IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Christopher L. Muscatello, Petitioner | : | |
| | : | No. 2474 C.D. 2009 |
| v. | : | |
| | : | Submitted: April 1, 2010 |
| Workers' Compensation Appeal Board (Trevdeck Construction Co., Inc.), Respondent | : | |

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

***OPINION NOT REPORTED***

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: June 29, 2010

Christopher L. Muscatello (Claimant) petitions for review of the November 19, 2009, order of the Workers' Compensation Appeal Board (Board), which reversed the decision of a workers' compensation judge (WCJ) and granted the suspension petition filed by Trevdeck Construction Co., Inc. (Employer). We affirm.

Claimant sustained a work-related injury on December 21, 2004, and he received total disability benefits pursuant to an agreement for compensation describing Claimant's injury as tendonitis/epicondylitis of the right elbow.[1] On September 11, 2006, Jack Smith, M.D., performed an independent medical examination of Claimant at Employer's request. Dr. Smith, a board-certified

[1] This agreement for compensation is included in the original record. Claimant did not include a copy of the same in the reproduced record.

orthopedic surgeon, completed a physical capabilities checklist limiting Claimant's use of his right arm to non-repetitive activities, limiting his driving to one hour per day, precluding any pushing or pulling with his right arm and restricting any lifting or carrying to ten pounds frequently and nothing in excess of twenty pounds.[2]

Employer sent Claimant a Notice of Ability to Return to Work, dated October 28, 2006, indicating that Dr. Smith had cleared him to return to a light-duty position. Employer also retained the services of Concentra Integrated Services, Inc. (Concentra), to perform a vocational assessment and earning power evaluation of Claimant. The matter was assigned to Cyndi Miller (Miller), a vocational case manager. Miller received the Notice of Ability to Return to Work, Dr. Smith's physical capabilities checklist, and Dr. Smith's narrative report. (R.R. at 125a.) Miller conducted a vocational interview of Claimant on December 13, 2006. (R.R. at 127a.)

Miller thereafter identified three security guard positions that were within Claimant's educational, vocational, and physical capabilities and had earning potential in excess of Claimant's pre-injury wages. (R.R. at 135a, 137a-38a, 145a, 148a, 150a.) After site visits and discussions with representatives of the prospective employers, Miller prepared a written job description/analysis and forwarded the same to Dr. Smith for his approval. (R.R. at 146a, 148a, 151a.) Dr. Smith reviewed the three job descriptions and approved them as being within Claimant's medical restrictions. (R.R. at 94a.) Upon Dr. Smith's approval, Miller submitted her earning power evaluation report to Employer.

[2] Claimant has not included the physical capabilities checklist in the reproduced record. However, the checklist is attached to Dr. Smith's deposition in the original record.

On April 12, 2007, Employer filed a suspension petition alleging that available work exists for Claimant within his physical and vocational capabilities that would result in no wage loss as compared to his pre-injury wages. Claimant filed an answer denying those allegations and the case was assigned to the WCJ for hearings.

Employer submitted the deposition testimony of Dr. Smith, who described his independent medical examination of Claimant. Dr. Smith unequivocally opined that Claimant was capable of performing full-time, sedentary or light-duty work. (R.R. at 90a, 95a.) Employer also offered the deposition testimony of Miller concerning her vocational interview of Claimant and her subsequent earning power assessment.

Miller also testified about the job duties required of each of the prospective security guard positions. Miller indicated that the first position required Claimant to sit in his vehicle overnight, from 11:00 p.m. until 7:00 a.m., and report any irregularities. (R.R. at 144a.) Miller described the second position as requiring Claimant to sit in a guard booth from 7:00 a.m. until 3:00 p.m. and check vehicles in and out. (R.R. at 148a, 167a.) As to the third position, Miller testified that the prospective employer, a credit union, merely wanted a visible presence in the lobby area, that Claimant would work from 8:00 a.m. until 4:30 p.m., and that his responsibilities would include securing the doors and windows and, if requested, escorting employees to the parking area. (R.R. at 149a, 159a, 162a.) She specifically noted that none of the positions required Claimant to engage in physical restraint; instead, if a confrontation arose, Claimant would be required to call 9-1-1. (R.R. at 144a, 147a, 149a.) Miller further testified that she prepared the written job descriptions/analyses for each position based upon her

meetings and telephone calls with representatives of the prospective employers and/or her personal observations of the prospective jobs. (R.R. at 145a-46a, 149a.)

On cross-examination, Miller was unable to recall the last names or titles of the representatives she spoke with at two of the prospective employers. (R.R. at 156a, 161a.) Additionally, Miller admitted that for one of the positions, she visited a comparable work site because the site where Claimant would actually be working was newer construction and was unsafe for her to visit.[3] (R.R. at 157a-58a.) However, Miller indicated that had employer's representative not offered her a comparable work site visit such that she would feel comfortable with the demands of the job, she would have stricken this job from the list of prospective positions. (R.R. at 158a.)

Claimant testified about his original work injury, his course of medical treatment, and his ongoing physical limitations and pain. Claimant also presented the deposition testimony of Eric Minde, M.D. Dr. Minde, who is board-certified in physical medicine and rehabilitation, examined Claimant on November 14, 2006. Dr. Minde diagnosed Claimant as suffering from a rupture of the extensor component of his right forearm. (R.R. at 202a.) Dr. Minde testified that Claimant essentially cannot use his right arm at all and that he remains incapable of performing the activities of his pre-injury job. (R.R. at 203a.) Dr. Minde further opined that Claimant was not capable of performing the security guard positions because he did not believe Claimant could be counted on "if something would arise." (R.R. at 207a.)

[3] We note that there is no evidence in the record that the prospective work site was unsafe for any reason other than the fact that it was new construction.

The WCJ accepted the testimony of Miller and Dr. Smith as credible, and he resolved any conflicts in the medical testimony in favor of Dr. Smith. (WCJ's Findings of Fact Nos. 15-17.) Based upon these credibility determinations, the WCJ concluded that the duties of each of the three security guard positions were within Claimant's physical limitations. (WCJ's Finding of Fact No. 16.) However, the WCJ concluded that Employer had failed to meet its burden of showing that no suitable work was available to Claimant with Employer, as required by section 306(b)(2) of the Workers' Compensation Act (Act).[4] Hence, the WCJ dismissed Employer's suspension petition.

Both parties appealed to the Board. In its decision, the Board held that the WCJ erred in dismissing Employer's suspension petition based on Employer's failure to establish it did not have suitable work available. (Board op. at 7.) The Board, citing Burrell v. Workers' Compensation Appeal Board (Philadelphia Gas Works and CompServices, Inc.), 849 A.2d 1282 (Pa. Cmwlth. 2004), observed that the language of section 306(b)(2) of the Act does not require an employer to prove the absence of specific jobs. (Board op. at 3.)

In addition, the Board rejected Claimant's assertion that Employer failed to establish that suitable work was available with other employers. Instead, the Board concluded that the credible testimony of Miller and Dr. Smith supported the WCJ's determination that the security guard positions were within Claimant's vocational, educational, and physical limitations and exceeded his pre-injury

[4] Act of June 2, 1915, P.L. 736, as amended, added by the Act of June 24, 1996, P.L. 350, 77 P.S. §512(2). This section addresses modification of a claimant's benefits based upon earning power and, in relevant part, mandates that, if an employer has a specific job vacancy the claimant is capable of performing, the employer shall offer such job to the claimant.

wages. (Board op. at 9-10.) Accordingly, the Board reversed the WCJ's decision and order and suspended Claimant's benefits effective February 22, 2007.

Claimant now appeals to this Court,[5] arguing that the Board erred as a matter of law in affirming the WCJ's conclusion that each of the three security guard positions was within Claimant's medical limitations. We disagree.

Pursuant to section 306(b)(2) of the Act, an employer may seek suspension of a claimant's benefits either by offering the claimant a specific job that he is capable of performing or by establishing earning power through expert opinion evidence. Kleinhagan v. Workers' Compensation Appeal Board (KNIF Flexpak Corporation), ___ A.2d ___ (Pa. Cmwlth., No. 2009 C.D. 2009, filed April 22, 2010); Allied Products and Services v. Workers' Compensation Appeal Board (Click), 823 A.2d 284 (Pa. Cmwlth. 2003). Section 306(b)(2) addresses the manner in which a claimant's "earning power" is assessed, as follows:

> 'Earning power' shall be determined by the work the employe is capable of performing and shall be based upon expert opinion evidence which includes job listings with agencies of the department, private job placement agencies and advertisements in the usual employment area. Disability partial in character shall apply if the employe is able to perform his previous work or can, considering the employe's residual productive skill, education, age and work experience, engage in any other kind of substantial gainful employment which exists in the usual employment area in which the employe lives within this Commonwealth. If the employe does not live in this Commonwealth, then the usual employment area where the injury occurred shall apply. If the employer

[5] Our scope of review is limited to determining whether findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Meadow Lakes Apartments v. Workers' Compensation Appeal Board (Spencer), 894 A.2d 214 (Pa. Cmwlth. 2006).

> has a specific job vacancy the employe is capable of performing, the employer shall offer such job to the employe. In order to accurately assess the earning power of the employe, the insurer may require the employe to submit to an interview by a vocational expert who is selected by the insurer and who meets the minimum qualifications established by the department through regulation. The vocational expert shall comply with the Code of Professional Ethics for Rehabilitation Counselors pertaining to the conduct of expert witnesses.

77 P.S. §512(2).

Claimant first argues that the Board erred in suspending his benefits because Miller's testimony is hearsay. However, this Court has previously held that opinion testimony by a vocational counselor, when that opinion is formed by the counselor's personal observations of the duties of the position and is based on information of the type normally relied on by such an expert in forming an opinion, is not hearsay testimony and is admissible. Edwards v. Workers' Compensation Appeal Board (MPW Industrial Services, Inc.), 858 A.2d 648 (Pa. Cmwlth. 2004); Kilker v. Workmen's Compensation Appeal Board (E.J. Rogan & Sons), 667 A.2d 1215 (Pa. Cmwlth. 1995); Acme Markets, Inc. v. Workmen's Compensation Appeal Board (Pilvalis), 597 A.2d 294 (Pa. Cmwlth. 1991). In the present case, Miller testified that she obtained information relating to the job duties of the three security guard positions through meetings and telephone calls with representatives of the prospective employers and personal observations of the prospective jobs. (R.R. at 145a-46a, 149a.) Thus, her testimony was not hearsay, and the Board properly relied on this testimony in rendering its decision.

Claimant also contends that Miller's testimony regarding the job duties of the security guard positions indicates that the positions likely would involve physical confrontation. For support, Claimant cites to Miller's testimony

that all three positions required a uniform, one job site was too dangerous to visit, and one job involved escorting employees to their cars. Claimant also cites to Dr. Smith's testimony that Claimant would be unable to defend himself in a physical confrontation. According to Claimant, these statements contradict Miller's testimony that none of the jobs would require Claimant to defend himself from a physical attack.

However, in making this argument, Claimant relies entirely on speculation and a hypothetical presented to Miller on cross-examination. More important, Claimant's assertion is contrary to Miller's credible testimony that none of the positions required Claimant to engage in physical restraint or confrontation.[6]

Accordingly, the order of the Board is affirmed.[7]

PATRICIA A. McCULLOUGH, Judge

[6] Questions of witness credibility and evidentiary weight are within the sole province of the WCJ and will not be disturbed on appeal. Schafer v. Workers' Compensation Appeal Board (Martin Schafer Jr., Inc.), 935 A.2d 890 (Pa. Cmwlth. 2007).

[7] We note that Claimant raises an additional issue in his brief to this Court that allowing the Board's decision to stand would equate to a denial of due process of law mandated by the Fifth and Fourteenth Amendments to the United States Constitution for the reasons explained in Henley v. United States, 379 F. Supp. 1044 (M.D. Pa. 1974). However, Claimant failed to raise this issue before the WCJ, the Board, or in his petition for review with this Court; hence, this issue is waived. Barrett v. Workers' Compensation Appeal Board (Sunoco, Inc.), 987 A.2d 1280 (Pa. Cmwlth. 2010); Horne v. Workers' Compensation Appeal Board (Chalmers & Kubeck), 840 A.2d 460 (Pa. Cmwlth. 2004).

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***ORDER***

AND NOW, this 29th day of June, 2010, the November 19, 2009, order of the Workers' Compensation Appeal Board is hereby affirmed.

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PATRICIA A. McCULLOUGH, Judge