IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sheldon F. Burk,	:	
Petitioner	:	
	:	
v.	:	No. 765 C.D. 2010
	:	SUBMITTED: August 13, 2010
Workers' Compensation Appeal Board (Wentzel),	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** December 10, 2010

Sheldon F. Burk (Claimant), *pro se*,[1] petitions this court for review of the order of the Workers' Compensation Appeal Board (Board) which affirmed a decision of the Workers' Compensation Judge (WCJ) granting Burk's claim petition in part and suspending his workers' compensation benefits as of September 21, 2007, and ongoing. After review, we affirm.

[1] Although Claimant was represented by counsel before the Workers' Compensation Judge and the Board, he is now proceeding *pro se*.

Claimant was employed as a union carpenter for Tom Wentzel Company (Employer). Claimant's job involved installing metal studs at construction sites. On September 14, 2007, while working at Employer's construction site in Concordville, PA, in a motorized high-reach basket, Claimant fell approximately 7 to 10 feet from the basket to the ground below when the basket malfunctioned. Claimant, who was wearing a hard hat, hit the right side of his head and his right shoulder, but did not lose consciousness. He informed his foreman and was taken to the emergency room at Springfield Hospital for examination. Claimant was out of work for one week, when he returned to light-duty work sorting screws at Employer's facility in Exton. Claimant was earning the same hourly wage and working the same number of hours per week as in his pre-injury job. Hearing of October 30, 2008, Notes of Testimony (N.T.), at 10, 14. He continued in this position until January 12, 2008, when he voluntarily quit due to transportation issues.[2] Thereafter, Claimant filed a claim petition, alleging that he sustained a work-related injury on September 14, 2007, to his head, neck, right shoulder, upper extremity, lower back with pain extending into his hip, and that he suffered from headaches and dizziness. He requested partial disability benefits for the period from September 14, 2007 until January 12, 2008, and full disability benefits from January 13, 2008 and ongoing.

Several hearings were held before the WCJ at which both parties testified and presented documentary evidence, including the deposition testimony of Drs. Burch and Mandel for Claimant and Dr. Kerson for Employer. Dr. Mandel,

[2] The WCJ found that Claimant stopped working due to transportation problems. WCJ's Decision/Order, Findings of Fact No. 1 (g) and (k). Claimant testified that his car was sideswiped sometime in January, 2008, and that after the accident, the car was inoperable. Hearing of June 18, 2008, N.T., at 33-34.

a board certified neurologist, testified that Claimant had post concussion syndrome, cervical radiculopathy, lumbar radiculopathy, and unsteadiness in walking. Dr. Mandel also testified that the encephalomalacia seen on Claimant's CAT scan pre-dated his September 14, 2007 work injury. On cross examination, Dr. Mandel acknowledged that a prior history of alcohol abuse could have caused Claimant's vestibular disturbance or he "could have had a head trauma that he may or may not have been aware of which would eventually lead to" a degeneration of the brain causing "memory problems, dizziness, unsteadiness, [and] confusion." Deposition of Dr. Steven Mandel, October 16, 2008, at 21-22; Findings of Fact No. 3(d) and (m). Dr. Mandel also opined that Claimant was capable of sedentary work. *Id.* at 18; Findings of Fact No. 3(k).

Claimant testified that he returned to light-duty work in Employer's warehouse following the work injury, that he did the job in spite of stiffness in his back from sitting, and that he quit the job because of his car and transportation, "which was an issue." Hearing of June 18, 2008, N.T. at 18-19.

Employer presented the deposition testimony of Dr. Kerson, board certified in neurology, who testified that in his opinion, Claimant suffered a closed head injury on September 14, 2007, without a loss of consciousness. Dr. Kerson testified that the abnormalities shown on Claimant's CAT scan and MRI of his head revealed encephalomalacia-chronic, meaning that it pre-dated the work injury. Dr. Kerson explained that if the encephalomalacia (dead brain tissue) had been caused by the work injury, Claimant "would have been comatose for a prolonged period of time . . . ." Deposition of Dr. Lawrence Kerson, February 26, 2009, at 14-15; Findings of Fact No. 17 (b) and (c).

Employer, Tom Wentzel testified that following Claimant's work injury on September 14, 2007, he offered Claimant a light-duty job sorting screws in their warehouse that was tailored to meet the restrictions imposed by the doctors. Mr. Wentzel testified that Claimant never complained that he was having physical difficulty in performing this job and that sometime in January, 2008, Claimant told him he could not get to work due to car problems. Mr. Wentzel stated that the modified duty position Claimant was working in was still available to him. Hearing of October 30, 2008, N.T. at 10-11, 16-17; Findings of Fact No. 9(c), (e) and (f).

After the record was closed, the WCJ concluded that Claimant met his burden of proving that he sustained a work-related injury to his neck, low back and shoulder but that the injury did not result in disability, as "[i]t is clear that light-duty work was and is available to Claimant but Claimant stopped working due to car problems." Decision of WCJ, dated June 29, 2009, Finding of Fact No. 23. The WCJ also concluded that Claimant had not met his burden of proving that the injury included an ongoing head injury or a head trauma related neurological disorder. Accordingly, the WCJ suspended Claimant's benefits effective September 21, 2007 and ongoing.[3]

Claimant appealed the WCJ's decision to the Board, which found that the WCJ's findings were supported by substantial evidence, that the WCJ did not err in granting the claim petition for a closed period, and that the WCJ did not err in failing to find ongoing disability. The Board also found that the WCJ issued a reasoned decision in accordance with Section 422 (a) of the Workers'

[3] The WCJ rejected Dr. Burch's testimony as neither credible nor persuasive. WCJ's Decision, dated June 29, 2009, Finding of Fact No. 20.

Compensation Act (Act),[4] 77 P.S. § 834, and for these reasons, affirmed the decision and order of the WCJ. Claimant now petitions this court for review.

On appeal, Claimant argues that the September 21, 2007 job offer letter sent by Employer regarding the modified duty job at its Exton facility was insufficient as a matter of law and that Employer failed to issue an LIBC 757[5] as required under the regulations. The Board counters that Claimant has waived these issues because he did not raise them before the Board.

In his petition for review with this court, Claimant stated that the Board's decision was in error for the following reasons:

> [N]ot well reasoned decision. Failed to take in account that Job Notice was insufficient – No LIBC 757 was issued. No Bureau document was issued nor filed with Bureau & not timely exchanged. Plaintiff objected to them. Defendant created and manufactured documents. Plaintiff had no transportation to get to work after car broke down. Septa does not travel there. Job not accessible by Public transportation.

Claimant's Petition for Review, at 2. However, in his appeal form filed with the Board, Claimant listed the following findings of fact that were allegedly in error and were not supported by substantial evidence as follows:

> #1 (g) (j) (K); 2 (g) (h) (i) (j) (m) (n); 9 (d) (e) (f); 10; 11; 12; 13; 14; 15; 16; 17 (b) (c) (d) (f) (g); 18; 19; 20; 21; 22; 23 24 are based upon objectional hearsay; falsified documents; not based upon evidence of record; not well reasoned.

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[4] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§ 1-1041.4, 2501-2708.

[5] An LIBC 757, known as the Notice of Ability to Return to Work, is the Bureau's designated form that an employer is required to send before seeking a modification or suspension of benefits based on earning power. For the sake of clarity, we will refer to the form as a notice of ability to return to work.

Appeal from Judge's Findings of Fact and Conclusions of Law, dated July 16, 2009.

Pennsylvania Rule of Appellate Procedure 1551 provides that "no question shall be heard or considered by the court which was not raised before the government unit . . . ." Pa. R.A.P. 1551(a). Appellate Rule 2117 further requires that an appellant must state the manner in which the questions were raised, the method of raising them, and the way the court decided the issues, with specific reference to where in the record the question or questions were timely and properly raised. Pa. R.A.P. 2117(c). The Board's rules similarly require the party appealing to state the "particular grounds upon which the appeal is based . . . and . . . **General allegations which do not specifically bring to the attention of the Board the issues decided are insufficient.**" 34 Pa. Code § 111.11(a)(2) (emphasis added). We have consistently held that an issue is waived when the party appealing fails to properly raise the issue with the required degree of specificity in the appeal documents filed with the Board. *See Reyes v. Workers' Comp. Appeal Bd. (AMTEC)*, 967 A.2d 1071 (Pa. Cmwlth.); *app. den.*, 602 Pa. 671, 980 A.2d 611 (2009); *Matticks v. Workers' Comp. Appeal Bd. (Thomas J. O'Hora Co., Inc.)*, 872 A.2d 196 (Pa. Cmwlth. 2005); *Jonathan Sheppard Stables v. Workers' Comp. Appeal Bd. (Wyatt)*, 739 A.2d 1084 (Pa. Cmwlth. 1999). Nowhere on his appeal form does the Claimant contend that the September 21, 2007 job offer letter was insufficient as a matter of law or that Employer failed to

issue a Notice of Ability to Return to Work as required. Therefore, we conclude that these issues have been waived on appeal.[6]

Next, Claimant argues that the WCJ erred in admitting certain Bureau documents, specifically, a Notice of Temporary Compensation Payable dated September 25, 2007, a Notice of Workers' Compensation Denial dated September 26, 2007, and a Notice Stopping Temporary Compensation also dated September 26, 2007. Claimant asserts that these documents were inadmissible as they were never filed with the Bureau and not exchanged during the proceedings on the claim petition as required under 34 Pa. Code § 131.61.[7] The Board counters that this issue has also been waived by Claimant for failing to properly raise it below. We agree.

As we noted *infra*, Claimant's appeal form from the WCJ's decision merely lists the specific numbered findings allegedly in error and states only that error is "based upon objectional hearsay; falsified documents; not based upon

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[6] Even if we were to address the merits of Claimant's contentions, we would reject them. The notice of ability to return to work is a form prescribed by the Bureau to ensure employers' compliance with the provisions of Section 306(b)(3) of the Act, 77 P.S. § 512(b)(3). However, in *Ashman v. Workers' Compensation Appeal Board (Help Mates, Inc.)*, 989 A.2d 57 (Pa. Cmwlth. 2010), we held that formal notice is not required where a claimant is actually performing work. Indeed, in *Burrell v. Workers' Compensation Appeal Board (Philadelphia Gas Works and CompServs., Inc.),* 849 A.2d 1282, 1286 (Pa. Cmwlth. 2004), we held that "it is unnecessary to give a 'notice of ability to return to work' to a person found actually performing work." In the matter *sub judice*, Employer sent Claimant a job offer letter. Even if the letter in some small respect fell short of the usual form letter, it is of no moment, given the fact that Claimant was actually performing the modified duty job after the work injury. *Burrell.* Therefore, we deem Claimant's arguments meritless.

[7] 34 Pa. Code § 131.61 (a), provides that the "Parties shall exchange all items and information, including medical documents, reports, records, employment records, wage information . . . to be used in or obtained for the purpose of prosecuting or defending a case, unless the foregoing are otherwise privileged or unavailable, whether or not intended to be used as evidence or exhibits."

evidence of record, not well reasoned." Claimant's Appeal from Judge's Findings of Fact and Conclusions of Law. Nowhere in his appeal form does Claimant argue that these documents were inadmissible or indicate how they prejudiced him in any way. At the hearing, Claimant did not challenge the admission of these documents on the grounds he now asserts. Rather, his sole contention was that the documents should not be used to establish his wages, a fact he contended was established by his own testimony.[8] Hence, Claimant failed to properly preserve and raise the issue below, thus, resulting in its waiver. *See Jonathan Sheppard Stables;* Pa. R.A.P. 1551, 2117; 34 Pa. Code § 111.11(a)(2).[9]

Claimant next challenges the WCJ's reliance on Dr. Kerson's testimony. Specifically, Claimant asserts that Dr. Kerson's testimony is not legally sufficient to support the finding that he was and has been capable of light-duty work because: 1) Dr. Kerson did not examine Claimant until more than two months after the injury occurred; 2) Dr. Kerson initially did not release Claimant to any work, noting that Claimant had ongoing symptoms of pain and gait issues; and 3) Dr. Kerson later released him to sedentary work, while Employer offered him a higher category of work in a light-duty position.

A review of Dr. Kerson's testimony reveals that Claimant's assertions are without merit. While Dr. Kerson testified that he did not believe Claimant could return to his pre-injury job because "he appeared to be unsteady," he also

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[8] *See* Hearing of March 18, 2009, N.T. at 5-6.

[9] In any event, admission of these documents was, at most, harmless. We note that the WCJ indicated to the parties that she would give the documents the appropriate weight in making her determination, and more importantly, it is clear from her decision that the WCJ relied on other evidence of record to support her findings, specifically, the credited testimony of Employer and Dr. Kerson. Accordingly, Claimant's challenge to the admission of these documents is without merit.

opined that even accepting Claimant's subjective complaints of pain and his residual unsteadiness, Claimant was capable of performing the light-duty job he was performing as that job was described by Employer. Deposition of Dr. Kerson, N.T., at 19, 20 and 25. Furthermore, Dr. Kerson did not agree that the modified duty position Claimant was offered and actually performed exceeded the physical limitations of a sedentary job. Dr. Kerson testified that "the description that I saw which included the job that was in the cover letter from Mr. Wentzel, that description fit with sedentary work." *Id.* at 40-41. It matters not whether Dr. Kerson called the job Claimant was actually performing sedentary rather than light-duty; he opined that Claimant's capabilities matched the job he was actually performing. Finally, Claimant's contention that the fact that Dr. Kerson did not examine him until two months after the work injury somehow renders his testimony legally insufficient is also without merit, as it goes to the weight to be accorded to the evidence, a matter left to the exclusive province of the WCJ.[10] Therefore, we conclude that Dr. Kerson's testimony constitutes substantial evidence to support the WCJ's findings.[11]

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[10] The WCJ is the ultimate fact-finder in workers' compensation cases and, as such, has exclusive province over questions of credibility and evidentiary weight, and is free to accept or reject, in whole or in part, the testimony of any witness, including a medical witness. *Ashman.*

[11] Claimant also argues that the WCJ's decision was not well-reasoned because of its misplaced reliance on Dr. Kerson's testimony. The reasoned decision requirement in Section 422(a) of the Act states that a WCJ must specifically state the evidence he/she is relying on and adequately explain his/her reasons for accepting evidence and for rejecting or discrediting conflicting evidence. As long as the WCJ has provided "some articulation of the actual objective basis for the credibility determination . . . ." the decision will be considered a reasoned one. *Daniels v. Workers' Comp. Appeal Bd. (Tristate Transport)*, 574 Pa. 61, 78, 828 A.2d 1043, 1053 (2003). A review of the WCJ's decision reveals that she more than adequately explained her reasons for accepting Dr. Kerson's testimony (*see* WCJ's Decision, Findings of Fact nos. 17 and 22), and in thus setting forth the reasons for her credibility determinations, we hold that the WCJ fully complied with the mandates of Section 422 (a), 77 P.S. § 834(a). *Daniels.*

Claimant's contention that because Dr. Kerson addressed the neurological aspect of Claimant's injuries, his opinion cannot support any finding regarding Claimant's neck, low back and shoulder injuries, is a red herring, inasmuch as the WCJ did not find recovery from the neck, low back and shoulder injuries. Indeed, the WCJ specifically rejected Dr. Kerson's opinion that Claimant had fully recovered from his neck, low back and shoulder injuries. The WCJ found that Claimant sustained his burden of proving that he sustained a work-related neck, low back and shoulder injury, but then suspended Claimant's benefits based on the fact that Claimant's loss of earning power was not due to the work-related injuries.

Claimant next argues that the WCJ's decision is not supported by substantial evidence because Employer failed to sustain its burden of proving job availability because Employer did not offer evidence that the modified duty job in Exton was one which a resident of Philadelphia (where Claimant resides) would routinely accept or that it was in the general employment vicinity of Philadelphia, citing *Dilkus v. Workmen's Compensation Appeal Board (John F. Martin & Sons)*, 543 Pa. 392, 671 A.2d 1135 (1996).[12]

[12] We note that Claimant initiated these proceedings by filing a claim petition and that he bears the burden of establishing all the necessary elements to support an award of compensation, including the duration and extent of disability. *Inglis House v. Workmen's Comp. Appeal Bd. (Reedy)*, 535 Pa. 135, 634 A.2d 592 (1993). Further, we have long defined "disability," as that term is used in workers' compensation law, as synonymous with loss of earning power. *Landmark Constructors, Inc. v. Workers' Comp. Appeal Bd. (Costello)*, 560 Pa. 618, 747 A.2d 850 (2000). We have further explained that even in a claim petition, the initial burden of proof associated with job availability is generally allocated to the employer once the claimant proves a loss of earning power attributable to the work injury. *Vista International Hotel v. Workmen's Compensation Appeal Board (Daniels)*, 560 Pa. 12, 742 A.2d 649 (1999).

In the matter *sub judice*, the evidence which was credited by the WCJ clearly demonstrates that Claimant's loss of earning power was due to transportation issues and not due to his work injury. Accordingly, Employer was not required to prove job availability. This evidence included Claimant's own testimony that he was able to perform the job; his admission that the reason he quit the modified duty job was because his car was sideswiped in an accident in Philadelphia rendering it inoperable; and, finally, his further acknowledgement that he later had the car repaired. Claimant clearly accepted the suitability of the employment by accepting the modified position and actually working in that position for almost four months, and he admittedly stopped working when his car was hit and he could no longer drive it. "Once it is shown that a loss of earning power has nothing to do with a claimant's work-related injury, reinstatement of total disability benefits is not proper and the employer is under no obligation to provide suitable alternative employment." *Campbell v. Workers' Comp. Appeal Bd. (Foamex)*, 707 A.2d 1188, 1191 (Pa. Cmwlth. 1998); *see also Miller v. Workmen's Comp. Appeal Bd. (Allied Aviation Servs. of PA)*, 627 A.2d 824 (Pa. Cmwlth. 1993) (claimant not entitled to reinstatement of benefits that were suspended when she returned to work with another employer at same wages and worked in the position for ten months before quitting for reasons other than her work injury). Finally, Employer testified and the WCJ found that the light-duty job was and is still available to Claimant. As the evidence of record supports the finding that the loss of earnings was attributable to reasons other than Claimant's work injury, the WCJ properly suspended Claimant's benefits as of the date he returned to work with Employer.

Accordingly, because we conclude that the WCJ's decision is both well-reasoned and amply supported by the evidence of record, we will affirm the order of the Board, affirming the grant of benefits for the closed period of September 14 through September 21, 2007, and the suspension of benefits thereafter.

BONNIE BRIGANCE LEADBETTER,
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sheldon F. Burk, Petitioner	:	
v.	:	No. 765 C.D. 2010
Workers' Compensation Appeal Board (Wentzel), Respondent	:	

O R D E R

AND NOW, this 10th day of December, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge