IN THE COMMONWEALTH COURT OF PENNSYLVANIA

George Stanton,	:	
Petitioner	:	
	:	
v.	:	No. 854 C.D. 2009
	:	SUBMITTED: September 18, 2009
Workers' Compensation Appeal Board (SRCF Mercer and Compservices, Inc.),	:	
Respondents	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE JAMES R. KELLEY, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** March 16, 2010

Claimant, George Stanton, petitions for review of an order of the Workers' Compensation Appeal Board (Board) that affirmed an order of a Workers' Compensation Judge (WCJ) that, *inter alia*, granted the modification petition filed by Commonwealth of Pennsylvania-SRCF Mercer (Employer) and denied the review petitions filed by Claimant. We affirm.

The WCJ made the following findings of fact. Claimant, a former corrections officer, was injured while pulling heavy boxes down from a shelf on April 6, 2006. Employer's insurer paid him total disability benefits for a lumbar strain/sprain pursuant to a notice of compensation payable. Claimant had an

average weekly wage of $1352.58, resulting in a weekly compensation rate of $745.

Claimant filed a review petition in October 2006, alleging that his injury should be expanded to include unspecified injuries to the thoracic and cervical spine. Employer filed April 2007 petitions for modification and suspension, arguing that it made a modified-duty job available to Claimant and that he unreasonably refused the job offer. In May 2007, Claimant filed a penalty petition and a petition to review medical treatment, alleging that Employer failed to pay for reasonable, necessary and causally related medical expenses, including prescription medications. In support of his petitions, Claimant testified on his own behalf and presented the testimony of Robert D. Multari, D.O., and Michael K. Matthews, Jr., M.D. The WCJ found Claimant's testimony to be credible only in part and rejected the testimony of his medical experts.[1]

Claimant testified that, at the time of the injury, he felt pain in his back and left leg and between his shoulder blades. He admitted that he was only treated for lower back injuries on the date of the incident. Further, although Claimant initially testified that he did not have any pre-injury pain or treatment for

[1] We will consider the testimony of Claimant's medical witnesses for the limited purpose of ascertaining whether the WCJ issued a reasoned decision. Section 422(a) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 834, provides in pertinent part:

> The [WCJ] shall specify the evidence upon which [he] relies and state the reasons for accepting it in conformity with this section. When faced with conflicting evidence, the [WCJ] must adequately explain the reasons for rejecting or discrediting competent evidence. . . . The adjudication shall provide the basis for meaningful appellate review.

Where, as here, the medical witnesses testified via depositions, the WCJ is required to state an actual objective basis for his credibility determinations. *Clear Channel Broad. v. Workers' Comp. Appeal Bd. (Perry)*, 938 A.2d 1150 (Pa. Cmwlth. 2007).

cervical problems, he later acknowledged that he had suffered a neck injury in 2003. With regard to the proffered modified-duty position, Claimant testified that Employer had offered him a job in the Restrictive Housing Unit (RHU) of the correctional facility, but that he would have contact with prison inmates and would have to respond to any prison emergencies. The WCJ found that Claimant's testimony regarding the proffered position lacked credibility, "inasmuch as he based his testimony upon his personal knowledge of the regular unrestricted duties of an officer in the RHU. This was not the job that was offered." Finding of Fact No. 13.

In August of 2006, Dr. Multari first treated Claimant for the April 2006 work-related lower back injury. Dr. Multari related that Claimant complained only about lower back pain at his first visit and did not complain about problems in his cervical or thoracic area until September 2006. At that time, Dr. Multari treated Claimant for neck-related pain, which he thought was related to Claimant's work injury. Dr. Multari also opined that there was compression of Claimant's cervical spine and that it took time for nerve impingement to occur. Dr. Multari, however, was unaware of Claimant's 2003 treatment for cervical and thoracic pain. Accordingly, the WCJ rejected Dr. Multari's testimony, finding:

> Dr. Multari offered diagnoses for claimant's physical condition that are not part of the work-related injury and are unsupported by the examination findings of various physicians and are not supported by any of the diagnostic studies referenced. Dr. Multari thought that claimant was totally disabled as a result of his lumbar, thoracic and cervical injuries. Dr. Multari was never asked and never offered an opinion as to claimant's physical capabilities with regard to the lumbar injury only. Indeed, Dr. Multari thought that claimant was incapable of any employment because of the medications that he was prescribed.

Finding of Fact No. 13.

Dr. Matthews, a board-certified neurologist, saw Claimant on referral from Dr. Multari and diagnosed Claimant with cervical and lumbar spinal stenosis. Dr. Matthews was unaware of any complaints from Claimant concerning cervical or lumbar problems before 2006 and testified that he, therefore, would have to reassess his diagnosis. Accordingly, because Dr. Matthews had relied upon an inaccurate medical history, the WCJ rejected his opinions.

In support of its petitions, Employer presented the testimony of J. William Bookwalter, III, M.D., a board-certified neurosurgeon, Fred Ruffo, Employer's Deputy Superintendent for Facility Management, and Jeanette Irwin, a human resource analyst. The WCJ found the testimony of all three witnesses to be credible. Dr. Bookwalter, who examined Claimant on December 12, 2006, opined that Claimant had degenerative disc disease, with degenerative changes present on x-rays dating back to 2003. Dr. Bookwalter found no indication that Claimant had radiculopathy or disc herniation of either the cervical or the lumbar spine. Dr. Bookwalter opined that Claimant aggravated his underlying lumbar degenerative disc disease when he suffered his work injury. Dr. Bookwalter further opined that Claimant's cervical and thoracic complaints were unrelated to the work injury, that Claimant could perform light-duty work on a full-time basis, and that Dr. Multari's opinion concerning the delayed onset of neck symptoms was not supported in medical literature. Finally, "Dr. Bookwalter opined that narcotic medications [were] an absolute waste of time and only [perturbed] the entire process when dealing with degenerative disc disease." Finding of Fact No. 7.

Deputy Ruffo testified that Employer offered Claimant a job exclusively in the RHU bubble area, a secure area within the minimum security

correctional facility to which inmates have no access. Claimant's job would entail opening and closing cell doors by pushing a button. There would be no inmate contact or lifting involved in the position and Claimant could perform the job in either a sitting or standing position. Deputy Ruffo admitted, however, that Claimant could have contact with certain inmates while walking from the parking lot to work, that a guard had been attacked recently and that even light-duty personnel would be required to respond to a prison riot. Deputy Ruffo testified that the bubble position remained open.

Ms. Irwin testified that, after obtaining physical capacities information from Dr. Bookwalter and meeting with Employer's officials, she offered Claimant the modified-duty bubble position by letter dated March 7, 2007. Claimant was to return to that position on March 12, 2007, but failed to do so.

The WCJ concluded that Claimant failed to sustain his burden of proof for all three of his petitions. As for Employer, the WCJ concluded that although it failed to sustain its burden of proof regarding the suspension petition, it did satisfy the elements necessary for modifying Claimant's benefits in that it established that he was capable of performing sedentary or light-duty work and had failed to avail himself of the proffered job. Accordingly, the WCJ modified Claimant's disability benefits to $198.50 per week, effective April 11, 2007.[2] Claimant appealed to the Board, which affirmed.[3] Claimant's appeal to this Court followed. We first address the denial of Claimant's review petitions.

[2] Claimant would have earned $1,054.83 per week in the offered position.

[3] The WCJ's denial of Claimant's penalty petition and Employer's suspension petition was not before the Board.

Section 413(a) of the Act, 77 P.S. § 771, in pertinent part, provides that "[a] workers' compensation judge may, at any time, review and modify or set aside a notice of compensation payable . . . if it be proved that such notice of compensation payable . . . was in any material respect incorrect." The party seeking modification bears the burden of proving that a material mistake of fact or law was made at the time the notice of compensation was issued. *ESAB Welding & Cutting Prods. v. Workers' Comp. Appeal Bd. (Wallen)*, 978 A.2d 399 (Pa. Cmwlth. 2009).

Claimant argues that the Board erred in concluding that he failed to meet his burden where the WCJ's decision was not substantiated by the record and did not constitute a reasoned decision. He disagrees with the WCJ's determination that the testimony of Drs. Multari and Matthews lacked credibility. In addition, he maintains that the WCJ erred in finding Dr. Bookwalter to be credible where the doctor failed to provide any reference to relevant medical literature discrediting Dr. Multari's opinions.

In response, Employer emphasizes the well-established principle that fact-finding and credibility determinations are solely within the province of the WCJ and that he is free to accept or reject, in whole or in part, the testimony of *any* witness. *See Joy Global, Inc. v. Workers' Comp. Appeal Bd. (Hogue)*, 876 A.2d 1098 (Pa. Cmwlth. 2005). It reiterates that the WCJ accepted the testimony of Dr. Bookwalter as credible and rejected the testimony of Drs. Multari and Matthews. As for Claimant's specific allegation that Dr. Bookwalter failed to reference any specific medical literature in support of his rejection of Dr. Multari's opinion, it points out that Dr. Bookwalter gave a detailed explanation as to why he believed Dr. Multari's opinion to be inaccurate. Dr. Bookwalter's Deposition, Notes of

Testimony (N.T.) at 34-37; Reproduced Record (R.R.) at 140a-43a. We agree with Employer that those credibility determinations are binding on this Court. *Sell v. Workers' Comp. Appeal Bd. (LNP Eng'g)*, 565 Pa. 114, 771 A.2d 1246 (2001).

Moreover, we note that a WCJ need not specifically evaluate every line of testimony offered to render a reasoned decision, as long as he makes the crucial findings and gives proper reasons for his decision. *Acme Mkts., Inc. v. Workers' Comp. Appeal Bd. (Brown)*, 890 A.2d 21 (Pa. Cmwlth. 2006). Ultimately, a decision is reasoned for Section 422(a) purposes if it allows for adequate review by the Board and this Court under applicable standards of review without further elucidation. *Visteon Sys. v. Workers' Comp. Appeal Bd. (Steglik)*, 938 A.2d 547 (Pa. Cmwlth. 2007). Here, the WCJ thoroughly described his credibility determinations in Findings of Fact Nos. 11 and 13. Clearly, he did not just summarize the testimony and state which testimony he found to be credible. We conclude, therefore, that the WCJ's decision is supported by the record and that he adequately articulated an objective basis for his decision; thus, the decision met the reasoned decision requirement. We turn now to Employer's modification petition.

Claimant argues that the Board erred in affirming the WCJ's grant of Employer's modification petition, maintaining that there was insufficient medical evidence to support the decision. Specifically, Claimant alleges that the alleged job offer was not within his work restrictions, that he had not been released to work due to the side effects of his medications and that he could come into physical contact with inmates while performing the job. In addition, Claimant maintains that the evidence reveals that the position may not be available to him in light of Employer's policy requiring employees with one year of service in the

RHU to undergo a psychological evaluation before returning to that unit. Claimant alleges that he worked in the RHU for one year prior to his injury and that no one made any determination as to whether he would be able to attend or pass such an evaluation.

In *Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Company)*, 516 Pa. 240, 532 A.2d 374 (1987), our Supreme Court concluded that to obtain a modification based on the claimant's return to work, employer must establish (1) medical evidence of a change in condition, or (2) evidence of a referral to a then open job which fits the occupational category for which the claimant has been medically cleared, *e.g.*, light work, sedentary work, etc. After employer has established referral to a suitable job, the claimant must then demonstrate that he has followed through on the referral in good faith. *Id.* If the referral does not result in a job, claimant's benefits should continue. *Id.* Actual availability of employment is established by evidence that the offered job is one that could be performed by the claimant. *Id*.

Our review of the record establishes that Employer offered Claimant work within his physical limitations. Dr. Bookwalter testified, within a reasonable degree of medical certainty, that Claimant could perform light-duty work on a full-time basis and that his medications "don't pose any specific restriction." Dr. Bookwalter's Deposition, N.T. at 42; R.R. at 148a. In addition, Deputy Ruffo testified that Claimant could perform the job either sitting or standing, that the position, for the most part, segregated Claimant from inmates, and that the position remained open. We turn to Claimant's argument regarding the requirement of a psychological evaluation.

First, it is not at all clear that Claimant argued either to the WCJ or in his appeal to the Board that the possibility of a psychological evaluation prevented Employer from proving that the offered position was actually available. Neither the WCJ nor the Board dealt with such an argument in their decisions. Furthermore, in his brief to this Court, Claimant has failed to comply with Pa. R.A.P. 2117(c) and Pa. R.A.P. 2119(e), both of which require the appellant to state the place and manner in which each issue has been preserved. Even assuming, however, that the issue was not waived for failure to assert it to the WCJ and the Board, we do not believe it has merit.

Both Deputy Ruffo and Ms. Irwin testified that it was Employer's policy that employees with one year of experience in the RHU undergo a psychological evaluation in order to return to the unit. Ms. Irwin's Deposition, N.T. at 25; R.R. at 406a; Deputy Ruffo's Deposition, N.T. at 28; R.R. at 357a. Ms. Irwin testified that, although she knew that Claimant had worked in the RHU unit before his work injury, she did not know the duration of his stint there. She further testified that she did not discuss the psychological evaluation requirement with the Superintendent or otherwise investigate the necessity of Claimant submitting to such an evaluation before extending the job to him. She could represent only that Claimant would have to undergo a psychological examination if he had one year of experience in the RHU.

As for Deputy Ruffo, he did not testify that the psychological evaluation requirement would disqualify Claimant. Deputy Ruffo reiterated, however, Employer's policy and its applicability to Claimant:

> Q. Would [Claimant] have to undergo a psychological evaluation then in order to go back into the bubble?

A. No.

. . . .

A. If he's been there a year and he wants to stay, then they [sic] would have to go to evaluation.

Q. And you don't know if he worked a year or not?

A. I have no idea if he's worked a year.

Q. If he worked a year, he would have to undergo a psychological evaluation?

A. Yes.

Deputy Ruffo's Deposition, N.T. at 29; R.R. at 358a.

Although the WCJ noted in Finding of Fact No. 5 that Claimant had worked in the RHU in the past, he did not make a finding as to the precise duration of Claimant's time there. In addition, Claimant's testimony in that regard is somewhat unclear. May 17, 2007 Hearing, N.T. at 13-14, 23; R.R. at 195-96a, 205a. At all events, given the WCJ's decision to credit Claimant's testimony only in part, we cannot speculate as to the exact length of Claimant's past stint in the RHU, let alone how the one-year rule would operate when one was moved to a different, limited-duty position in the RHU with no inmate contact. Finally, there is absolutely nothing in the record to suggest that Claimant had any psychological problems or that the evaluation, if and when Claimant might have to undergo one, would pose any impediment to his remaining in the job. Therefore, it is not at all clear how long Claimant could work at the modified position before he would be subject to the evaluation process, and the notion that the results of such an evaluation would cause him to lose the job is sheer speculation. Suffice it to say that the job was available when offered, at the time of the hearing, and until some

unknown time in the future when he might *possibly* lose it. Should such a contingency occur, of course, Claimant would be entitled to reinstatement of full benefits unless a substitute modified position was offered, but for the present, modification was appropriate.

Accordingly, we affirm the Board's order.

BONNIE BRIGANCE LEADBETTER,
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

George Stanton,	:	
Petitioner	:	
	:	
v.	:	No. 854 C.D. 2009
	:	
Workers' Compensation Appeal Board (SRCF Mercer and Compservices, Inc.),	:	
Respondents	:	

O R D E R

AND NOW, this 16th day of March, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge