable of resuming his pre-injury job. Id.

Claimant testified that he continues to experience pain and a loss of strength in his left leg that prevents him from being able to engage the clutch and shift gears in his truck. (Finding of Fact No. 9.) Additionally, Claimant indicated that he takes medication for the pain that causes him to be drowsy and prevents him from driving in accordance with Pennsylvania Department of Transportation regulations. Id.

Claimant also presented the deposition testimony of Dale Federico, M.D., a board-certified orthopedic surgeon who has been Claimant's treating physician since February 24, 2007. (Finding of Fact No. 8.) Dr. Federico noted that Claimant had a shortened, external-rotated left leg consistent with a fracture during his initial examination. Id. Dr. Federico performed surgery on Claimant's hip, which included the insertion of hardware for stabilization. Id. Dr. Federico testified that, despite extensive and aggressive physical therapy, Claimant still experiences pain and some weakness in his left leg. Id. Dr. Federico said that he discussed with Claimant the possibility that the hardware was causing Claimant's pain and might need to be removed. Id. Dr. Federico stated that he ordered a functional capacity evaluation of Claimant on March 31, 2008.[2] Id. Dr. Federico opined that Claimant was incapable of returning to his pre-injury job as a tractor trailer driver. Id.

The WCJ accepted the testimony of Dr. Trabulsi as credible and persuasive and rejected the testimony of Dr. Federico. (Finding of Fact No. 10.) The WCJ also rejected Claimant's testimony relating to his ongoing symptoms and

[2] The functional capacity evaluation concluded that Claimant was only capable of occasional bending, twisting, reaching, grasping, lifting with a weight restriction of thirty-six pounds, and pushing and/or pulling with a weight restriction of twenty-two pounds. (R.R. at 45.) This evaluation also concluded that Claimant was able to sit, stand, or walk no longer than two and a half hours at a time. Id.

complaints. Id. Based upon these credibility determinations, the WCJ concluded that Employer met its burden of proving that Claimant had fully recovered from his work injury. Hence, the WCJ granted Employer's termination petition. Claimant appealed to the Board, which affirmed the WCJ's decision.

On appeal to this Court,[3] Claimant first argues that the WCJ erred as a matter of law in granting Employer's termination petition when Employer failed to provide him with a physician's affidavit of recovery. We disagree.

Claimant contends that Employer's failure to provide him with a physician's affidavit of recovery precludes a termination of his benefits. Claimant relies on section 306(b)(3) of the Workers' Compensation Act (Act)[4] and the following cases for support: Allegis Group v. Workers' Compensation Appeal Board (Henry), 882 A.2d 1 (Pa. Cmwlth. 2005); Summit Trailer Sales v. Workers' Compensation Appeal Board (Weikel), 795 A.2d 1082 (Pa. Cmwlth.), appeal denied, 569 Pa. 727, 806 A.2d 865 (2002); and Hoover v. Workers' Compensation Appeal Board (Henry), 783 A.2d 886 (Pa. Cmwlth. 2001), appeal denied, 569 Pa. 725, 806 A.2d 864 (2002). However, neither section 306(b)(3) of the Act nor the cases cited above support Claimant's contention.

Section 306(b) of the Act addresses partial disability and in relevant part provides that:

---

[3] Our scope of review is limited to determining whether findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Meadow Lakes Apartments v. Workers' Compensation Appeal Board (Spencer), 894 A.2d 214 (Pa. Cmwlth. 2006).

[4] Act of June 2, 1915, P.L. 736, added by the Act of June 24, 1996, P.L. 350, as amended, 77 P.S. §512(3).

> (3) If the insurer receives medical evidence that the claimant is able to return to work in any capacity, then the insurer must provide prompt written notice, on a form prescribed by the department, to the claimant, which states all of the following:
>
> (i) The nature of the employe's physical condition or change of condition.
>
> (ii) That the employe has an obligation to look for available employment.
>
> (iii) That proof of available employment opportunities may jeopardize the employe's right to receipt of ongoing benefits.
>
> (iv) That the employe has the right to consult with an attorney in order to obtain evidence to challenge the insurer's contentions.

77 P.S. §512(3). The notice required by this section is the notice of ability to return to work, which Claimant indisputably received. This section does not require Employer to provide Claimant with a physician's affidavit of recovery, and the cases cited by Claimant merely reaffirm that a notice of ability to return to work is a prerequisite for an employer to obtain a modification or suspension of benefits.[5]

Moreover, section 306(b)(3) is specifically limited to situations where an employer seeks a modification or suspension of a claimant's benefits based upon

[5] In Hoover, we held that section 306(b)(3) of the Act imposes a burden on an employer to issue a notice of ability to return to work whenever it receives medical evidence that a claimant is able to return to work in any capacity. In Allegis Group, we reaffirmed our holding in Hoover that, when an employer seeks a suspension based upon a job offer, even in the context of a claim petition, the employer must first provide the claimant with a notice of ability to return to work. In Summit Trailer Sales, we held that compliance with section 306(b)(3) of the Act is a threshold burden which must be met in order for an employer to obtain a modification or suspension of a claimant's benefits.

medical evidence. Burrell v. Workers' Compensation Appeal Board (Philadelphia Gas Works), 849 A.2d 1282 (Pa. Cmwlth. 2004) (holding that section 306(b)(3) is expressly limited to modifications sought upon the receipt of medical evidence and compliance with that section is a threshold burden which must be met in order to obtain a modification or suspension of benefits).[6] Section 306(b)(3) is not applicable here, where Employer sought a termination of benefits.

Next, Claimant argues that the Board erred in affirming the WCJ's decision because the testimony of Dr. Trabulsi, upon which the WCJ relied, was insufficient to support a termination of benefits. Again, we disagree.

An employer seeking to terminate workers' compensation benefits bears the burden of proving either that the employee's disability has ceased or that any current disability arises from a cause unrelated to the employee's work injury. Campbell v. Workers' Compensation Appeal Board (Antietam Valley Animal Hospital), 705 A.2d 503 (Pa. Cmwlth. 1998) (holding that termination was improper where employer's expert did not rebut the claimant's credible complaints of ongoing pain and fatigue). Termination is proper where the WCJ credits the testimony of the employer's medical expert, who testifies unequivocally, that within a reasonable degree of medical certainty, the employee is fully recovered and can return to work without restrictions, and there are no objective medical findings that either substantiate the complaints of pain or connect them to the work injury. Udvari v.

[6] In Burrell, we ultimately held that section 306(b)(3) was inapplicable, and a notice of ability to return to work was not required, because the employer was not seeking a modification based upon medical evidence. Rather, the employer was seeking a modification on the basis of surveillance evidence showing the claimant working at another job as well as vocational expert testimony.

Workers' Compensation Appeal Board (US Air, Inc.), 550 Pa. 319, 705 A.2d 1290 (1997).[7]

Claimant argues first that Dr. Trabulsi's testimony does not satisfy Employer's burden because Dr. Trabulsi failed to address the remaining hardware in his leg which is allegedly causing him pain. In making this argument, Claimant relies on the testimony of Dr. Federico, who performed Claimant's hip surgery and continued to treat Claimant after the surgery. Dr. Federico testified that Claimant "can be having a rubbing sensation of his tendons over the plate [in his left leg]" and that he talked with Claimant about removing the hardware to try to decrease his pain. (R.R. at 26.) However, the WCJ specifically addressed this testimony in his decision and found it was equivocal and insufficient to establish that the hardware was the cause of Claimant's subjective complaints of pain.[8] Further, the WCJ rejected

[7] In Udvari, the employer filed a termination petition, and, in support thereof, the employer's medical expert testified that the claimant had fully recovered from the work injury. The WCJ granted termination, and the Board affirmed. This court reversed the termination, citing the expert's acknowledgement that the claimant continued to have subjective complaints of pain. The employer appealed, arguing that there was substantial evidence to support a termination. Our Supreme Court agreed and held as follows:

> We must keep in mind that the employer bears the burden of proof in a termination proceeding to establish that the work injury has ceased. In a case where the claimant complains of continued pain, this burden is met when an employer's medical expert unequivocally testifies that it is his opinion, within a reasonable degree of medical certainty, that the claimant is fully recovered, can return to work without any restrictions and that there are no objective medical findings which either substantiate the claims of pain or connect them to the work injury.

Udvari, 550 Pa. at 327, 705 A.2d at 1293.

[8] Medical testimony is equivocal if, after a review of a medical expert's entire testimony, it is found to be merely based on possibilities. Campbell v. Workers' Compensation Appeal Board

(Footnote continued on next page…)

Claimant's testimony regarding his ongoing symptoms and complaints of pain as not credible and rejected Dr. Federico's testimony that Claimant was not fully recovered as less than credible and persuasive.[9] Instead, the WCJ credited Dr. Trabulsi's testimony that Claimant's examination was normal, Claimant's hip fracture had healed, there was no objective evidence supporting Claimant's subjective complaints of pain, and Claimant had fully recovered and was capable of returning to his pre-injury job. Dr. Trabulsi's testimony constitutes substantial evidence to support the WCJ's determination that Claimant had fully recovered from his work injury.

Claimant also asserts that Dr. Trabulsi's testimony does not support the WCJ's decision because Dr. Trabulsi vacillated in his testimony, his testimony was contradicted by that of Claimant and Dr. Federico, as well as a functional capacity evaluation, and Dr. Trabulsi only performs IMEs for employer/insurers.

We begin by noting that any issue regarding Dr. Trabulsi's preference to perform examinations for, and testify on behalf of, employers/insurers goes to the weight to be afforded his testimony, which is within the exclusive province of the WCJ. Michel v. Workers' Compensation Appeal Board (United States Steel Corporation), 966 A.2d 643 (Pa. Cmwlth. 2009) (holding that the WCJ is the final

(continued…)

(Pittsburgh Post Gazette), 954 A.2d 726 (Pa. Cmwlth. 2008). Medical testimony will be deemed incompetent if it is equivocal. Id.

[9] The law is well settled that the WCJ has exclusive province over questions of credibility and evidentiary weight and may accept or reject the testimony of any witness in whole or in part. Michel v. Workers' Compensation Appeal Board (United States Steel Corporation), 966 A.2d 643 (Pa. Cmwlth. 2009). Moreover, the determination of whether a claimant's subjective complaints of pain are accepted is a question of fact for the WCJ and in the absence of objective medical testimony, the WCJ is neither required to accept the claimant's assertions, nor prohibited from doing so. Udvari.

arbiter of witness credibility and the weight to be accorded evidence). Moreover, Claimant's argument that Dr. Trabulsi's testimony was contradicted by his own testimony and that of Dr. Federico amounts to nothing more than an attack on the WCJ's credibility determinations, which we will not entertain. Id. With respect to the functional capacity evaluation, Claimant questioned Dr. Trabulsi regarding the findings of this evaluation which indicated that Claimant complained of pain during numerous tests. However, Dr. Trabulsi repeatedly emphasized that the evaluation was performed four months prior to his examination and that Claimant's complaints were subjective. (R.R. at 125-31.) Furthermore, a review of Dr. Trabulsi's entire testimony reveals that he never vacillated from his opinion that Claimant's complaints of pain were not supported by objective evidence and that Claimant was fully recovered and capable of returning to his pre-injury job.

Finally, Claimant argues that Dr. Trabulsi's testimony does not support the WCJ's decision because Dr. Trabulsi relied upon a job description that inadequately described Claimant's duties as a tractor trailer driver. However, while the job description upon which Dr. Trabulsi relied did not adequately describe Claimant's duties as a tractor trailer driver,[10] the record reflects that Dr. Trabulsi did not rely exclusively on this job description in rendering his opinion. Rather, Dr. Trabulsi obtained a history from Claimant which included Claimant's specific job duties and Dr. Trabulsi referenced these duties in his testimony. (R.R. at 93, 101.) Additionally, Dr. Trabulsi testified on cross-examination that, although not indicated

[10] The job description reviewed by Dr. Trabulsi merely described Claimant's job duties as checking with dispatcher for instructions, hooking tractors to trailers, reporting any damaged or inoperative equipment, operating tractor trailer, and assisting customer with unloading. (R.R. at 167.) As Claimant noted in his brief to this Court, the job description did not discuss the specifics of loading and unloading the trailer, straightening the merchandise in the trailer, or operating a ten-gear tractor trailer truck.

in the history, he was aware that Claimant would have to operate a clutch when driving his tractor trailer. (R.R. at 138-39.) Thus, Claimant's argument in this regard is belied by the record.

Accordingly, the order of the Board is affirmed.

_____

PATRICIA A. McCULLOUGH, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Donald Buchanan,	:	
Petitioner	:	
	:	No. 1460 C.D. 2010
v.	:	
	:	
Workers' Compensation Appeal Board	:	
(Beacon Container Corporation),	:	
Respondent	:	

ORDER

AND NOW, this 19th day of May, 2011, the June 30, 2010, order of the Workers' Compensation Appeal Board is hereby affirmed.

_____

PATRICIA A. McCULLOUGH, Judge