



Employer presented the deposition testimony of medical witnesses, Joseph Chesky, M.D., and Gene Levin, M.D., and lay witnesses, Craig Shelly and Kathleen Patton.

Based upon the testimony and evidence presented, the WCJ made the following relevant findings. The WCJ credited the testimony of Claimant and her medical expert and found that Claimant sustained a work-related injury on November 4, 2007 in the nature of a cervical and lumbar sprain. Based upon the testimony of Dr. Levin, which the WCJ also credited, the WCJ found that Claimant became capable of light duty work as of March 26, 2008. Employer offered a light duty position to Claimant by letter dated April 23, 2008. However, the letter did not adequately explain the functions of the referred position. The WCJ found that the letter's shortcomings were adequately addressed by the testimony of Mr. Shelly and Ms. Patton, which the WCJ found credible. Mr. Shelly described the duties of the position and testified that the position was still available to Claimant. The WCJ found that the position offered was within Claimant's physical capabilities as approved by Dr. Levin and was available as of June 19, 2008 – the date of Mr. Shelly's testimony. Claimant did not return to work despite being capable of doing so.

Based upon these findings, the WCJ concluded that Claimant was entitled to total disability benefits for a limited period with a modification to partial disability benefits based upon the availability of light-duty work. By order dated June 29, 2009, the WCJ granted Claimant's claim petition and ordered Employer to pay total disability benefits to Claimant from November 5, 2007 through June 28, 2008, and partial disability benefits thereafter.

From this decision, Claimant filed an appeal with the Board, which affirmed. This appeal now follows.<sup>1</sup> Claimant raises the issue of whether a legally insufficient light-duty job offer to a claimant can be cured by deposition testimony of an employer's witnesses such that a claimant's temporary total disability benefits are subject to modification. Claimant argues the WCJ erred in modifying her benefits as of June 29, 2008 because the written job offer was insufficient as it did not adequately present the functions of the referred position. We disagree.

Preliminarily, we note that the WCJ is the ultimate finder of fact and has exclusive province over questions of credibility and evidentiary weight. Universal Cyclops Steel Corporation v. Workmen's Compensation Appeal Board, 305 A.2d 757 (Pa. Cmwlth. 1973). The WCJ is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part. General Electric Company v. Workmen's Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), petition for allowance of appeal denied, 529 Pa. 626, 600 A.2d 541 (1991). Questions of credibility and the resolution of conflicting testimony, arising from a witness' inconsistent testimony or from the conflicting testimony of two or more witnesses, are within the exclusive province of the fact finder. American Refrigerator Equipment Company v. Workmen's Compensation Appeal Board, 377 A.2d 1007 (Pa. Cmwlth. 1977).

It is not the function of this Court to reweigh evidence and to substitute its judgment for that of the WCJ. Vitelli v. Workmen's Compensation

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<sup>1</sup> This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of appeal board procedures, and whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

Appeal Board, 630 A.2d 923 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 537 Pa. 627, 641 A.2d 591 (1994). Rather, the function of our review is to determine, upon consideration of the evidence as a whole, whether the record contains substantial evidence to support the WCJ's findings. Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Board (Skirpan), 531 Pa. 287, 612 A.2d 434 (1992). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Mrs. Smith's Frozen Foods Company v. Workmen's Compensation Appeal Board (Clouser), 539 A.2d 11 (Pa. Cmwlth. 1988). If the testimony accepted constitutes substantial evidence, the WCJ's findings will not be disturbed even though there may be evidence to the contrary. American Refrigerator.

In a proceeding on a claim petition, the claimant bears the burden of establishing a work-related injury rendering the claimant incapable of performing the time-of-injury job. Vista International Hotel v. Workmen's Compensation Appeal Board (Daniels), 560 Pa. 12, 22, 742 A.2d 649, 654 (1999). If the employer asserts that the claimant can perform some work within his/her medical restrictions, the employer bears the burden of proving that suitable employment is available. Id. (citing Kachinski v. Workmen's Compensation Appeal Board (Vepeco Construction Co.), 516 Pa. 240, 244-45, 532 A.2d 374, 376 (1987)).<sup>2</sup> To

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<sup>2</sup> Generally, issues concerning the availability of modified-duty work arise in the context of an employer's petition to suspend, terminate or modify benefits. The instant matter arose from a proceeding on a claim petition. Once Claimant demonstrated a loss of earning capacity attributable to a work-related injury, the burden of proof associated with job availability is allocated to Employer. Vista International Hotel, 560 Pa. at 28 n.11, 742 A.2d at 658 n.11 (1999); Presby Homes and Services v. Workers' Compensation Appeal Board (Quiah), 982 A.2d 1261, 1264 n.2 (Pa. Cmwlth. 2009). "Workers' compensation judges are vested with the authority to render adjudications on claim petitions which incorporate aspects of modification, suspension or termination where the evidence so indicates, without the necessity of formal

(Continued....)

satisfy this burden, an employer must either: (1) offer to a claimant a specific job that it has available, which the claimant is capable of performing, or (2) establish a claimant's "earning power."<sup>3</sup> Edwards v. Workers' Compensation Appeal Board (MPW Industry Services, Inc.), 858 A.2d 648 (Pa. Cmwlth. 2004); South Hills Health System v. Workers' Compensation Appeal Board (Kiefer), 806 A.2d 962 (Pa. Cmwlth. 2002). When an employer refers a claimant to an available job, the employer is generally required to provide information related to the job classification and job duties such that the claimant can make an informed decision regarding whether the offered position is within his/her capabilities. Eidem v. Workers' Compensation Appeal Board (Gnaden-Huetten Memorial Hospital), 560 Pa. 439, 746 A.2d 101 (2000). Claimants must not be forced to rely on their own speculations and suppositions in making this determination. School District of Philadelphia v. Workmen's Compensation Appeal Board (Stutts), 603 A.2d 682 (Pa. Cmwlth. 1992). Once the employer has satisfied its burden, the burden then shifts to the claimant to demonstrate that he/she has in good faith followed through on the job referral. Id.

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petitions by the employer." Id.

<sup>3</sup> Pursuant to Section 306(b)(2) of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §512(2):

"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.

Here, Employer presented the deposition testimony of Mr. Shelly, Employer's Assistant Administrator. Reproduced Record (R.R.) at 227a. Mr. Shelly testified that based upon the opinions of Dr. Levin, he authored the April 23, 2008 letter offering Claimant a light-duty position with Employer. R.R. at 239a-240a. Attached to the offer letter was Dr. Levin's findings and report from the independent medical examination, which included a physical capacities checklist. R.R. at 242a. Mr. Shelly testified that the specific duties of the job he offered were all paperwork related and were within Claimant's restrictions. R.R. at 240a, 243a. Mr. Shelly further testified Claimant would have the ability to sit or stand and get up and move around as much as she needed. R.R. at 244a. According to Mr. Shelly, Claimant would not have physical interaction with patients. R.R. at 244a-245a. Claimant may be required to lift patient charts, which weigh less than ten pounds. R.R. at 245a. Mr. Shelly further testified that the position was still open and available to Claimant as of the date of the deposition – June 19, 2008. R.R. at 244a.

Ms. Patton, Employer's director of nurses, also testified. Her testimony corroborated Mr. Shelly's testimony. Ms. Patton testified that there was no specific job title for the position offered, but that there were specific duties Claimant could perform that would be helpful to Employer that did not require bending or heavy lifting. R.R. at 307a. Ms. Patton testified that the duties were paperwork related and included preparing resident risk assessments, care plans, auditing of medication administration records, performing nursing office duties as needed, assisting with infection control paperwork, taking doctors' orders and assisting with admissions. R.R. at 308a.

The testimony of Mr. Shelly and Ms. Patton, which the WCJ found credible, constitutes substantial evidence to support a finding that a light duty

position within Claimant's medical restrictions was made available to her. While the initial offer letter itself was inadequate to establish whether the position was within Claimant's capabilities, it was cured by Mr. Shelly's testimony on the date of his deposition. Contrary to Claimant's assertions, there is no requirement that a light duty job offer forming the basis for a modification must be in writing. Although Claimant herself was not present at Mr. Shelly's deposition, her attorney was present. Notice to Claimant's counsel of suitable work availability is imputed to Claimant. Farkaly v. Workmen's Compensation Appeal Board, 516 Pa. 256, 532 A.2d 382 (1987). We, therefore, conclude that the WCJ did not err in modifying Claimant's benefits based upon the testimony of Employer's witnesses.

Accordingly, the order of the Board is affirmed.

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JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Catherine Donohue,	:	
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Petitioner	:	
	:	
v.	:	No. 806 C.D. 2010
	:	
Workers' Compensation Appeal	:	
Board (Zerbe Sisters Nursing	:	
Center, Inc.),	:	
	:	
Respondent	:	

**ORDER**

AND NOW, this 5th day of January, 2011, the order of the Workers' Compensation Appeal Board, at No. A09-1282, dated April 1, 2010, is AFFIRMED.

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JAMES R. KELLEY, Senior Judge