

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Topps Market 601, | : | |
| Petitioner | : | |
| | : | |
| v. | : | No. 2276 C.D. 2009 |
| | : | |
| Workers' Compensation | : | Submitted: January 29, 2010 |
| Appeal Board (VanGorder), | : | |
| Respondent | : | |

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: March 16, 2010

Topps Market 601 (Employer) petitions for review of the order of the Workers' Compensation Appeal Board (Board) affirming the decision of a workers' compensation judge (WCJ) denying Employer's petition to suspend the compensation benefits of Todd VanGorder (Claimant) pursuant to the provisions of the Pennsylvania Workers' Compensation Act (Act).¹ We affirm.

On September 3, 2006, Claimant sustained a low back injury while in the course and scope of his employment as a manager of the meat department in Employer's store in Erie, PA. Claimant received weekly compensation benefits due to his work-related injury pursuant to a Notice of Compensation Payable.

¹ Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1 – 1041.4, 2501 – 2708.

On February 15, 2007, Employer filed a petition to suspend Claimant's compensation benefits as of January 26, 2007, because a specific job had been offered to Claimant. On March 6, 2007, Claimant filed an answer to the petition and hearings before a WCJ ensued.

On July 18, 2008, the WCJ issued a decision disposing of the petition in which she made the following relevant findings of fact. In support of the petition, Employer presented the testimony of Edward Armstrong, the manager of Employer's store. Mr. Armstrong testified that Claimant had been offered his pre-injury job as manager of the meat department with modifications to accommodate no lifting greater than ten pounds, to allow switching between sitting and standing as needed by Claimant, and any additional accommodations that might be necessary. WCJ Decision at 1. Mr. Armstrong acknowledged that Employer's store is about 45 minutes away from Claimant's home in Jamestown, NY. Id.

Employer also presented the deposition testimony of James Faulk, M.D., a physician board certified in orthopedic surgery. Dr. Faulk testified that, based upon his review of Claimant's medical records and his examination of Claimant, he diagnosed Claimant with "mechanical back pain related to a herniated disc at L5-S1 central." WCJ Decision at 2. Dr. Faulk explained that Claimant's disc is bulging and is indenting the thecal sac. Id. Dr. Faulk opined that although Claimant could not perform his pre-injury job due to the lifting, Claimant could perform the job if the lifting was modified. Id. Dr. Faulk stated that he did not feel that Claimant was precluded from driving from his home in Jamestown to the store in Erie, but he did acknowledge that Claimant's medication may cause drowsiness and should not be taken before driving. Id.

In opposition to the petition, Claimant testified, stating that he has severe low back and buttocks pain, muscle spasm, and pain down his legs. WCJ

Decision at 1. He stated that long periods of walking, standing or sitting aggravate his condition, and causes muscle spasm and shooting pain down his leg. Id. He also stated that although he could perform the duties of the modified position at Employer's store, he could not tolerate the drive back and forth from his home in Jamestown to the store in Erie. Id. at 2.

In opposition to the petition, Claimant also presented the deposition testimony of Frank Zimba, M.D., a physician board certified in neurosurgery. WCJ Decision at 2. Dr. Zimba testified that he began treating Claimant on March 6, 2007. Id. He stated that Claimant's injury was a L5-S1 annular tear, and that Claimant returned to him for surgery yet to be performed, L5-S1 fusion with screws and fixation. Id. Dr. Zimba explained that sitting generally increases innerdiscal pressure, and that the drive from Jamestown to Erie would worsen Claimant's symptoms. Id.

Based on the foregoing, the WCJ found:

8. Based on all the evidence in the record, this Judge finds that although the Claimant could physically perform the duties of the modified Meat Manager Position, he could not travel the distance from his home in Jamestown, New York, to the Topp's Store in Erie, Pennsylvania because the 45 minute drive would increase the symptoms related to his work injury. In so finding, this Judge relies on the testimony of the Claimant as to the symptoms he develops when the travel distance between Jamestown, New York and Erie, Pennsylvania, as well as the medical opinion of Dr. Zimba that such travel would increase the Claimant's symptoms.

The Claimant testified in a straightforward, non-invasive manner and this Judge credits his testimony as to his symptoms and abilities. This Judge also found Dr. Zimba's testimony and opinions to be well reasoned and rational. Dr. Zimba credibly explained why driving a distance of 45 minutes or more would increase the

Claimant's symptoms. This Judge finds Dr. Zimba to be more credible than Dr. Faulk who provided a conclusory opinion as to the Claimant's ability to drive without any explanation.

WCJ Decision at 3.

As a result, the WCJ concluded that Employer had not met its burden of proof with respect to its suspension petition, as Employer had not established that work was available to Claimant within his restrictions. WCJ Decision at 3. Accordingly, the WCJ issued an order denying Employer's suspension petition. Id.

On August 8, 2008, Employer appealed the WCJ's decision to the Board. On October 21, 2009, the Board issued an opinion and order affirming the WCJ's decision. Employer then filed the instant petition for review.²

The sole claim raised by Employer in this appeal is that the Board erred in affirming the WCJ's decision based on the finding that Employer did not offer available work to Claimant within his restrictions. We do not agree.

It is well settled that an employer seeking to modify a claimant's benefits on the basis that he has recovered some or all of the ability to work must first produce medical evidence of a change in the claimant's condition, and must also produce evidence of a referral or referrals to a then open job or jobs in the occupational category for which the claimant has been given medical clearance. Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.),

² This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of appeal board procedures, and whether necessary findings of fact are supported by substantial evidence. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

516 Pa. 240, 532 A.2d 374 (1987). To meet the second prong of the above test, the employer must demonstrate that the referred position was actually available to the claimant. Id.³

In this regard, this Court has previously noted the following:

Under the second prong of the *Kachinski* analysis, it is well-settled that, in making a particular job referral, the employer has the burden of proving that the job is actually available to the claimant:

[A] position may be found to be actually available, or within the claimant's reach, only if it can be performed by the claimant, having regard to his physical restrictions and limitations, his age, his intellectual capacity, his education, his previous work experience, and other relevant considerations, such as his place of residence.

The “other relevant considerations” have included various *non-medical factors* in determining whether a position is actually available to a claimant, such as, the claimant's place of residence, the distance and duration of the claimant's commute, and the length of the workday. Ultimately, a “totality of the circumstances” approach should be applied to individual fact patterns when determining what is actually available and if a particular job is appropriate for a reasonable person in the position of the claimant....

Karpulk v. Workers' Compensation Appeal Board (Worth and Company), 708 A.2d 513, 516 (Pa. Cmwlth.), petition for allowance of appeal denied, 557 Pa. 633, 732 A.2d 617 (1998) (citations and footnote omitted and emphasis in original).

³ Once the employer meets these initial burdens, the claimant must then demonstrate that he has, in good faith, followed through on the job referral or referrals. Kachinski. If the referral or referrals fail to result in a job, then claimant's benefits should continue. Id.

Applying the “totality of the circumstances” approach, this Court concluded in Karpulk that an offered position was not actually available where, although the job was within the claimant’s medical restrictions and involved the same 150-mile commute that he performed pre-injury, the claimant’s injury precluded such an onerous commute. Similarly, in Roadway Express, Inc. v. Workmen’s Compensation Appeal Board (Palmer), 659 A.2d 12 (Pa. Cmwlth.), petition for allowance of appeal denied, 543 Pa. 699, 670 A.2d 145 (1995), this Court held that an offered job was not actually available where, although the claimant could perform the duties associated with the position, there was substantial evidence to support the finding that the claimant could not complete both the work duties and the 120-mile commute each way to the offered position, and that the claimant would suffer further injury if he attempted to complete the commute.

Like the claimants in Karpulk and Roadway Express, Inc., the WCJ in this case found that Claimant here was able to perform the duties of the modified meat department manager position; however, as a result of his work-related injury, Claimant was no longer physically capable of completing the commute between his residence in Jamestown and the store in Erie. The WCJ’s findings in this regard are amply supported in the record of this case.⁴ As a result, the WCJ did not

⁴In this regard, Claimant testified in pertinent part, as follows:

Q Mr. VanGorder, have you had occasion obviously since the time of the injury to ride in a car between Jamestown and Erie?

A Yes.

Q On how many occasions if you can say has that occurred?

A Approximately six.

* * *

(Continued....)

Q On the occasions when you've come to Erie, did you actually drive the car or did you come accompanied and have someone else drive?

A I had my fiancée drive.

* * *

Q Is there a reason why you chose to have [your fiancée] drive as opposed to yourself?

A Yes.

Q Tell us what that is, please.

A I need to be able to move around while I'm sitting for long periods, so she drives so I can actually move from side to side to try to ease it.

Q On the occasions when you've come to Erie and on those occasions, have you returned home the same day?

A Yes.

Q Can you describe for us whether that roundtrip between Jamestown and Erie and back caused any aggravation in your symptoms after you returned to Jamestown?

A Yes, it does.

Q Describe that for us, please.

A Well, obviously it's a long drive and when I try to get out of the vehicle, I have a hard time standing up and it takes a little while for my muscles to loosen up and be able to stand and walk.

Q Does the pain increase?

A Yes.

Q How significantly?

A Quite a bit. I don't understand what you mean by significantly, but it increases quite a bit when I do get up out of the vehicle. I have a shooting pain down my legs.

* * *

Q Did you return to work here in Erie?

A No.

Q Tell us why?

(Continued....)

A Because of the drive. The drive. It's a long drive, it's very painful.

Reproduced Record (RR) at 76-79, 80.

In addition, Dr. Zimba testified, in pertinent part, as follows:

Q Doctor, one of the issues that brings us together today is an issue regarding a job offer which was made to [Claimant] to return to work in a modified capacity at his former place of employment, the Tops [sic] Supermarket, which is located in Erie, Pennsylvania.

I'd like you to assume for purposes of my question that [Claimant] has testified in this proceeding that while he was willing to return to work, the round-trip commute from his home located here in western New York to the Tops [sic] Supermarket was approximately 45 minutes to 50 minutes each way.

I'd like you also to assume for purposes of my question that [Claimant] has testified that driving in a car for that period of time significantly increases his symptomology, including his pain, his stiffness, and the associated symptoms that he had related to his condition.

Assuming those facts, do you have an opinion whether [Claimant] is physically capable of traveling on a round-trip basis from here in western New York to Erie, Pennsylvania full time and working on a full-time basis?

A This gentleman presented in my office with a 10-minute ride from outside of Jamestown to my office and had exacerbation of his symptoms. It is likely that in the car travel of – and I would suggest that it's closer to an hour to get to Erie and back, especially winter can stretch out further, that it's not practical and that he does worsen his symptoms, indeed, by driving that distance.

Q All right. Do you have an opinion whether [Claimant] has current work capabilities? In other words, would you release him to work in some modified capacity at the present time, assuming there was no such commute involved?

A The patient, I would release him to work. Yes, sir.

* * *

Q And wouldn't you expect sitting to actually relieve his reported symptoms as opposed to aggravate them?

(Continued....)

err in determining that Employer had not sustained its burden of proof with respect to its suspension petition, as Employer had not established that it had offered a position that was actually available to Claimant, and the Board did not err in affirming the WCJ's decision. Karpulk; Roadway Express, Inc.

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

A No. I'd expect the opposite. It depends on what part of the annulus had let loose. Most people with a disc bulge increase their innerdiscal pressure by sitting. Plus, when you sit in a car, you actually are concentrating on something else, so most times you let your muscles relax some and that lets the vertebral bodies slip.

So most patients are actually worse when they first get out of a car after riding in a car....

RR at 224-225, 235.

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ORDER

AND NOW, this 16th day of March, 2010, the order of the Workers' Compensation Appeal Board, dated October 21, 2009, at No. A08-1478, is AFFIRMED.

JAMES R. KELLEY, Senior Judge