IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carlos Mares, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Universal Concrete Products), Respondent	:	No. 1634 C.D. 2009
	:	Submitted: November 25, 2009

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: January 5, 2010

Carlos Mares (Claimant) petitions for review of the order of the Workers' Compensation Appeal Board (Board) which affirmed the Workers' Compensation Judge's (WCJ) suspension of Claimant's benefits.

Claimant worked as a laborer and a rigger on a crane crew for Universal Concrete Products (Employer). On September 21, 2005, Claimant suffered a work-related injury to his right knee in the form of a lateral meniscus tear when he was "walking on the trailer when his right leg fell through the deck and injured his right knee." Notice of Compensation Payable, November 8, 2005 at 1; Reproduced Record (R.R.) at R1a.

On January 23, 2008, Employer issued a Notice of Ability to Return to Work to Claimant and asserted that he was capable of returning to work with

restrictions. By letter dated February 4, 2008, Employer offered Claimant a position as a full time light duty laborer. Claimant did not respond.

On February 29, 2008, Employer petitioned to modify or suspend benefits on the basis that Claimant was capable of returning to work with restrictions and that a job offer was ignored.

Employer presented the deposition testimony of Ronald Krasnick, M.D. (Dr. Krasnick), a board-certified orthopedic surgeon. Dr. Krasnick examined Claimant on April 26, 2006, and on November 28, 2007, took a history, and reviewed medical records. As part of this review, Dr. Krasnick determined that Claimant underwent a partial lateral meniscusectomy on his right knee due to his torn lateral meniscus. Claimant underwent a second arthroscopic surgery to repair the knee. After the November 28, 2007, examination, Dr. Krasnick diagnosed Claimant with "a lot of patellofemoral symptoms and signs . . . consistent with chondromalacia." Deposition of Ronald Krasnick, M.D., May 14, 2008, (Dr. Krasnick Deposition) at 14; R.R. at R.20a. Dr. Krasnick explained that due to his work-related injury Claimant had "progressive, traditional changes in the knee with progressive wear and tear of the lateral meniscus, and development of chondromalacia, especially with respect to the lateral facet." Dr. Krasnick Deposition at 14; R.R. at R.20a. Dr. Krasnick testified within a reasonable degree of medical certainty that Claimant could return to work at a medium level job with restrictions on "kneeling, squatting, crawling, or climbing on a repetitive basis." Dr. Krasnick Deposition at 15; R.R. at R.21a. On cross-examination, Dr. Krasnick admitted that Claimant's condition had worsened since the last examination. He

noted Claimant went to the emergency room on February 4, 2008, with complaints of right knee pain. Dr. Krasnick Deposition at 23-24; R.R. at R.29a-R.30a. Dr. Krasnick wanted to examine Claimant before he returned to work. Dr. Krasnick Deposition at 24-25; R.R. at R.30a-R.31a. On redirect examination, Dr. Krasnick testified that none of the questions posed to him on "cross-examination altered any . . . previously expressed opinions." Dr. Krasnick Deposition at 27; R.R. at R.33a.

Employer also presented the deposition testimony of David J. Kuczawa (Kuczawa), Employer's plant manager. Kuczawa testified that he sent the letter to Claimant offering him a light duty position within Claimant's restrictions. Claimant did not respond. David J. Kuczawa Deposition, June 9, 2008, (Kuczawa Deposition) at 7-8; R.R. at R.45a. Kuczawa explained the position offered:

> We would have him prepping brick and that would work within Dr. Krasnick's return to work order as far as sitting or standing. And basically, he would be painting brick with a roller. He would be lifting about a three-pound brick. After it was painted it would be placed on a skid.

Kuczawa Deposition at 10; R.R. at R.46a. Kuczawa explained that Claimant could either sit or stand to do the job. The job paid $10 per hour which was Claimant's time of injury wage. Kuczawa Deposition at 10-11; R.R. at 46a. Kuczawa also identified various forms which Claimant completed when he started work with Employer. Kuczawa testified that Claimant never expressed to him that he did not understand or write English. Kuczawa Deposition at 27; R.R. at R.50a.[1]

[1] Claimant neither testified nor presented any medical deposition testimony.

The WCJ granted the suspension petition as of February 23, 2009, and dismissed the modification petition as moot. The WCJ made the following relevant findings of fact:

> 3. On full review, the undersigned finds the evidence presented by the Employer to be credible and persuasive. It is found that Claimant was capable of returning to work as of November 28, 2007, on a full time basis, but with limitations. Further, it is found that the Employer offered full-time employment to the Claimant as of February 11, 2008, which was within his ability to perform at Claimant's pre-injury regular wages. The Employer is entitled to relief by way of a suspension of benefits as of February 11, 2008.
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> 4. The undersigned finds the testimony and opinions of Dr. Krasnick to be credible and persuasive as they support the determinations made above. In this connection, and recognizing that the burden of proof was on the Employer, the Claimant, as noted, did not present medical testimony contra the opinions of Dr. Krasnick. The undersigned does not find the cross-examination of Dr. Krasnick, and specifically as to re-examining the Claimant again before returning him to work (following his emergency room visit on February 6, 2008), nullified his findings and opinions as to Claimant's ability to return to work, with limitations. Here, it is observed that on re-direct examination Dr. Krasnick specifically testified that none of the questions posed to him on cross-examination altered any of his previously expressed opinions (re Claimant's ability to return to work with limitations). . . . Moreover, on this record, the un-rebutted testimony from Mr. Kuczawa demonstrates that the Employer was most cooperative and accommodating to injured workers and was willing to provide appropriate employment to the Claimant even if there were extreme physical limitations; work was made available even for injured workers on crutches. . . .
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> 5. The testimony of Mr. Kuczawa is found credible and persuasive. He forwarded a letter to the Claimant on

February 4, 2008 offering a position to the Claimant as a 'light duty laborer'. . . . The position was full time and paid Claimant his pre-injury wages. The offer was predicated upon Dr. Krasnick's evaluation. The letter was acknowledged as having been received by the Claimant. . . . Claimant was to report for work on February 11, 2008. He did not contact the Employer; again, Claimant did not testify in this proceeding as to his reason for failing to contact the Employer or reporting to work; there is no indication a medical report was submitted to the Employer at that time as to any inability to return to work.

6. The letter offering employment to the Claimant was sufficiently detailed; Claimant's argument to the contrary is rejected. Dr. Krasnick's approval clearing the Claimant for return to work was enclosed with the letter as evidenced by the letter itself. Moreover, it is clear that 'light duty' was being offered, 'As per Dr. Krasnick's recommendations.' Here, it is also observed that a Notice of Ability to Return to Work dated January 23, 2008 (prior to the offer of employment) had been forwarded to the Claimant. . . . This Notice specifically advised the Claimant per the medical examination on November 28, 2007 with Dr. Krasnick that he was capable of returning to work, 'but with restrictions.' The Notice further indicates the report of Dr. Krasnick and his physical capacity determinations were enclosed. Within the purview of the un-rebutted evidence submitted by the Employer, it is found that the Employer adequately notified the Claimant of the limitations under which he would be working. This is confirmed by the testimony of Mr. Kuczawa which reveals the work – painting bricks (which could even be done sitting down) was extremely light.

. . . .

8. Within the context of the evidence presented, it is found that Claimant did not act appropriately in conjunction with the employment referral, not only in February 2008 when employment was first offered, but thereafter. In this connection, it is of note that Mr. Kuczawa fully described the nature of the proffered employment at his deposition in June 2008, and most

> importantly again noted the position remained open for the Claimant. Claimant, however, on this record has not responded to the continued offer of employment. (Citations omitted).

WCJ's Decision, February 23, 2009, (Decision), Findings of Fact Nos. 3-6, and 8 at 1-2; R.R. at R.167a-R.168a.

Claimant appealed to the Board which affirmed.

Claimant contends that the Board erred when it affirmed the WCJ's decision without addressing whether the WCJ erred when he ordered a suspension of benefits when the job offer letter was deficient of requisite information and when it affirmed the WCJ's determination that the job offer letter was sufficiently detailed.[2]

In Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.), 516 Pa. 240, 532 A.2d 374 (1987), our Pennsylvania Supreme Court adopted the following requirements which an employer must meet to satisfy its burden to modify compensation payments:

> 1. The employer must produce medical evidence of a change in the employee's condition.
>
> 2. The employer must produce evidence of a referral or referrals to a then open job (or jobs), which fits the occupational category which the claimant has been given medical clearance e.g., light work, sedentary work, etc.

[2] This Court's review is limited to a determination of whether constitutional rights were violated, whether an error of law was committed and whether necessary findings of fact are supported by substantial evidence. Vinglinski v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

> 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 the claimant's benefits should continue.

Kachinski, 516 Pa. at 252, 532 A.2d at 380.

Here, Employer provided medical evidence that Claimant was able to perform a light duty job in the nature of the deposition testimony of Dr. Krasnick. Employer produced evidence that it referred Claimant to the full time light duty position of laborer. It is undisputed that Claimant failed to follow through on the job referral.

However, Claimant contends that the job referral letter provided to Claimant was insufficiently detailed to provide a legitimate referral. An employer must provide a claimant with information as to the type of work the job entails and that the work is within the category of work for which the claimant was medically cleared. School of District of Philadelphia v. Workmen's Compensation Appeal Board (Stutts), 603 A.2d 682 (Pa. Cmwlth. 1992). Claimant asserts that the job referral letter erroneously advised Claimant that he was cleared for full duty work by Dr. Krasnick. The letter from Kuczawa states in pertinent part:

> I am writing regarding an offer of employment for you. Dr. Ronald Krasnick, MD has cleared you to return to full duty work. A copy of his approval was sent to your insurance carrier. A copy is enclosed for your review.
>
> As per Dr. Krasnick's recommendations, we are able to offer you a position as a light duty laborer. The position is open for you to return to work effective 2/11/2008. The pay for this job is $10.00 per hour. The hours are 6:00 am to 2:30 pm, Monday through Friday.

> . . . .
> Should you have any questions, please do not hesitate to contact me at the above number. I look forward to seeing you back to work with us.

Letter from David J. Kuczawa, February 4, 2008, at 1; R.R. at R.62a.

While Kuczawa should have written "full time" work instead of "full duty" work, it is clear from the letter, as a whole, that Claimant was offered a light duty position which followed Dr. Krasnick's recommendations. This letter satisfied Employer's obligations in that regard.

Next, Claimant asserts that there is no proof that Dr. Krasnick's report was enclosed because the letter does not include the term "enclosures" on it. There is nothing in the record to indicate that the report was not enclosed. Claimant did not testify that he did not receive it.

Claimant also asserts that both the job restrictions and a job classification delineated by Dr. Krasnick were not included in the letter. Claimant is challenging the WCJ's factfinding. The WCJ found Claimant was advised there was a light duty job available that met the restrictions set forth by Dr. Krasnick. The WCJ and the Board found this description to be adequate. This Court finds no error.

Claimant next asserts that the letter did not provide Claimant with a basic job description. Claimant argues that the "light duty laborer" position that was offered was the same position Claimant had prior to his injury. In fact, Kuczawa testified that Claimant's time of injury job was a "laborer and/or a

rigger." Kuczawa Deposition at 5; R.R. at R.45a. Kuczawa also explained that Claimant's job involved "hooking up panels all day long to be loaded or offloaded onto storage racks." Kuczawa Deposition at 5; R.R. at R.45a. Kuczawa also explained that the panels were made of precast concrete and on average were eight feet by thirty feet. As a rigger, Claimant had to "go up ladders and actually put the lifting hooks into the top of the panel, connect the hooks from the crane to the lifting hooks, come down off the ladder with a tag line and help guide the panel either into the rack or onto the trailer." Kuczawa Deposition at 5-6; R.R. at R.45a. The light duty job was designed to fit Claimant's physical capacity as determined by Dr. Krasnick. Also, in the letter Kuczawa stated that if Claimant had any questions that he should contact him. There is nothing in the record to indicate that Claimant was unaware of the nature of the position.[3]

[3] Claimant also asserts that because he is Spanish speaking and has a weak knowledge of English, it was more important that the letter be clear and further that because Employer's letter was in English it decreased the chance that he would understand it. Once again there is nothing in the record to establish that Claimant did not understand English. In fact, with respect to this issue, the WCJ found "the testimony of Mr. Kuczawa demonstrates otherwise, both by Claimant's ability to execute certain documents and that Claimant never complained to him that he was unable to follow any instructions during the course of his employment with this Employer since 2005. It is of note that Claimant's Fee Agreement with Claimant's counsel is in English only." Decision, Finding of Fact No. 7 at 2; R.R. at R.168a. The WCJ found Kuczawa credible. Further, the WCJ, as the ultimate finder of fact in workers' compensation cases, has exclusive province over questions of credibility and evidentiary weight, and is free to accept or reject the testimony of any witness, including a medical witness, *in whole or in part*. General Electric Co. v. Workmen's Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 529 Pa. 626, 600 A.2d 541 (1991). This Court will not disturb a WCJ's finding when those findings are supported by substantial evidence. Nevin Trucking v. Workmen's Compensation Appeal Board (Murdock), 667 A.2d 262 (Pa. Cmwlth. 1995).

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

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	:	
v.	:	
	:	
Workers' Compensation Appeal	:	
Board (Universal Concrete Products),	:	No. 1634 C.D. 2009
Respondent	:	

O R D E R

AND NOW, this 5th day of January, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge