IN THE COMMONWEALTH COURT OF PENNSYLVANIA

County of Delaware, Petitioner	:	
v.	:	No. 781 C.D. 2010
	:	Submitted: November 12, 2010
Workers' Compensation Appeal Board (Lee), Respondent	:	

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: February 23, 2011

The County of Delaware (Employer) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) that reversed the Workers' Compensation Judge's (WCJ) decision modifying Clarence Lee's (Claimant) benefits from total to partial. The WCJ concluded that Claimant had earning power because one of the jobs identified in Employer's labor market survey was available to him. The Board reversed the WCJ, reasoning that even under the WCJ's own findings, the job was not actually available to Claimant. Concluding that the Board did not err, we affirm.[1]

[1] Claimant filed a cross petition for review. By order dated June 3, 2010, this Court granted Employer's motion to quash the cross petition for review because Claimant was not aggrieved by the Board's adjudication.

Claimant was employed as a certified nursing assistant at Employer's Fair Acres geriatric nursing facility. On August 25, 2005, Claimant injured his left shoulder when he lifted a resident. Employer issued a Notice of Temporary Compensation Payable (NTCP) describing the injury as a left shoulder "strain/sprain" and paying total disability benefits in the amount of $367.56 per week based on an average weekly wage of $561.34. The NTCP subsequently converted to a Notice of Compensation Payable. Claimant underwent shoulder surgery in October 2005 and again in October 2006. He has not returned to work.

On March 13, 2007, Claimant attended an independent medical examination (IME) with Noubar A. Didizian, M.D., who found Claimant capable of performing light work with restrictions on reaching and lifting with his left arm. Upon receipt of Dr. Didizian's report, Employer sent Claimant a Notice of Ability to Return to Work. Employer also hired a certified rehabilitation counselor, Carl Hawkinson, M.S., C.R.C., to determine Claimant's earning power. Hawkinson met with Claimant for a vocational interview and then performed a labor market survey. After locating several potential jobs that fell within Claimant's capabilities, Employer then filed a petition to modify Claimant's benefits to partial disability.

A hearing was held before the WCJ. In support of its petition, Employer submitted Hawkinson's deposition testimony. He explained that he did a labor market survey in October 2007, using Dr. Didizian's medical opinion and the results of his vocational interview with Claimant. Hawkinson identified four positions appropriate for Claimant. They were: a manager trainee with Enterprise Rent-A-Car; a sales associate with Pearle Vision; a customer assistant specialist with Applied Card Systems; and an appointment setter with Mid Atlantic Systems.

Public transportation was available to all of the work sites, which was necessary because Claimant did not drive. With respect to the appointment setter position, Hawkinson testified that based on his conversation with Marie Greene of Mid Atlantic, he concluded that Claimant was capable of performing the job with Mid Atlantic on a full-time basis.

Claimant presented the deposition testimony of Marie Greene, a manager at Mid Atlantic Systems who supervises the hiring and training of appointment setters. She had no recollection of speaking with Hawkinson. Greene stated that appointment setters work part-time, four hours per day. Further, Greene testified that some appointment setters are required to attend home shows from time to time and some are not. She explained that attending home shows "depends on what we're hiring for at the time, what the needs of our department are." Reproduced Record at 298a (R.R. ___). An appointment setter required to attend home shows must have a driver's license.

Following Greene's deposition, Hawkinson was re-deposed.[2] Hawkinson admitted that he had been unaware that some appointment setters are required to drive to home shows. Hawkinson acknowledged that he did not determine whether the position Mid Atlantic had open in October 2007, when he did his survey, was one that required attendance at home shows. Hawkinson also

[2] In addition to these witnesses, Employer submitted the medical deposition of Dr. Didizian outlining Claimant's medical condition and work restrictions. For his part, Claimant testified in opposition to Employer's petition. Claimant also presented the deposition testimony of his own vocational expert, Gary A. Young, M.Ed., and of Employer's personnel director, Delphine Mitchell. Because the testimony of these witnesses is not integral to the appeal now before us, we do not summarize their testimony.

acknowledged that a position with Mid Atlantic requiring attendance at shows would not be a position available to Claimant because he does not drive.[3]

The WCJ found that the jobs with Pearle Vision and Applied Card Systems were not available to Claimant for various reasons, including lack of public transportation during all shifts and Claimant's lack of computer skills and customer service skills. The WCJ found that the job with Enterprise Rent-A-Car was not available because it required some driving and Claimant does not have a driver's license. With respect to the position with Mid Atlantic, the WCJ credited the testimony of Hawkinson and Greene.[4] The WCJ found that public transportation was available for a position at Mid Atlantic's office. The WCJ also found that, depending on Mid Atlantic's needs at the time of hiring, an

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[3] Specifically, Hawkinson testified as follows:

> **[Claimant's counsel:]** You didn't know whether or not [Mid Atlantic was] going to hire [Claimant] to do the home show job or not because you didn't ask about that?
>
> **[Hawkinson:]** No, I wouldn't know.
>
> **[Claimant's counsel:]** If the position with Mid Atlantic System was one [in] which he was required to go to the home shows, then you and I can agree that this position is not available for [Claimant] due to the fact that he does not have a driver's license?
>
> **[Hawkinson:]** If that specific job that was open required him, you're right. It would not be available.
>
> **[Claimant's counsel:]** As we sit here today, we don't know whether or not that was the job?
>
> **[Hawkinson:]** No.
>
> **[Claimant's counsel:]** Or not, correct?
>
> **[Hawkinson:]** That's correct.

R.R. 384a.

[4] The WCJ has complete authority over questions of credibility, conflicting medical evidence and evidentiary weight. *Sherrod v. Workmen's Compensation Appeal Board (Thoroughgood, Inc.)*, 666 A.2d 383, 385 (Pa. Cmwlth. 1995).

appointment setter might be required to drive to home shows. The WCJ specifically found:

> The record, including the testimony of Mr. Hawkinson and Ms. Greene, established, and *the [WCJ] finds that the available job as an appointment setter for Mid Atlantic Systems*, which was identified as an available job for the Claimant by Mr. Hawkinson during the period in issue and during Mid Atlantic System's hiring process, *involved the attendance at home shows*.

WCJ decision, June 10, 2009, at 15-16; Finding of Fact 55 (emphasis added). Nevertheless, the WCJ found that Claimant could have performed the appointment setter job 20 hours per week and modified his benefits based on those potential earnings.

Claimant appealed, and the Board reversed. The Board determined that the WCJ's findings that Claimant could not drive and that some appointment setters must travel to home shows meant that the Mid Atlantic appointment setter job was not available to Claimant. Therefore, the WCJ erred in granting Employer's modification petition.[5] Employer now petitions for this Court's review.[6]

On appeal, Employer argues that the Board erred in reversing the WCJ's decision when substantial, competent evidence supports the modification of

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[5] Claimant also challenged a finding by the WCJ that although Employer itself had job openings, Employer was not required to offer those jobs to Claimant. The Board rejected Claimant's argument and affirmed the WCJ on this issue.

[6] This Court's review of an order of the Board is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether Board procedures were violated, whether constitutional rights were violated or an error of law was committed. *City of Philadelphia v. Workers' Compensation Appeal Board (Brown)*, 830 A.2d 649, 653 n.2 (Pa. Cmwlth. 2003).

Claimant's benefits. Employer asserts that the appointment setter job was available to Claimant because there was a possibility that he could have been hired without the requirement to attend home shows.[7] We disagree.

An employer wishing to modify the claimant's disability benefits to partial disability may do so by establishing under Section 306(b)(2) of the Workers' Compensation Act[8] (Act) that the claimant has "earning power," which

> 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.

77 P.S. §512(2). Section 306(b)(2) provides that an injured worker's benefits can be modified to partial disability if he

> 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.

77 P.S. §512(2).

To modify benefits based on a labor market survey and earning power assessment, the employer must present evidence of jobs that are open and actually available to the claimant. *South Hills Health System v. Workers' Compensation Appeal Board (Kiefer)*, 806 A.2d 962, 969, 970 (Pa. Cmwlth. 2002). Further, the

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[7] Employer also contends that the Board erred in addressing whether the Mid Atlantic job was available to Claimant because Claimant waived the issue by not specifically raising it before the Board. Our review of the appeal documents reveals that Claimant did, in fact, specifically raise the issue.

[8] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §512(2).

jobs must be open and available at the time the vocational expert conducts the labor market survey. *Phoenixville Hospital v. Workers' Compensation Appeal Board (Shoap)*, 2 A.3d 689, 693 (Pa. Cmwlth. 2010). Employer's evidence on availability of the appointment setter job fails for two reasons.

First, the WCJ found that the only appointment setter job that was open at the time of Hawkinson's labor market survey involved "travel to home shows" and "a driver's license." WCJ decision, June 10, 2009, at 15; Finding of Fact 55. Employer does not challenge that finding. Employer's own vocational expert agreed that a job involving attendance at home shows would not be available to Claimant because he cannot drive. Thus, the WCJ's finding of fact shows that the appointment setter job was not available to Claimant at the time of the labor market survey.

Second, even if the WCJ had not explicitly found that the Mid Atlantic job required attendance at home shows, Employer still could not prevail. In order to modify benefits, Employer had to prove that in October 2007, Mid Atlantic had an open position that Claimant could perform, *i.e.*, one that did not involve travel to home shows. Employer did not offer such evidence. Greene testified that some appointment setters are not expected to attend home shows but that it all depended on the needs of the company at the time of hiring. Greene offered no testimony as to Mid Atlantic's needs in October 2007, and whether the specific job open at that time did or did not require travel to home shows. Hawkinson did not know which type of appointment setter job was open when he did his labor market survey because he never asked Greene. It may be that Claimant could have been hired at some point for an appointment setter job that did not require travel, but the critical time period is October 2007 when the labor

market survey was performed. Employer did not prove that Mid Atlantic had an open job that was available to Claimant in October of 2007.[9]

In sum, the Board did not err when it reversed the grant of Employer's modification petition. Accordingly, the order of the Board is affirmed.

MARY HANNAH LEAVITT, Judge

[9] In his brief, Claimant suggests an alternate theory for why the WCJ's grant of the modification was erroneous. Namely, Claimant asserts that the WCJ and Board erred in concluding that Employer did not have to offer Claimant any of the open positions that Employer had. Based on our disposition of the case, we need not address this argument.

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ORDER

AND NOW, this 23rd day of February, 2011, the order of the Workers' Compensation Appeal Board dated April 2, 2010, in the above captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge