IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dennis J. Schittler, Petitioner	:	
v.	:	No. 1604 C.D. 2010
	:	SUBMITTED: December 3, 2010
Workers' Compensation Appeal Board (The Kingsley Group), Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED: January 27, 2011**

Dennis J. Schittler (Claimant) petitions for review of the order of the Workers' Compensation Appeal Board (Board) that reversed the order of the Workers' Compensation Judge (WCJ) denying the modification petition of the Kingsley Group (Employer). For the reasons that follow, we affirm in part and vacate in part.

The facts of this case, as found by the WCJ, are as follows. Claimant, who worked for Employer as a boiler assembler for 30 years, suffered a work-related injury to his left leg in December 2006. A Notice of Compensation Payable issued by Employer described the injury as "left hip abductor, quad strain, left ankle strain/sprain." Reproduced Record (R.R.) at 4a. In November 2007,

Employer filed a Petition to Suspend Benefits, later amended to a Petition to Modify, alleging that Employer had offered Claimant a job within his restrictions, but that Claimant had failed to respond in good faith.

At the hearing before the WCJ, medical evidence was presented by both sides. Employer presented the testimony of L. Richard Trabulsi, M.D. Dr. Trabulsi found that Claimant had not fully recovered from his hip sprain/strain, and that he also suffered from a non-work-related degenerative spinal condition that might require surgery. Dr. Trabulsi released Claimant to work full time under sedentary restrictions. Linda P. D'Andrea, M.D., Claimant's medical witness, offered testimony similar to Dr. Trabulsi's. Dr. D'Andrea did opine, however, that Claimant's leg injury was due to a labral tear, and not a sprain or strain, and that Claimant could work, if he avoided lifting 15 pounds or more as well as twisting and climbing, and limited his standing and sitting time.

In October 2007, Employer sent Claimant a job offer letter. The letter noted that Dr. Trabulsi had released Claimant to sedentary work, and stated:

> As per Dr. L. Richard Trabulsi, MD, recommendation, we are able to offer you your current position, as a Class A boiler assembler, with physical constraints. In accordance with the IME restrictions set forth by the physical capacities form submitted by Dr. L. Richard Trabulsi, MD, we can offer you work in the sub-assembly area.

R.R. at 10a. Mark Wensel, President of Employer, testified that prior to his injury Claimant had been employed as a boiler assembler, doing all the work to "build a boiler from start to finish." R.R. at 71a. He stated that the offered job had the same title, but had been modified to include only sedentary tasks, all of which fell into the category of sub-assembly. Sub-assembly involves building components which will eventually be placed onto the boiler. At the hearing, Wensel produced a list of

11 sub-assembly tasks Claimant could do without lifting more than five pounds. He acknowledged, however, that this list had not been made available to Claimant at the time of the job offer. Wensel also testified that while the offered job had the same base pay as Claimant's prior position, the actual pay would be somewhat less, because incentive pay is not available for sub-assembly work. Finally, Wensel testified that, after receiving the job offer, Claimant told him that he could not take the job because of an upcoming surgery related to his spinal condition.

Claimant also testified at the hearing. He acknowledged receiving the job offer letter, and turning down the offered job. He also acknowledged familiarity with sub-assembly tasks:

> Q: Had you ever performed the sub-assembler position before?
>
> A: Not as it's set up now. At one point, we did the whole assembly so, yes, I am aware of the procedure.
>
> Q: So you know the individual duties that are required?
>
> A: Yes.
>
> Q: But you never performed at that station before?
>
> A: Right.
>
> Q: Are you aware of what the position requires a worker to do?
>
> A: Pretty much so, yes.

R.R. at 156a. Claimant also testified that the reason he turned down the job offer was that he felt that he could not perform the job due to his condition.

Stating that there was broad agreement on the facts of the case, medical and otherwise, the WCJ found all the witnesses credible. The WCJ denied the suspension position, finding that the job offer letter had not sufficiently explained how the position would be modified to meet Claimant's restrictions. On

appeal, the Board reversed, finding that the WCJ erred as a matter of law in finding the job offer letter insufficient. The Board went on to find that Claimant did not respond to the job offer in good faith, and ordered that his benefits be modified. An appeal to this court followed.

On appeal, Claimant argues that the Board erred in finding that the job offer letter sufficiently described the offered job, in finding that he did not respond to the job offer in good faith, and in the specific modification that it made to Claimant's benefits.

Our Supreme Court has set out a procedure for cases in which employers seek modification or suspension 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).
>
> 4. If the referral fails to result in a job then claimant's benefits should continue.

Kachinski v. Workmen's Comp. Appeal Bd. (Vepco Constr. Co.), 516 Pa. 240, 252, 532 A.2d 374, 380 (1987). Under *Kachinski*, an employer must provide the claimant with a general job classification and a basic description of the job. However, "where the claimant already knows the job requirements, the employer need not communicate them to the claimant in the job referral letter." *Fontaine v.*

Workers' Comp. Appeal Bd. (Philip Fountain & Son), 739 A.2d 628, 633 (Pa. Cmwlth. 1999) (citation omitted).

In this case, the job offer letter made clear that Employer was offering claimant his prior position as a Class A boiler assembler, and that the position would be modified to comply with the restrictions put in place by Dr. Trabulsi. The letter went on to specify that the tasks Claimant would be expected to perform would be sub-assembly tasks. Claimant testified that he was familiar with the sub-assembly tasks, and therefore, the Board was correct to find that the job offer letter sufficiently described the offered position. *Fontaine*.

Claimant also argues the Board erred in finding that he did not respond to the job offer in good faith. The WCJ did not address this issue, but the Board noted that, while Claimant testified that he did not believe he could perform the offered job, both of the medical witnesses believed that he could. A claimant's mere subjective belief that he cannot perform the offered position is not a good-faith reason to refuse an offered job. *Walk v. Workers' Comp. Appeal Bd. (U.S. Air)*, 659 A.2d 645 (Pa. Cmwlth. 1995). Therefore the WCJ did not err in finding that Claimant did not make a good faith effort to follow through on the job offer.

Finally, Claimant argues that the Board erred in ordering that Claimant's benefits be modified in accordance with the offered job. Employer offered Claimant forty hours of work a week, and Claimant argues that he would not have been able to perform for that length of time. The WCJ made no findings on this issue, nor was it considered at length by the Board. In front of the WCJ, both Claimant and Dr. D'Andrea testified that Claimant would have trouble working a full eight hour day. Dr. Trabulsi, on the other hand, believed Claimant could work full-time. The WJC found the testimony of all the witnesses to be

credible, and made no finding of fact as to how long Claimant would be able to work. Hence, it is necessary to remand this matter for the WCJ to make a finding as to whether Claimant is able to return to a full-time or a part-time position, and to determine the extent of modification of Claimant's benefits. The Board's order is affirmed in all other respects.

BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 27th day of January 2011, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby VACATED to the extent that it modified Dennis J. Shittler's disability benefits based on the full-time position offered to him by the Kingsley Group. This matter is REMANDED to the Worker's Compensation Judge to make a finding as to whether Claimant is able to return to a full-time or part-time position, and to determine the extent of modification of benefits based on that finding. The Board's order is AFFIRMED in all other respects. Jurisdiction relinquished.

BONNIE BRIGANCE LEADBETTER,
President Judge