IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| P & L Landscaping, Petitioner | : | |
| v. | : | |
| Workers' Compensation Appeal Board (Martinez), Respondent | : | No. 2441 C.D. 2009 |
| | : | Submitted: April 30, 2010 |

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: June 4, 2010

P&L Landscaping (Employer) challenges the order of the Workers' Compensation Appeal Board (Board) which reversed the Workers' Compensation Judge's (WCJ) decision to terminate Pedro Martinez's (Claimant) benefits after April 1, 2008.

Claimant cut grass, trees, and branches, performed construction work, and operated equipment for Employer. On October 4, 2007, Claimant operated a "cutting machine" in the course and scope of his employment. The handle of the machine hit his hand, and he sustained cuts to the ring and middle fingers and thumb of his right hand. Claimant petitioned for benefits and alleged that he suffered compensable injuries to his right ring finger, right middle finger, and right thumb.

Claimant petitioned for benefits.[1] Before the claim petition was adjudicated, Employer petitioned to suspend benefits on the basis that Claimant was offered a specific job and failed to return to work on May 28, 2008.

## I. Original Petition: The Stipulation of June 18, 2008.

On June 18, 2008, Claimant and Employer entered into a stipulation of fact and agreed to the following:

> 5. The Claim Petition should be granted, and benefits awarded on an ongoing basis from October 5, 2007 up into the present and into the future indefinitely.
> . . . .
> 8. The Stipulation acknowledges that the Claimant is disabled within the meaning of the PA Workers' Compensation Act, as amended.
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> 9. The parties to this stipulation are free to file whatever other Petitions it might warrant going into the future.
> . . . .
> 11. It is the intention of the parties to submit this Stipulation to the Judge for adoption in a Decision and Order thereby resolving the Claim Petition, having the claim accepted, and paying Claimant wage loss and medical Workers' Compensation benefits consistent with the Pennsylvania Workers' Compensation Act.
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> 12. The description of injury, consistent with the opinion of Dr. Daisy Rodriguez, is laceration of the right ring finger, compound and comminuted fracture of the right ring finger, DeQuervain's tendonitis of the right ring finger, contusions of the right thumb and ring fingers, aggravation of pre-existing degenerative joint disease of the right hand.

[1] The record does not indicate the date Claimant filed the claim petition.

Stipulation of Fact, June 18, 2008, (Stipulation), Paragraphs 5, 8-9, and 11-12 at 1-2; Reproduced Record (R.R.) at 16a-17a.

In a decision dated June 30, 2008, the WCJ adopted the Stipulation as the findings of fact and entered the following order:

> **AND NOW, THIS 30th DAY OF JUNE, 2008,** the Claim Petition is marked as **WITHDRAWN** in accordance with the terms of the Stipulation of Facts and Pennsylvania Workers' Compensation Act and the parties' compliance therewith.
>
> It is **ORDERED** that as a result of the Claimant's work injuries of October 4, 2007, the Defendant [Employer] is and was to make payment of workers' [compensation] benefits at the rate of $236.57 per week for total disability on the basis of the Claimant's per-injury average weekly wage of $262.85 on October 4, 2007 and from October 5, 2007 and until an alteration of the Claimant's Workers' Compensation Benefits in accordance with the terms of Provision Numbers 5 and 6 of the Stipulation of Facts. . . .

WCJ's Decision, June 30, 2008, at 1-2; R.R. at 14a-15a.

## II. July 17, 2008 Hearing on the Suspension Petition.

Despite entering into the Stipulation that Claimant was totally disabled on June 18, 2008, Employer continued to pursue the May 28, 2008, suspension. At hearing on July 17, 2008, Employer presented the deposition testimony of Andrew B. Sattel, M.D. (Dr. Sattel), a board-certified orthopedic surgeon with a certificate of added qualifications for surgery of the hand. Dr. Sattel examined Claimant on January 30, 2008, and issued a report that same date before the June 18, 2008, Stipulation. Employer took Dr. Sattel's deposition on

July 16, 2008, after the June 30, 2008, original decision. Dr. Sattel diagnosed Claimant with "diminished sensation" in his right ring finger and flexor tenosynovitis in the A-1 pulley[2] for the ring finger. Dr. Sattel Deposition at 20-21. He observed that Claimant had a laceration to the ring finger and perhaps a fracture. Dr. Sattel Deposition at 22. Dr. Sattel opined that Claimant was not disabled as a result of the October 4, 2007, incident and could resume his normal work activities. Dr. Sattel Deposition at 23-24. He did caution that Claimant should wear warm gloves in cold weather and recommended a cortisone injection to alleviate the flexor tenosynovitis. Dr. Sattel Deposition at 26.

Also, at hearing on July 17, 2008, Employer introduced into evidence the WCJ's Decision of June 30, 2008. Employer also introduced a letter from Pate Purvis, owner of Employer, to Claimant dated May 16, 2008, which stated "We received the report and opinion of Dr. Andrew Sattel releasing you to return to work, without restrictions. Please be advised that your job is available, and we respectfully request that you return to work no later than Thursday, May 22, 2008." Letter from Pate Purvis, May 16, 2008, at 1; R.R. at 221a.

Claimant testified at hearings on November 29, 2007, and July 17, 2008. Claimant "used to cut grass, I used to work with construction, moved from school to another, snow removal, cleaning school." Notes of Testimony, November 29, 2007, (N.T.) at 4; R.R. at 274a. Claimant also described how he was injured. On cross-examination, Claimant admitted he received the May 16,

[2] The A-1 pulley corresponds to the area in the upper palm below the ring finger. Deposition of Andrew B. Sattel, M.D., July 16, 2008, (Dr. Sattel Deposition) at 17; R.R. at 164a.

2008, letter that requested his return to work but did not contact Employer. Notes of Testimony, July 17, 2008, (N.T. 7/17/08) at 13; R.R. at 202a. Claimant "didn't read it. They delivered it to me at night, and I couldn't read English." N.T. 7/17/08 at 15; R.R. at 204a. Claimant did not believe he could return to work. N.T. 7/17/08 at 14; R.R. at 203a.

Claimant also presented the deposition testimony of Daisy A. Rodriguez, M.D. (Dr. Rodriguez), board-certified in internal medicine and Claimant's treating physician.[3] Dr. Rodriguez initially treated Claimant on October 30, 2007. After that first examination, Dr. Rodriguez diagnosed the following conditions: "Fracture of the distal tuft of the right ring finger. It was a compound and complex fracture. There was a laceration of the right ring finger. DeQuervain's tendinitis of the right wrist, and contusion, crush injury of the right thumb and ring fingers." Deposition of Daisy A. Rodriguez, M.D., April 7, 2008, (Dr. Rodriguez Deposition) at 14; R.R. at 99a. Dr. Rodriguez explained that before Claimant came under her care, he underwent plastic surgical debridement of the right ring finger. Dr. Rodriguez Deposition at 20; R.R. at 105a. Dr. Rodriguez subsequently included neuropathy of the right ring finger as part of her diagnosis. Dr. Rodriguez Deposition at 23; R.R. at 108a. After examining Claimant on April 1, 2008, Dr. Rodriguez testified within a reasonable degree of medical certainty that the work injury was causally related to "a compound and comminuted fracture

[3] Claimant submitted into evidence two depositions of Dr. Rodriguez. The first one was taken on April 7, 2008. The second deposition was taken on September 22, 2008. Both depositions were submitted to the WCJ on October 2, 2008. There was no hearing on that date. The WCJ held hearings on November 29, 2007, April 24, 2008, and July 17, 2008. No record was made on April 24, 2008.

of the distal right ring finger, a laceration of the right ring finger, DeQuervain's tendinitis of the right wrist, degenerative joint disease . . . and neuropathy of the right ring finger." Dr. Rodriguez Deposition at 29-30; R.R. at 114a-115a. Dr. Rodriguez opined that Claimant could not return to his time of injury job. Dr. Rodriguez Deposition at 30; R.R. at 115a.

On August 8, 2008, Claimant underwent a functional capacity evaluation.[4] The evaluator "recommended that he seek employment at the medium physical demand level with the restrictions I just listed." Dr. Rodriguez Deposition, 9/22/08 at 13; R.R. at 240a. At this point Dr. Rodriguez diagnosed Claimant with "a resolved laceration of the right ring finger, a healed compound and comminuted fracture of the right ring finger, a healed compound and comminuted fracture of the right ring finger, continuing DeQuervain's tendinitis of the right wrist, resolved contusions of the right thumb and ring fingers, posttraumatic degenerative changes of the right hand and right fourth digit neuropathy." Dr. Rodriguez Deposition, 9/22/08 at 14-15; R.R. at 241a-242a. Dr.

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[4] Dr. Rodriguez related that the evaluator recommended the following restrictions:

> [O]ccasional bilateral lifting of up to 30 pounds and frequent bilateral lifting of up to 15 pounds from floor to knuckle height. He was limited to occasional bilateral lifting of up to 25 pounds and frequent bilateral lifting of up to 12 pounds from knuckle to overhead height. He was limited to occasional lifting only of up to ten pounds with the right arm. And he was limited to frequent walking, bilateral carrying of up to 15 pounds, left and bilateral pushing, left and bilateral pulling, stooping, crouching, left hand handling, left hand fingering, left hand gripping, and left hand pushing.

Deposition of Daisy A. Rodriguez, M.D., September 22, 2008, (Dr. Rodriguez Deposition, 9/22/08) at 12-13; R.R. at 239a-240a.

Rodriguez did not believe that Claimant could return to his time of injury job. Dr. Rodriguez Deposition, 9/22/08 at 17; R.R. at 244a. On cross-examination, Dr. Rodriguez explained that despite the functional capacity evaluation she did not release Claimant to work because she wanted to evaluate him after the evaluation. Dr. Rodriguez Deposition, 9/22/08 at 23; R.R. at 250a.

In a decision dated February 24, 2009, the WCJ ordered the termination of Claimant's benefits after April 1, 2008, in spite of the June 18, 2008, Stipulation of total disability. The WCJ made the following relevant findings of fact:

> 20. Dr. Sattel's Testimony established, and the Judge finds that the Claimant does not have a disability as a result of the work injury and that the Claimant could resume his usual work activities, or pre-injury job in accordance with these findings. Dr. Sattel testified, and the Judge finds that he did not restrict the Claimant's work activities.
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> 21. Based on Dr. Sattel's Testimony and despite his report of the Claimant's complaints of some residual sensory deficit at the fingertip of the ring finger, the Judge finds that the Claimant did make a recovery from the work injury by April 1, 2008. Dr. Sattel's Testimony established, and the Judge finds that cold sensitivity may occur, that padded warm gloves for outside and cold weather activities were appropriate, and that an injection with cortisone would be effective for the help of the alleviation of the Claimant's reported symptoms over the flexor tendon and as an anti-inflammatory medication to the specific anatomic area.
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> . . . .
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> 34. Regarding work, the Judge finds that although Dr. Rodriguez testified that the Claimant could not . . . have performed his pre-injury job and that the Claimant could not perform his pre-injury job with the use of only one

hand, the Claimant can perform and could have performed his pre-injury job and that it was available to him.

. . . .

41. Based on the Decision and Order with a circulation date of June 30, 2008 and with the incorporation of the Stipulation of Facts with an execution date of June 18, 2008, the Judge finds that the Claimant did not have diagnosed conditions of deQuervain's tendonitis of the right thumb[5] in contrast to Dr. Rodriquez' Testimony and in accordance with the terms of the Stipulation of Fact, Decision and Order with a circulation date of June 30, 2008 and Dr. Sattel's Testimony, that the Claimant did not have a crush injury of the right thumb and ring fingers in contrast to Dr. Rodriguez's Testimony. . . and that the Claimant did not have post-traumatic degenerative changes of the right hand in contrast to Dr. Rodriguez' Testimony. . . . Based on the evidence, particularly Dr. Rodriguez' Testimony, the Judge finds that at the time of her last examination of the Claimant on April 1, 2008 before her Depositional Testimony on April 7, 2008, the Claimant's diagnoses of a laceration of the right ring finger resolved by April 1, 2008, that the Claimant's compound and comminuted fracture of the right ring finger healed and resolved by April 1, 2008, and that the Claimant's contusions of the right thumb and right fingers resolved by April 1, 2008.

42. Based on the record, particularly the Testimony of Drs. Rodriguez and Sattel, the Judge finds that the evidence did not establish that the nature of the Claimant's work injury in the Stipulation of Facts and Decision and Order with a circulation date of June 30, 2008, specifically laceration of the right ring finger, deQuervain's tendonitis of the right ring finger[6],contusions of the right thumb and ring fingers,

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[5] Dr. Rodriguez actually diagnosed Claimant with DeQuervain's tendinitis of the right wrist.

[6] Again, Dr. Rodriguez actually diagnosed Claimant with DeQuervain's tendinitis of the right wrist.

> and aggravation of pre-existing degenerative joint disease of the right hand, were materially incorrect.
>
> 43. Based on the record, particularly the Stipulation of Facts and Decision and Order with a circulation date of June 30, 2008 and the Testimony of Drs. Rodriguez and Sattel, the Judge finds that the Claimant made a recovery from the work injury by April 1, 2008, or the date of Dr. Rodriguez' last examination of the Claimant before her Depositional Testimony on April 7, 2008 but that the parties had a stipulation about the Claimant's entitlement to the payment of workers' compensation indemnity benefits at the rate for total disability until June 30, 2008.

WCJ's Decision, February 24, 2009, Findings of Fact Nos. 20-21, 34 and 41-43 at 6, 11-14; R.R. at 27a, 32a-35a.

Claimant appealed to the Board and argued that there was no substantial evidence of record to support a suspension or termination of benefits.

The Board reversed:

> Even though the Judge acknowledged that Claimant was disabled through June 30, 2008, by virtue of the stipulation and order confirming it, the Judge terminated Claimant's benefits as of April 1, 2008. The stipulation, as adopted by the Judge in her prior Order, should not have been disregarded where it materially affected Claimant's substantive rights. . . . In addition, a suspension could not have been ordered based upon a job offer as of May 16, 2008, when Claimant was totally disabled at least until June 30, 2008. Although we acknowledge that Defendant [Employer] may in fact be entitled to a suspension or termination of Claimant's benefits based upon existing medical evidence, that can be accomplished at a later date by the filing of an appropriate petition. (Citations omitted).

Board Opinion, November 23, 2009, at 3; R.R. at 60a.

Employer contends that the Board erred when it reversed the WCJ who granted a suspension of benefits based upon a medical release and the offer of work by Employer.[7] Employer concedes that the Board correctly determined that the WCJ erred when she terminated benefits but argues that the Board should have affirmed the suspension of benefits.

This Court disagrees. 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.
>
> 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.[8]

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

[8] Because Employer sought a suspension through a change of medical condition and a job offer rather than through an earning power assessment, Kachinski is still in play.

Here, Employer asserts that it met the requirements to modify or suspend Claimant's benefits. Dr. Sattel testified that despite diminished sensation in his right ring finger and flexor tenosynovitis in the A-1 pulley for the ring finger, Claimant was not disabled and could return to his time of injury job. This testimony is problematical. Dr. Sattel based his opinion on his examination of Claimant on January 30, 2008. In the proceeding on the original claim petition the parties stipulated that Claimant was totally disabled from "October 7, 2007, up into the present and into the future indefinitely." Stipulation, Paragraph 5. The parties entered into the Stipulation on June 18, 2008, and the WCJ entered her order which marked the claim petition as withdrawn in accordance with the Stipulation on June 30, 2008. Any attempt to suspend benefits would have to include a change in medical condition after June 30, 2008. Dr. Sattel's testimony was based on an examination of Claimant months before June 30, 2008. Employer failed to satisfy the first requirement of Kachinski.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

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**O R D E R**

AND NOW, this 4th day of June, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge