

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sam Muzzicato,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Workers' Compensation Appeal	:	
Board (Strow's Plumbing &	:	
Heating, Inc.),	:	No. 897 C.D. 2010
Respondent	:	Submitted: August 13, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: October 15, 2010

Sam Muzzicato (Claimant) petitions for review of the April 15, 2010 order of the Workers' Compensation Appeal Board (Board) affirming the Workers' Compensation Judge's (WCJ) order granting Strow's Plumbing and Heating, Inc.'s (Employer) modification petition. The only issue before this Court is whether there was substantial evidence to support the WCJ's finding that Claimant was capable of performing one of five specified jobs, even though all five jobs required the same vocational capability. For the reasons stated below, we reverse the Board.

Claimant sustained a work-related, low back strain injury on January 8, 2007. Employer accepted the injury by a Notice of Compensation Payable issued April 19, 2007. On February 22, 2008, Employer filed a modification petition alleging that work was generally available to Claimant based on a Labor Market Survey with Earning Power Evaluation. Claimant filed an answer denying the

petition. A hearing was held before the WCJ, at which Employer submitted the deposition testimony of a vocational expert and a medical expert in support of its position, while Claimant testified and submitted the deposition testimony of a vocational expert.

The WCJ found Employer's vocational expert credible and persuasive concerning one position as a hotel front desk clerk, but did not find his opinion credible concerning four other positions he evaluated. The WCJ did not credit Claimant's testimony that he did not have the vocational capability to perform the front desk clerk position, but did credit the remainder of his testimony. Finally, the WCJ found Claimant's vocational expert's opinion that Claimant was unable to perform any of the five evaluated positions not credible. The WCJ granted Employer's modification petition, and Claimant appealed to the Board. The Board affirmed the WCJ, and Claimant appealed to this Court.¹

“[A]n employer may seek modification of a claimant's benefits by either offering the claimant a specific job that it has available that he is capable of performing or establishing earning power through expert opinion evidence.” *Kleinhagan v. Workers' Comp. Appeal Bd. (KNIF Flexpak Corp.)*, 993 A.2d 1269, 1275 (Pa. Cmwlth. 2010) (quotation marks omitted). Both parties stipulated that Employer did not have a position available that would accommodate Claimant's modified duty restrictions. Reproduced Record (R.R.) at 210a. Therefore, Employer

¹ “This Court's scope and standard of 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.” *World Kitchen, Inc. v. Workers' Comp. Appeal Bd. (Rideout)*, 981 A.2d 342, 346 n.5 (Pa. Cmwlth. 2009).

must establish his earning power through an expert. Section 306(b)(2) of the Workers' Compensation Act² provides:

'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.

Claimant argues that the WCJ's determination that he could perform the front desk clerk position was inherently contradicted by her determination that he was incapable of performing the other four positions evaluated, since all five positions required the same vocational capability.

Substantial evidence is such relevant evidence as a reasonable person might accept as adequate to support a conclusion. In performing a substantial evidence analysis, this court must view the evidence in a light most favorable to the party who prevailed before the factfinder. Moreover, we are to draw all reasonable inferences which are deducible from the evidence in support of the factfinder's decision in favor of that prevailing party. Furthermore, in a substantial evidence analysis where both parties present evidence, it does not matter that there is evidence in the record which supports a factual finding contrary to that made by the WCJ. Rather, the pertinent inquiry is whether there is any evidence which supports the WCJ's factual finding. It is solely for the WCJ, as the factfinder, to assess credibility and to resolve conflicts in the evidence[, and] . . . to determine what weight to give to any evidence. As such, the WCJ may reject the testimony of any witness in whole or in part, even if that testimony is uncontradicted.

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

McCabe v. Workers' Comp. Appeal Bd. (Dep't of Revenue), 806 A.2d 512, 515 (Pa. Cmwlth. 2002) (citations omitted). "The WCJ, as fact finder, has exclusive province over questions of credibility and evidentiary weight . . . unless such determinations are made arbitrarily and capriciously, they are binding on appeal." *Ward v. Workers' Comp. Appeal Bd. (City of Philadelphia)*, 966 A.2d 1159, 1164 (Pa. Cmwlth. 2009).

Further:

A capricious disregard of evidence exists when there is a willful and deliberate disregard of competent testimony and relevant evidence which one of ordinary intelligence could not possibly have avoided in reaching a result. The meaning of arbitrary includes founded on prejudice or preference rather than on reason or fact.

Casne v. Workers' Comp. Appeal Bd. (Stat Couriers, Inc.), 962 A.2d 14, 19 n.5 (Pa. Cmwlth. 2008) (quotation marks and citations omitted).

We hold that the WCJ erred in this case by capriciously disregarding competent evidence.

Employer's expert, George Cote (Cote), interviewed Claimant relative to his work history and educational background, and conducted a labor market survey which identified five positions in the Bangor, Pennsylvania area that Claimant was capable of performing. These five positions were identified as: 1) a cashier/courtesy technician at Jiffy Lube; 2) a teller at the Downs of Lehigh Valley casino; 3) a dispatcher at J & J Luxury Transportation; 4) a customer service representative at J.C. Ehrlich Co.; and 5) a front desk clerk at Extended Stay Hotel. Cote developed the job descriptions for these positions based on visits to the companies and consultations with the various managers. R.R. at 97a. During his interview with Claimant, Cote determined that Claimant had lived in Italy, where he attended only four years of formal schooling, until he came to the United States in 1969. R.R. at 77a-78a. Cote

testified that Claimant was limited in his ability to read and write, had basic math skills, and worked jobs that were mainly labor-related. R.R. at 78a-82a. He also indicated that Claimant told him that he did not use computers. R.R. at 107a. Cote did not perform any type of testing to determine Claimant's skill levels, instead his knowledge was based strictly on what Claimant told him. R.R. at 78a. Cote stated that: "I saw him as being suited to do crafts, elemental work, mechanical and industrial, equipment operation, production work, quality control, customer services and attendant services." R.R. at 82a.

In his evaluation of the five positions, Cote indicated that for the Jiffy Lube cashier position, Claimant "would be responsible for accepting cash and/or credit card payments for services rendered The employee would prepare coffee for customers He would check air pressure in tires and vacuum front seats and floors of the customers' automobiles. . . . Complete on-the-job training was provided." R.R. at 85a. The position would also require working with a computerized cash register. R.R. at 107a. Cote opined that this position would be a good fit for Claimant because he was able to communicate well with Cote, had an outgoing personality, and wanted to learn new skills. R.R. at 86a-87a.

For the teller position at the Downs of Lehigh Valley, Claimant would be required to work with large sums of money, either when placing bets, pricing bets or making change, to keep accurate documentation of payouts, and to count and verify all exchanges with customers. R.R. at 87a-88a. This position would also require Claimant to work with a computerized cash register. R.R. at 108a. On-the-job training would be provided. R.R. at 88a. Cote believed this position was appropriate because, again, Claimant would be dealing with customers, and his work as a plumber, i.e., "fitting the parts and making sure that the correct cutting is done,"

provided Claimant with “the same attention to detail that would be needed for a cashier position.” R.R. at 89a.

Next, Cote explained that, in the dispatcher position with J & J Luxury Transportation, Claimant would be:

responsible for providing customer service relating to rental of limos, vans and buses. Employee would be responsible for receiving telephone calls from customers, obtaining pertinent information from customers regarding pickup location, point of destination and establishing a payment, and the employee would relay customer information to the dispatch personnel to establish transport details to meet customer needs. Customer information would be compiled with the use of a computer terminal, but no specific words per minute were required and complete on-the-job training was provided by the employer.

R.R. at 89a-90a. Again, Cote opined that Claimant could perform this position because, “the ability that he has to deal with people so well, I think, would make him an ideal candidate.” R.R. at 90a.

The fourth position, customer service representative at J.C. Ehrlich Company, would require Claimant to be “responsible for receiving inbound calls from customers through a system and scheduling appointments, making changes to already existing appointments for pest control and answering billing questions. Employee would utilize a computer terminal to obtain the requested information. . . . [A]nd complete on-the-job training was provided. . . .” R.R. at 91a-92a. Again, Cote referenced Claimant’s customer service skills for his belief that this position was appropriate for Claimant. R.R. at 92a.

Finally, Cote described that, in the front desk clerk position at the Extended Stay Hotel, Claimant would be “responsible for providing customer service, completing guest registrations and processing money transactions. The employee

would check guests in and out . . . take payment via cash and credit cards and enter pertinent information into the computer system. . . . And again, complete on-the-job training was provided by the employer.” R.R. at 93a. Cote opined that he believed Claimant could perform this position “[b]ecause of his ability to deal with the public because of the complete on-the-job training that’s provided, [and] his basic ability to interact with people.” R.R. at 94a. Thus, Cote opined that Claimant was capable of performing each of the five positions listed.

According to Cote, he was unable to review any of the actual computer programs that Claimant would be expected to use at each of the five companies he evaluated. R.R. at 111a, 113a, 114a-116a. The WCJ based her decision on the fact that Cote’s testimony was not credible concerning the positions at Jiffy Lube, the Downs of Lehigh Valley, J & J Luxury Transportation, and J.C. Ehrlich Co. because Cote was not aware of the extent of computer work required by those four positions. R.R. at 217a. It is clear from the WCJ’s determination, however, that Cote was not aware of the extent of the computer work required for *any* of the five positions listed. Specifically, the WCJ found that Mr. Cote was not able to look at the computer screen at the Extended Stay Hotel to determine the amount of information Claimant would be required to input. R.R. at 215a. The WCJ’s determination that Cote’s testimony concerning the Extended Stay Hotel position was credible while the testimony concerning the remaining four positions was not credible is arbitrary and capricious because the facts concerning the extent of computer usage in all five positions are virtually the same. Since the WCJ’s findings concerning Cote’s testimony are arbitrary and capricious, they do not support the WCJ’s determination that Claimant was capable of performing the work required, specifically the computer work required, for the front desk clerk position. Therefore, the Board erred in

determining that Employer met its burden of establishing Claimant's earning power through its expert.

For these reasons, we reverse the Board's order.

JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 15th day of October, 2010, the April 15, 2010 order of the Workers' Compensation Appeal Board is reversed.

JOHNNY J. BUTLER, Judge