IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mark Gordon,	:	
Petitioner	:	
	:	
v.	:	No. 5 C.D. 2010
	:	SUBMITTED: April 23, 2010
Workers' Compensation Appeal	:	
Board (Showcase Publications),	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** June 22, 2010

Claimant, Mark Gordon, petitions for review of an order of the Workers' Compensation Appeal Board (Board) that affirmed an order of Workers' Compensation Judge (WCJ) Terry W. Knox granting the suspension petition filed by Showcase Publications (Employer). We affirm.

On August 15, 2006, Claimant sustained a work injury when a piece of glass became embedded in his toe while he was unloading Employer's van at a recycling center. At that time, Claimant had been working for Employer as a distribution driver for approximately two and one-half weeks at an average weekly wage of $440. Pursuant to a claim petition to which Employer filed no answer,

WCJ Peter E. Perry determined that Claimant was temporarily totally disabled from that injury.

In March 2007, John F. Perry, M.D., a board-certified orthopedic surgeon, conducted an independent medical examination of Claimant. Pursuant to that evaluation, Employer issued a June 4, 2007 notice of ability to return to work. On June 15, 2007, Employer offered Claimant his previous distribution driver position at his pre-injury wage.[1] Claimant, however, never returned to work for Employer. Accordingly, Employer filed the August 2007 suspension petition at issue, alleging that Claimant's benefits should be suspended as of June 25, 2007, due to its offer of an available position within his medical restrictions and with no wage loss.

Employer presented the deposition testimony of Dr. Perry, whose testimony WCJ Knox accepted as credible. In addition to conducting the physical examination, Dr. Perry also reviewed Claimant's medical records and diagnostic study reports. Dr. Perry opined that Claimant was physically capable of performing the in-house position and that there was no objective evidence that any glass remained embedded in his toe, noting that none had appeared on the CT scan or was evident via palpation. Acknowledging Claimant's current complaints of "an aching feeling from his toe to his heel," Dr. Perry opined that pain of that type

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[1] The distribution driver position involved the following:

> [D]riving a delivery van 75-150 miles per day to deliver bundles of publications to various retail locations, remove stale ones, and stock shelves with current ones. The bundles weigh 15-20 pounds and can be broken down into lighter bundles. The worker carries the bundles from the van to the shelving location, a distance in excess of 20 feet. The worker is not required to sit, stand, walk, or drive in excess of 30 minutes at a time.

WCJ Knox's September 15, 2008 Decision, Finding of Fact No. 5.

was compatible with Claimant's "numerous, diagnostically identifiable, physiologic conditions," such as his non-work-related hallus rigidus. WCJ Knox's September 15, 2008 Decision, Findings of Fact Nos. 6(a) and (e). In that regard, Dr. Perry specifically opined:

> Claimant's complaints of sharp and intermittent pain from his toe all the way to his heel are simply not consistent with the injury that he sustained. If the allegedly remaining glass is so small as to be undetectable by sophisticated diagnostic equipment, it should not be sufficient to cause the level of symptoms complained of.

Finding of Fact No. 7.

In defense of the suspension petition, Claimant offered the testimony of his treating podiatrist, Bradley Shollenberger, D.P.M., who first examined Claimant in September 2006. Dr. Shollenberger, whose testimony WCJ Knox rejected as unpersuasive, testified that Claimant was experiencing toe pain and problems with standing and walking, which were related either to a foreign body in his toe or the sequelae of a foreign body. He further opined that Claimant was unable to perform a full-duty job that involved weight-bearing and should not walk or stand for more than one hour per day. Although Dr. Shollenberger never conceded that there was no longer glass present in Claimant's toe, he agreed that he could not find a shard two weeks after the injury or at any time since that date. In rejecting Dr. Shollenberger's testimony, WCJ Knox noted that he relied totally on Claimant's subjective complaints, there being no objective sign of injury or evidence of the continuing presence of a foreign body or the sequelae thereof, and that "[t]he length and extent of Claimant's alleged symptoms for this injury is simply not believable." Finding of Fact No. 16.

Claimant also testified on his own behalf. Having already established in the claim petition proceeding that he sustained a work injury, Claimant further indicated that, when he went home after the injury, his father pulled a half-inch long sliver of clear glass out of his toe. The following day, he had an x-ray in the emergency room which reported as negative for glass. Two weeks later, he began treating with Dr. Shollenberger. Claimant also testified that he would be unable to do the proffered job. WCJ Knox found Claimant's testimony to be not credible, stating that if he had continuing symptoms, they were not related to the work injury. Further, WCJ Knox found as follows:

> Despite diagnostic studies, no remaining glass was found. Despite the passage of several months, Dr. Perry was unable to palpate scar tissue. Despite the passage of 16 months, Dr. Shollenberger is unable to palpate scar tissue. There is no glass remaining in his toe. An injury this minute, a one-half inch piece of clear glass removed by his father, does not cause this level of pain, continuing symptoms in apparently his whole foot, and disability at the level opined by Dr. Shollenberger.

Finding of Fact No. 14.

Accordingly, WCJ Knox granted Employer's suspension petition, determining that it satisfied its "burden of proving that it had work available for Claimant within his work-related medical restrictions and physical limitations as of June 25, 2007, and that it timely offered that position to claimant within the statutory requirements, and that Claimant failed to return to work in bad faith." Conclusion of Law No. 2. The Board affirmed and Claimant's timely petition for review to this Court followed.

Where, as here, an employer seeks to suspend a claimant's benefits on the basis of an offer of an in-house position, the standards espoused in *Kachinski v.*

Workmen's Comp. Appeal Bd. (Vepco Construction Company), 516 Pa. 240, 532 A.2d 374 (1987), continue to apply. *CRST v. Workers' Comp. Appeal Bd. (Boyles)*, 929 A.2d 703 (Pa. Cmwlth. 2007). In *Kachinski*, our Supreme Court concluded that in order to obtain a modification based on a claimant's ability to return to work, an employer must establish evidence of a referral to a then open job which fits the occupational category for which the claimant has been medically cleared. After an employer has established referral to a suitable job, the claimant must then demonstrate that he has followed through on the referral in good faith. Actual availability of employment is established by evidence that the job is one that could be performed by the claimant.

Claimant argues that the WCJ erred in accepting Dr. Perry's expert opinion because he allegedly identified the wrong location of the accepted work injury.[2] He maintains that WCJ Knox erred in determining that Dr. Perry was a competent witness because his opinion was based solely on the non-substantive and uncorroborated hearsay statement from Claimant at the time of the independent medical examination that the location of the entry wound was at the distal tip of the toe, contrary to the overwhelming evidence that the injury occurred at the base or underside of the toe. Claimant asserts that such hearsay statements do not come under the exception for medical providers found in Pennsylvania Rule

[2] We note that WCJ Perry's November 9, 2006 final decision is part of the record in the present case. September 25, 2007 Hearing, WCJ Knox's Exhibit 1; Supplemental Reproduced Record ("S.R.R.") at 1-4b. In that decision, WCJ Perry deemed the averments of the claim petition to be admitted as true and accepted Claimant's testimony as credible and convincing. WCJ Perry did not, however, specifically describe the accepted work injury, merely stating that Claimant was injured when "a piece of glass became embedded in his toe." S.R.R. 3b. Indeed, WCJ Perry never elaborated on the precise location of the injury, even to the extent of identifying which toe was involved.

of Evidence 803(4), which provides that statements for purposes of medical diagnosis or treatment shall not be excluded by the hearsay rule.[3] Claimant emphasizes that Dr. Perry was not his treating physician and that any statements made to him were in the course of an evaluation requested by his Employer and in the midst of legal proceedings.

While acknowledging that Dr. Perry could rely on hearsay statements in offering an opinion as to his condition,[4] Claimant further asserts that such statements could not constitute substantive evidence that the glass actually entered the toe at the distal tip. Claimant maintains that such evidence could only be admitted to explain the basis of Dr. Perry's opinion, but could not serve as substantive evidence. Claimant also contends that, even if the statement regarding the location of the injury was not objected to, it nonetheless constitutes non-substantive evidence, it is contrary to the testimony of Claimant and Dr. Shollenberger and uncorroborated by any substantive facts of record. Accordingly, Claimant maintains that the WCJ erred in determining that Dr. Perry was a competent witness.

In response, Employer argues that Claimant failed to preserve on appeal a hearsay issue as to Dr. Perry's deposition testimony describing Claimant's

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[3] Pa. R.E. 803(4) provides an exception to the hearsay rule as follows:

> **(4) Statements for purposes of medical diagnosis or treatment.** A statement made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past and present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to treatment, or diagnosis in contemplation of treatment.

[4] Pa. R.E. 703 permits a medical expert witness to render an opinion that is based, in part, on otherwise inadmissible hearsay, if it is of the type that is customarily relied on by such an expert in the practice of his profession.

specific complaints of pain made during the independent medical examination. Further, it points out that Claimant's counsel submitted no separate writing prior to the close of the record preserving any hearsay objections and even confirmed at the final hearing that he had no objections that he wished to preserve regarding the deposition. Accordingly, the parties having agreed at the outset of the deposition that all objections would be placed on the record for the WCJ to rule upon at a later date, Employer argues that Claimant waived any hearsay objection on appeal. *Alessandro v. Workers' Comp. Appeal Bd. (Precision Metal Crafters, LLC)*, 972 A.2d 1245 (Pa. Cmwlth. 2009); 34 Pa. Code § 131.66(b).[5]

As for Claimant's arguments that Dr. Perry's testimony was otherwise incompetent, Employer asserts that Dr. Perry based his opinions on his examination of the toe and the foot and review of Claimant's medical records and diagnostic studies. It points out that a physician's opinion must be taken as a whole, without sections being taken out of context. *Am. Contracting Enters, Inc. v. Workers' Comp. Appeal Bd. (Hurley)*, 789 A.2d 391 (Pa. Cmwlth. 2001).

In resolving the parties' respective arguments, we too note that Claimant's history, which he acknowledged a doctor would customarily rely upon in generating an opinion, was only part of what Dr. Perry based his opinion on in reaching his determination that Claimant was physically capable of performing the proffered position. As the Board noted in its decision:

> Dr. Perry's opinion did not turn on a finding that Claimant's injury was at the tip of his toe. Rather, based on his examination of Claimant's toe and foot and a review of the medical records, Dr. Perry concluded that

[5] At all events, the statements were those of Claimant and so were admissible under Pa. R.E. 803(25). Rule 803(25) addresses admissions by party-opponents.

> there was no objective evidence indicating that Claimant had any glass in his toe. Furthermore, a medical expert's opinion is not rendered incompetent unless it is based solely on inaccurate information. *Pryor v. Workers' [Comp. Appeal Bd. (Colin Serv. Sys.)]*, 923 A.2d 1197 (Pa. Cmwlth. 2006). The record demonstrates that Dr. Perry's opinion was grounded upon various sources of information including a physical examination, diagnostic studies, and medical records.

Board's Decision at 5-6.

Moreover, WCJ Knox accepted Dr. Perry's testimony that Claimant could physically perform the proffered position and that any problems were due to *non-work-related* medical conditions. Indeed, Dr. Perry testified that, assuming *arguendo* that any glass remained embedded in Claimant's toe, the presence of such a foreign object could not explain his complaints of pain. Dr. Perry stated that those complaints were consistent with other conditions, unrelated to the work injury. Further, even though Claimant makes much of Dr. Perry's testimony regarding where the glass entered the toe, we emphasize WCJ Knox's finding that *neither* medical provider could find any objective evidence whatsoever that any glass remained embedded in Claimant's toe and that the accepted injury as reflected in the claim petition decision did not pinpoint the precise point of entry.

In addition, regarding Claimant's contention that Dr. Perry's statement regarding the location of the injury cannot stand because it is contrary to the testimony of both Claimant and Dr. Shollenberger, we point out that WCJ Knox rejected their testimony. It is well established that fact-finding and credibility determinations are solely within the province of the WCJ who is free to accept or reject, in whole or in part, the testimony of any witness. *Joy Global, Inc. v. Workers' Comp. Appeal Bd. (Hogue)*, 876 A.2d 1098 (Pa. Cmwlth. 2005).

Further, a WCJ's credibility determinations are binding on this Court. *Sell v. Workers' Comp. Appeal Bd. (LNP Eng'g)*, 565 Pa. 114, 771 A.2d 1246 (2001).

Accordingly, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 22nd day of June, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge