IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Shultz,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 361 C.D. 2010
	:	
Workers' Compensation Appeal Board (Witco Chemical Corp.),	:	Submitted: December 3, 2010
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: July 26, 2011**

William Shultz (Claimant) petitions for review of the Order of the Workers' Compensation Appeal Board (Board) that affirmed the determination of a Workers' Compensation Judge (WCJ), which granted Witco Chemical Corporation's (Employer) Modification Petition and declined to award Claimant litigation costs. On appeal, Claimant argues that: (1) Employer did not sustain its burden of showing that the job offered to Claimant was actually available within Claimant's usual employment area; (2) he did not act in bad faith in not pursuing the job opportunity offered by Employer because he was not given sufficient notice

of his ability to return to work; and (3) he is entitled to litigation costs because he prevailed in part.

Claimant sustained an injury to his lower back on November 30, 1989, while working for Employer as a shipper and was receiving weekly benefits in the amount of $399.00 based on an average weekly wage of $700.30. On July 9, 2007, Michael W. Weiss, M.D., an orthopedic surgeon, performed an Independent Medical Evaluation on Claimant at the request of Employer and opined that Claimant could perform light-duty work. Thereafter, on October 4, 2007, Teri S. Soyster, a rehabilitation specialist and vocational case manager, met with Claimant and conducted a vocational interview. On November 7, 2007, Ms. Soyster sent Claimant a letter informing Claimant of a job opportunity with Youghiogheny Valley Specialty Services (Prospective Employer) and instructing Claimant to meet with its owner, Dennis Moriarty, for an interview on November 15, 2007. The interview did not take place on November 15th and was rescheduled for November 29, 2007. In the meantime, on November 27, 2007, Dr. Weiss approved the security job opportunity with the Prospective Employer. The scheduled interview, which was to take place on November 29, 2007, did not occur because Mr. Moriarty was mistaken as to the time of the interview. Subsequently, on December 6, 2007, Employer filed a Modification/Suspension Petition alleging that "Claimant has been provided job offer opportunities which he has failed to pursue or accept in good faith and which are within his physical capabilities and thus the Claimant's benefits should be suspended or modified." (Modification/Suspension Petition at 1, R.R. at 3.) Claimant filed a timely answer denying that he "has been provided with job opportunities within his physical capabilities that he has failed to pursue and/or accept" and requested attorney fees for unreasonable contest.

(Answer, December 14, 2007, R.R. at 6.) The matter was then assigned to a WCJ to hold a hearing on January 16, 2008.

On January 10, 2008, Ms. Soyster sent a letter to Claimant acknowledging that Mr. Moriarty mistakenly arrived at the wrong time for the last scheduled interview of November 29, 2007, and rescheduled the interview for January 18, 2008. On January 15, 2008, Employer's counsel cancelled the first-scheduled WCJ hearing for January 16, 2008. On January 18, 2008, the rescheduled interview with Mr. Moriarty did not take place because of inadequate directions regarding the location of the interview, and Ms. Soyster rescheduled the interview to take place via telephone on January 25, 2008. The telephone interview successfully took place on January 25, 2008, at which time Mr. Moriarty offered Claimant the light-duty security position to begin on February 12, 2008.

Numerous hearings were then held in this matter from February 2008 through November 2008. During the course of these hearings, Claimant presented his own testimony as well as the testimony of his treating physiatrist, Sophie Hanna, M.D. Employer presented the testimony of Dr. Weiss, Ms. Soyster, and Mr. Moriarty. At the beginning of the first hearing in this matter on February 13, 2008, Employer's counsel requested that the Modification Petition be amended to reflect a modification date as of February 12, 2008, which was based on the evidence of a job offer by Mr. Moriarty to Claimant to begin February 12, 2008. Counsel for Employer explained:

> [T]he original date [of November 15, 2007] was used because we received misinformation about what had happened on the communication of a job offer at that time. I believe that the offer was – the [Prospective Employer, Mr. Moriarty] who was making the offer

> did not get to see and make the offer to [Claimant] back at that time. We had received information indicating that a meeting had taken place, but in actuality there was a time discrepancy. Mr. – the [Prospective] Employer, through Dennis Moriarty, thought it was one time and [Claimant] showed up at another time, and [Claimant], in fact, was correct with regard to the time to appear to meet with Mr. Moriarty. . . . turned out to be our error, but because these meetings were . . . going to still take place, an interview was going to be scheduled and then presumably an offer made, and that's what happened. We kept the petition open figuring that we would amend it if necessary or withdraw it if the Claimant, in our opinion, applied in good faith or accepted the job.

(Hr'g Tr. at 5-6, February 13, 2008, R.R. at 71.) In response, Claimant's counsel stated:

> I mean . . . that was my point. You know, I understand your position now with the specific job offer that you've made clear on the record, but up until this point, our position was there was no basis for the initial Modification/Suspension Petition and we're going to make a request for attorney's fees based upon an unreasonable contest because based upon what you're saying and testimony from my client, I don't think there was any basis for the initial petition that was filed and now you're amending it for what you claim to be a job offer made as of yesterday and this hearing was scheduled way before yesterday.

(Hr'g Tr. at 7, R.R. at 71.)

In opposition to the Modification/Suspension Petition, Claimant testified that Mr. Moriarty offered him a plain-clothes security guard position to commence February 12, 2008; however, Claimant indicated to Mr. Moriarty that he had to confer with his physician, Dr. Hanna, and he requested a job description from Ms. Soyster for Dr. Hanna to review. Claimant testified he never received the job description or Job Analysis from Ms. Soyster. Additionally, Claimant testified that

he did not think he could perform the job offered to him, or any job for that matter, because of his back pain. (FOF ¶ 4.)

Dr. Weiss testified on behalf of Employer on May 28, 2008. Dr. Weiss evaluated Claimant on October 2, 2002, June 30, 2005, and July 9, 2007, at Employer's request. Dr. Weiss thought Claimant had chronic complaints of spine pain due to his 1989 work injury, but opined that Claimant could perform light-duty work on a full-time basis on the occasion of each medical evaluation. Dr. Weiss reviewed the Job Analysis of the plain-clothes security guard position Ms. Soyster prepared and thought Claimant was capable of performing the duties of that job. Although Dr. Weiss agreed that Claimant had not fully recovered from his work injury, he testified that Claimant had reached maximum medical improvement.

Ms. Soyster testified on behalf of Employer on September 4, 2008. Ms. Soyster explained that, in providing vocational services for Claimant, she relied on the medical report of Dr. Weiss and located two different positions with Prospective Employer that were suitable for Claimant based on the medical opinion of Dr. Weiss: (1) a covert surveillance position; and (2) a plain-clothes security position. Additionally, Ms. Soyster testified that she sent Claimant a copy of each of the job descriptions in her November 7, 2007, letter to Claimant. (FOF ¶ 6; Soyster Dep. at 34-35, R.R. at 166-67.)

Mr. Moriarty testified on behalf of Employer on September 4, 2008. He explained that his company specializes in loss prevention and surveillance services to retail grocery stores and convenience markets. Mr. Moriarty testified that he

interviewed Claimant for a security position in New Castle and Hermitage by telephone on January 25, 2008. (FOF ¶ 7.) Mr. Moriarty testified that he offered Claimant the security position, which pays $8.00 per hour and $0.35 per mile for travel, to commence February 12, 2008. Mr. Moriarty testified that Claimant responded that he wanted to discuss the position with his doctor and attorney before accepting the job. Mr. Moriarty indicated that Claimant never contacted him further about the position. (Moriarty Dep. at 10-12, 15, R.R. at 208-10, 213.)

Dr. Hanna testified on behalf of Claimant on November 11, 2008. Dr. Hanna first began treating Claimant for pain in November 2007. Upon examination, Dr. Hanna thought Claimant's pain was mostly degenerative in origin, secondary to degenerative disc disease. Dr. Hanna undertook a course of pain management that included medication and patches, and she provided epidural injections in Claimant's cervical spine in February 2008. Dr. Hanna reviewed the job descriptions offered to Claimant and did not think Claimant could perform either position. Dr. Hanna opined that, because of Claimant's condition, he could not sit in a car for long periods of time. On cross-examination, however, "Dr. Hanna acknowledged that [C]laimant could perform the physical duties of the job but that he had memory problems . . . not related to the work injury." (FOF ¶ 8.) She stated that "Claimant could perform the plain-clothes security position if he was able to move about and change positions as needed." (FOF ¶ 8.)

The WCJ found that Employer sustained its burden of proving Claimant was capable of performing the two security guard positions as of February 12, 2008. (FOF ¶ 9.) In making this finding, the WCJ credited Dr. Weiss's medical opinions regarding Claimant's physical capabilities over those of Dr. Hanna. (FOF ¶ 9.)

Additionally, the WCJ credited the testimony of Ms. Soyster and Mr. Moriarty. With regard to Claimant's testimony, the WCJ found Claimant not credible. The WCJ found that Claimant acted in bad faith by failing to pursue the security guard position that was offered to him. The WCJ explained:

> When offered a position, [Claimant] requested a job description and wanted to confer with his doctor, however, [C]laimant had been provided job description copies at least three months before he was offered the job and certainly had the opportunity to confer with his physician regarding his physical capabilities. Further, [C]laimant never responded to the job offer after having the opportunity to confer with his attorney and his physician. This is further evidence of bad faith. Although [C]laimant testified that he had rather vaguely looked for work on occasion, this testimony is rejected as [C]laimant also testified that he did not think he was capable of performing any work whatsoever.

(FOF ¶ 9.) The WCJ also made a finding and conclusion that "[E]mployer established a reasonable basis to contest the petition…." (FOF ¶ 12; Conclusion of Law (COL) ¶ 6.) Accordingly, the WCJ granted the Modification Petition as of February 12, 2008, entitling Claimant to partial disability benefits in the amount of $253.53 per week (thereby reducing Claimant's benefits by $145.47 per week); dismissed the Suspension Petition as moot; and denied litigation costs and attorney fees to Claimant.

Claimant appealed to the Board, which affirmed the decision and order of the WCJ. The Board held that the WCJ applied the correct burden of proof. (Board Op. at 6.) The Board found that, based on the credited evidence, Claimant was sent a copy of both job descriptions in November 2007 and had ample opportunity to have the descriptions reviewed by his attorney and physician before the job was to begin in February 2008. (Board Op. at 4, 6; Soyster Dep. at 34, R.R.

at 166.) Additionally, the Board held that the WCJ did not err in declining to award litigation costs to Claimant under Section 440(a) of the Pennsylvania Workers' Compensation Act (Act)[1] because Claimant was not successful in whole or in part. (Board Op. at 6.)[2] Claimant now petitions this Court for review.[3]

Claimant first argues that the Board erred in affirming the WCJ's decision granting Employer's Modification Petition because Employer did not sustain its burden of showing that the job offered to Claimant was actually available within Claimant's usual employment area consistent with the Supreme Court's decision in Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.), 516 Pa. 240, 532 A.2d 374 (1987).[4] In Kachinski, the Supreme Court established a four-pronged test, including relevant burdens of proof, where an employer wishes

[1] Act of June 2, 1915, P.L. 736, added by Section 3 of the Act of February 8, 1972, P.L. 25, as amended, 77 P.S. § 996(a).

[2] It appears from the appeal documents to the Board, the brief before this Court, and the failure of counsel to attach a quantum meruit exhibit to the record, that Claimant's counsel is not pursuing a request for attorney fees.

[3] "Our standard of review is limited to determining whether necessary findings of fact are supported by substantial evidence, whether constitutional rights were violated, or whether an error of law was committed." South Hills Health System v. Workers' Compensation Appeal Board (Kiefer), 806 A.2d 962, 965 n.5 (Pa. Cmwlth. 2002).

[4] Section 306(b) of the Act, 77 P.S. § 512(2), was amended by the Act of June 24, 1996, P.L. 57, by adding subsection (2), which essentially "replaced this Court's Kachinski approach" by lowering the employer's burden and allowing an employer to modify a claimant's benefits with evidence in the form of expert testimony proving a claimant's earning power rather than by providing evidence that the claimant had obtained employment. Riddle v. Workers' Compensation Appeal Board (Allegheny City Electric, Inc.), 603 Pa. 74, 82 n.8, 981 A.2d 1288, 1293 n.8 (2009). "The Kachinski test continues to apply exclusively only in cases where the injury took place before June 24, 1996," id., like the case at bar.

to modify benefits payable to an injured worker allegedly capable of returning to some form of work. The "Kachinski test" is as follows:

> 1. The employer who seeks to modify a claimant's benefits on the basis that he has recovered some or all of his ability must first produce medical evidence of a change in condition.
>
> 2. The employer must then produce evidence of a referral (or referrals) to a then open job (or jobs), which fits in the occupational category for 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 claimant's benefits should continue.
>
> Obviously, the viability of this system depends on the good faith of the participants. The referrals by the employer must be tailored to the claimant's abilities and be made in a good faith attempt to return the injured employee to productive employment, rather than a mere attempt to avoid paying compensation. By the same token, employees must make a good faith effort to return to the work force when they are able, and their benefits can be modified for failure to follow up on referrals or for willfully sabotaging referrals. If an employee refuses a valid job offer[,] his benefits can also be modified if it is found he had no basis upon which to do so. *Of course[,] medical evidence which rebuts the employer's evidence of a change in condition, or indicates the unacceptability of the offered employment, can be a basis for a determination that claimant had a valid reason for refusing a job offer*.

Id. at 252, 532 A.2d at 380 (internal citation omitted) (emphasis added). It is well-settled that under the second prong of the Kachinski test, in making a referral to a particular job, the burden is on the employer to prove 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.

Dilkus v. Workmen's Compensation Appeal Board (John F. Martin & Sons), 543 Pa. 392, 398, 671 A.2d 1135, 1138 (1996) (quoting Kachinski, 516 Pa. at 251, 532 A.2d at 379). "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." Karpulk v. Workmen's Compensation Appeal Board (Worth and Co.), 708 A.2d 513, 516 (Pa. Cmwlth. 1998). This Court, in Karpulk, explained that "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." Id. In applying the "totality of the circumstances" approach, this Court, in Karpulk, concluded that because of the unreasonable length and nature of the claimant's commute, which was "a daily round-trip commute of five hours, for [a] ten hour workday, five days a week," the potential jobs were unavailable to the claimant as a matter of law. Id. at 517.

Here, Employer presented the testimony of Ms. Soyster, who credibly testified that she considers "geographic area and physical restrictions" when placing individuals in job positions that are open. (Soyster Dep. at 10, R.R. at 142.) Ms. Soyster also credibly testified that she contacted Mr. Moriarty and "explained [Claimant's] geographic area" and medical restrictions to see if he had any available openings. (Soyster Dep. at 10-11, R.R. at 142-43.) Consistent with

Ms. Soyster's testimony, Mr. Moriarty credibly testified that Ms. Soyster contacted him to find out if he had any job openings "in the northern part of the state . . . [specifically,] Chicora . . . [a]nd [he told her that he had] openings in New Castle and the Hermitage area." (Moriarty Dep. at 10, R.R. at 208.) Ms. Soyster put together a "Job Analysis" based on the information from Mr. Moriarty, which specifically provided that "[t]ravel would be within 25 to 30 mile range." (Job Analysis at 2, R.R. at 187.) Dr. Weiss credibly testified that he reviewed the Job Analysis and that Claimant was suitable for those positions. (Weiss Dep. at 11-12, R.R. at 89-90.) Although Claimant testified that he limits his driving because he often experiences drowsiness due to the medications that he takes, and that the commute to the offered job positions would be "around 50 miles," (Hr'g Tr. at 15, February 13, 2008, R.R. at 73), the WCJ specifically discredited his testimony. (FOF ¶ 9.) The WCJ is the fact-finder and is entitled to "accept or reject the testimony of any witness . . . in whole or in part." Minicozzi v. Workers' Compensation Appeal Board (Industrial Metal Plating, Inc.), 873 A.2d 25, 28 (Pa. Cmwlth. 2005). "The WCJ's authority over questions of credibility, conflicting evidence and evidentiary weight is unquestioned," and this Court is "bound by the WCJ's credibility determinations." Id. at 28-29. Additionally, we note that the distance of Claimant's commute was not an issue that Claimant pursued in questioning the witnesses and Claimant did not raise this issue in his appeal to the Board. Accordingly, we conclude that the Board was correct that Employer sustained its burden under Kachinski.

Next, Claimant argues that he did not act in bad faith in not pursuing the job opportunity offered by Mr. Moriarty because he was not given sufficient notice of his ability to work as a security guard for Mr. Moriarty. Specifically, Claimant

contends that he was not "given sufficient information, including his duties and classification, in order to make an informed decision as to whether this position fit within his physical capabilities." (Claimant's Br. at 14-15.) Again, this issue turns on the credibility determinations made by the WCJ, which this Court may not overturn. Ms. Soyster credibly testified that she sent Claimant the "job description," or Job Analysis, prior to a job interview being set up in early November 2007. (Soyster Dep. at 34-35, R.R. at 166-67.) A review of the Job Analysis clearly describes the job duties as "sedentary work" and breaks down the physical requirements of the job. (Job Analysis at 1-2, R.R. at 186-87.) Based on this credited evidence, we cannot conclude that the WCJ erred in finding that Claimant acted in bad faith in not pursuing the job opportunity because Claimant had more than three months to discuss the Job Analysis with his physician and attorney prior to the commencement of the job in February 2008.[5]

[5] Claimant also states, without legal citation or explanation, that "there is no evidence in the record that Claimant was provided a Notice of Ability to Return to Work in compliance with Section 306(b)(3)." (Claimant's Br. at 14, 16.) "[C]ompliance with the provisions of Section 306(b)(3) [of the Act] is a threshold burden" that must be met in order "to obtain a modification or suspension of a claimant's" workers' compensation benefits when a change in status is sought. Allegis Group (Onsite) v. Workers' Compensation Appeal Board (Henry), 882 A.2d 1, 4 (Pa. Cmwlth. 2005). "The clear purpose of Section 306(b)(3) is to require the employer to share new medical information about a claimant's physical capacity to work and its possible impact on existing benefits." Burrell v. Workers' Compensation Appeal Board (Philadelphia Gas Works), 849 A.2d 1282, 1286 (Pa. Cmwlth. 2004). The Act was amended in 1996 to require employers to supply injured workers with a Notice of Ability to Return to Work when they receive medical evidence of a change in condition. Because this amendment is procedural, it is applicable to the case at bar. Miegoc v. Workers' Compensation Appeal Board (Throop Fashions/Leslie Fay), 961 A.2d 269, 273 (Pa. Cmwlth. 2008). However, this issue was not preserved and, thus, it is waived. Specifically, this issue was not contested by Claimant in the proceedings before the WCJ. The record discloses that Claimant did not raise this issue before the WCJ or in his appeal to the Board, which resulted in neither the WCJ nor the Board addressing this alleged error. Moreover, Claimant did not raise this issue in his six-page Petition for Review filed with this Court.

Finally, Claimant argues that he is entitled to litigation costs under Section 440(a) of the Act because he prevailed in part, in two respects: (1) the date as of which his benefits were modified was later than the date Employer originally requested in the Modification Petition; and (2) the Suspension Petition was dismissed as moot.

Section 440(a) of the Act, provides in relevant part:

> In any contested case where the insurer has contested liability in whole or in part, including contested cases involving petitions to terminate, reinstate, increase, reduce or otherwise modify compensation awards, . . ., the employe or his dependent, as the case may be, in whose favor the matter at issue has been finally determined in whole or in part shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred for attorney's fee, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend the proceedings: Provided, That cost for attorney fees may be excluded when a reasonable basis for the contest has been established by the employer or the insurer.

77 P.S. § 996(a). Thus, in order for a claimant to recover litigation costs, the claimant must first show that he prevailed in whole or in part on an issue that was actually contested before the WCJ. Reyes v. Workers' Compensation Appeal Board (AMTEC), 967 A.2d 1071, 1079 (Pa. Cmwlth. 2009). The question of whether a claimant has prevailed in whole or in part in the context of a request for litigation costs has been recently addressed by this Court in Minicozzi and Bentley v. Workers' Compensation Appeal Board (Pittsburgh Board of Education), 987 A.2d 1223 (Pa. Cmwlth. 2009). In Minicozzi, this Court awarded litigation costs to the claimant even though the employer's modification petition was granted as modified because the claimant achieved a financial benefit for himself as a direct result of his defense to the modification petition by disputing the date upon which

a job was actually offered to him. Minicozzi, 873 A.2d at 31. In contrast, however, litigation costs are not recoverable where the perceived victory has no actual impact on the claimant. For example, in Bentley, this Court denied the claimant litigation costs after the Board affirmed the WCJ's order granting modification of benefits, but amended the modification of benefits from January 22, 2003, to May 5, 2003, based on the employer's evidence that jobs were available to the claimant as of May 5, 2003. Id., 987 A.2d at 1227. This Court reasoned that, because the claimant did not actually dispute the date upon which the jobs in the labor market survey were available to the claimant and because the claimant continued to receive total disability through the date of the decision, the change in the effective date of the modification had no immediate impact on the claimant. Id. at 1230. Thus, the claimant did not prevail in part under the Act to entitle the claimant to litigation costs.

In this case, the WCJ denied Claimant litigation costs because "[C]laimant has not prevailed in whole or in part." (WCJ Order.) The Board affirmed the WCJ's order and specifically noted that Claimant was not entitled to litigation costs because he was not successful in part. (Board Op. at 6.) Specifically, the Board stated that "the burden of proof in a Suspension Petition is identical to the burden of proof in a Modification Petition except for the amount of earnings. Claimant did not prevail in any meaningful way." (Board Op. at 6.)

Before this Court, Claimant argues that he did prevail in part on the Modification Petition because he "presented sufficient evidence to successfully delay the onset of modification from November 15, 2007[, the date Employer originally requested benefits to be modified,] to February 12, 2008[, the date the

WCJ granted modification of benefits]." (Claimant's Br. at 8.) Claimant acknowledges that "Employer was unaware that the meeting [between Mr. Moriarty and Claimant in which Mr. Moriarty was to offer Claimant a job] never occurred [in November 2007] due to the [P]otential [E]mployer's failure to show up to the interview as scheduled[, and as] a result, Employer admitted error in presuming that a meeting had taken place [in which a job was offered to Claimant as of November 15, 2007] and eventually amended the petition to request relief as of February 12, 2008." (Claimant's Br. at 9.) Claimant contends that, due to this error, Claimant was "forced to spend time and incur expenses in preparation of a defense against the incorrectly dated petition as well as expend resources to demonstrate that Claimant acted in good faith in pursuing the job opportunity." (Claimant's Br. at 9.)

Here, the change in the effective date of the modification of benefits was not a result of Claimant's defense and evidence presented but, rather, resulted from Employer's request. Employer filed its Modification Petition on December 6, 2007, seeking to modify benefits as of November 15, 2007. The Modification Petition was filed almost one month after Claimant was informed by Ms. Soyster of job opportunities or referrals within his physical capabilities. At the beginning of the first hearing before the WCJ on this matter, held on February 13, 2008, Employer requested that the Modification Petition be amended from November 15, 2007 to February 12, 2008, which was based on the evidence of a job offer by Mr. Moriarty to Claimant to begin February 12, 2008. We note that Kachinski does not require that a job be offered to Claimant, but only that Employer provide job referrals to Claimant within his physical capabilities, which had occurred. Further, unlike the claimant in Minicozzi, the amendment in this case did not occur because

of a defense pursued by Claimant. Up until the first hearing before the WCJ, Claimant's defense solely came in the form of his Answer denying that he "has been provided with job opportunities *within his physical capabilities* that he has failed to pursue and/or accept." (Answer, December 14, 2007, R.R. at 6 (emphasis added).) Moreover, Claimant's Bill of Costs does not include fees incurred prior to the first hearing when the amendment was made. Most importantly, Claimant has focused his defense in this matter on alleging that he was not physically capable of performing the light duty security position. Although the onset of the modification of benefits was delayed from November 15, 2007 to February 12, 2008, that delay was not due to any defense or contested issue on which Claimant prevailed but, rather, was due solely to Employer's request at the beginning of the hearing. Accordingly, we conclude that the Board did not err in concluding that Claimant was not successful in part and denying Claimant litigation costs.

With regard to the Suspension Petition filed by Employer, we likewise conclude that Claimant did not prevail in part. Although the WCJ dismissed the Suspension Petition as moot so that Claimant's total benefits were not suspended, we agree with the Board that Claimant did not prevail on a contested issue because "the burden of proof in a Suspension Petition is identical to the burden of proof in a Modification Petition except for the amount of earnings." (Board Op. at 6.)

Accordingly, the Order of the Board is affirmed.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Shultz,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 361 C.D. 2010
	:	
Workers' Compensation Appeal Board (Witco Chemical Corp.),	:	
	:	
Respondent	:	

O R D E R

NOW, July 26, 2011, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge