

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Justin Miller, :
 :
 Petitioner :
 :
 v. : No. 167 C.D. 2011
 : Submitted: May 13, 2011
 Workers' Compensation Appeal Board :
 (Johnson Matthey Holdings, Inc.), :
 Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN

FILED: June 16, 2011

Justin Miller (Claimant) petitions for review of that portion of the January 24, 2011, order of the Workers' Compensation Appeal Board (WCAB), which affirmed the decision of a workers' compensation judge (WCJ) to grant Claimant's reinstatement petition from July 12, 2007, through August 3, 2008, and suspending Claimant's benefits thereafter. We affirm.

Claimant worked as a die and roll finisher for Johnson Matthey Holdings, Inc. (Employer) when, on February 23, 2007, he sustained a work-related injury recognized as a low-back strain by the notice of compensation payable (NCP) dated April 2, 2007. (WCJ's Findings of Fact, No. 1.) Claimant continued to work for Employer until July 12, 2007, when his doctor advised him not to return. (WCJ's Findings of Fact, No. 6.)

On October 16, 2007, Claimant filed a reinstatement petition alleging that he was disabled due to his work injury. (WCJ's Findings of Fact, Nos. 1, 3.) The WCJ granted Claimant's reinstatement petition; however, the WCJ suspended Claimant's benefits as of August 4, 2008, based upon Employer's offer of work within Claimant's restrictions. Claimant appealed to the WCAB, which affirmed. Claimant's petition for review to this court followed.¹

Claimant first argues that the WCAB erred in affirming the WCJ's suspension of Claimant's benefits as of August 4, 2008, because the WCJ's decision is not reasoned in that regard.² Claimant specifically contends that the WCJ did not provide a reason for overruling Claimant's objection to the deposition of Employer's fact witness. However, the Special Rules of Administrative Practice and Procedure before Referees, 34 Pa. Code §131.66(b), provide:

(b) Objections shall be made and the basis for the objections stated at the time of the taking of the depositions.

¹ Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

² Section 422(a) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §834, provides in pertinent part:

All parties to an adjudicatory proceeding are entitled to a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached.

Only objections which are identified in a separate writing, introduced prior to the close of the evidentiary record, as close of the record is specified in § 131.101(c) – (e) (relating to briefs, findings of fact and close of record), and stating the specific nature of the objections and the pages where they appear in the deposition or the exhibits to which they refer will be preserved for ruling. Objections not so preserved are waived.

In the present controversy, the record is void of any documentation that Claimant attempted to preserve his objection in a separate writing; thus, the objection is waived.³ *Yezovich v. Workmen's Compensation Appeal Board (USX Corporation)*, 601 A.2d 1341, 1342-43 (Pa. Cmwlth. 1992).

Next, Claimant argues that he was prejudiced by Employer taking the deposition of its fact witness four days before the record was closed, as Claimant was not given adequate opportunity to defend against the witness's testimony regarding the job offer. The deposition of Employer's fact witness was taken on October 2, 2008, and the record was closed at a hearing on October 6, 2008. At the October 6, 2008 hearing, Claimant did not request that the record be kept open for the purposes of offering rebuttal evidence to Employer's deposition testimony. Thus, Claimant cannot now argue that he was prejudiced by the deposition.

³ We note that in the reproduced record at page 85a Claimant includes a written notice objecting to Employer's deposition of its fact witness. However, the notice is not included in the original record before this court, which is the only record certified to this court for review. *See* Pa. R.A.P. 1551(a) (stating that our review of quasi-judicial orders shall be conducted on the record made before the government unit).

Next, Claimant argues that he was not properly notified by Employer of an available job within his restrictions. Claimant asserts that the first time he received Employer's notice of ability to return to work was with Employer's job offer, and, under *Secco, Inc. v. Workers' Compensation Appeal Board (Work)*, 886 A.2d 1160 (Pa. Cmwlth. 2005), this is not sufficient notice. We disagree. Under *Secco*, when a notice of ability to return to work is sent after the job offer and both are received on the date that the job offer expires, the notice is insufficient. *Id.* at 1162. *Secco* is distinguishable even if Claimant received the notice of ability to return to work at the same time as the job offer, as the job offer did not expire until nineteen days after the notices were received. Thus, Claimant had prompt notice as required under section 306(b)(3) of the Act, 77 P.S. §512(3).

Finally, Claimant argues that the WCJ erred in suspending his benefits where no suspension petition was ever filed. This case involves a reinstatement petition filed by Claimant. Therefore, Claimant was required to prove that his disability had increased or reoccurred and that his physical condition had actually changed in some way, along with the **duration** of his disability. *Mader v. Workmen's Compensation Appeal Board (USAir, Inc.)*, 669 A.2d 511, 513 (Pa. Cmwlth. 1996); *Ohm v. Workmen's Compensation Appeal Board (Caloric Corp.)*, 663 A.2d 883, 886 (Pa. Cmwlth. 1995). In other words, in this proceeding, the WCJ, based upon the evidence presented, could have approved compensation for an indefinite period of time, for a closed period of time, or not at all. *See Ohm*, 663 A.2d at 886; section 413(a) of the Act, 77 P.S. §772. Thus, the WCJ acted within his discretion in determining that Claimant was entitled to compensation for a closed period of time.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

