IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Maurizio Gulinello, Petitioner	:	
v.	:	No. 1029 C.D. 2008
Workers' Compensation Appeal Board (City of Pittsburgh), Respondent	:	Submitted: October 17, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: December 17, 2008**

In this petition for review, Maurizio Gulinello (Claimant) assigns error in the suspension of his workers' compensation benefits where the City of Pittsburgh (Employer) failed to issue a notice of ability to return to work. Claimant further alleges a Workers' Compensation Judge (WCJ) erred by failing to award him benefits through the date of her decision. Discerning no merit in either assertion, we affirm.

Claimant worked for Employer as a support clerk. His duties included ordering office supplies and furniture, paying contractors, storing and destroying confidential papers, and loading and unloading trucks. Claimant's duties often required him to travel to other buildings.

In August 2004, Claimant filed a claim petition for benefits alleging an April 12, 2004 work injury.[1] During the course of his employment, Claimant stepped off a curb to cross a street and jerked backwards to avoid being hit by a car. He alleged the incident caused either direct trauma to his low back or an aggravation of a pre-existing low back condition. Claimant sought full disability as of April 13, 2004. Employer filed a timely answer denying the material allegations of the claim petition. Litigation ensued.

During the proceedings, Employer filed a March 2005 notice of compensation payable (NCP) acknowledging Claimant sustained a low back strain and right knee strain on April 12, 2004. The NCP reflected that Claimant: received total disability benefits between April 13 and May 6, 2004; returned to transitional duty work between May 7 and May 20, 2004 with no wage loss; was disabled on May 20, 2004; and, resumed transitional duty work on May 21, 2004 with no wage loss. Employer therefore suspended Claimant's disability benefits.

Employer also filed an April 2005 petition to terminate benefits. Employer alleged Claimant fully recovered from the work injury as of October 18, 2004, the date on which Employer's medical expert conducted an independent medical examination (IME) of Claimant. Employer also averred Claimant could return to his pre-injury position without restrictions.

[1] Prior to the claim petition, Employer filed a notice of temporary compensation payable. It subsequently filed a notice stopping temporary compensation alleging the work injury did not disable Claimant.

Before the WCJ, Claimant testified regarding the work incident giving rise to his injuries. On the day of injury, Claimant finished working. The following day, he reported to work but left early to go to the emergency room. Initially treating with Employer's panel physicians, Claimant returned to work with lifting, bending, sitting, and walking restrictions. Claimant began light duty work in May 2004 in Employer's mailroom. In late August 2004, Employer transferred Claimant to another light duty job in its tax office. He worked in the tax office two days and then left work due to back pain. Claimant has not returned to work.

In October 2004, Claimant treated with Dr. Thomas Kramer, a board-certified orthopedic surgeon (Claimant's surgeon). After examination and medical records review, Claimant's surgeon diagnosed a herniated disc at the L4-5 level as a result of the April 12, 2004 work incident. Due to the location of the herniated disc, Claimant's surgeon recommended conservative treatment and took Claimant completely off work.

Claimant's surgeon referred Claimant to Dr. Russell Gilchrist (Claimant's pain specialist), who is board-certified in physical medicine and rehabilitation. Pain specialist first examined Claimant in October 2004 and eventually performed a discogram and a L4-5 percutaneous disc compression. Neither procedure alleviated Claimant's symptoms of low back pain with radiating pain into the buttocks, calf and thigh. Pain specialist referred Claimant back to his surgeon for surgical evaluation but has not discharged Claimant from care due to an ongoing chronic pain modulation program. Pain specialist did not know Claimant worked light duty until September 2004. He stated Claimant can work so

long as the job allows for frequent changes in position and restricts lifting to 25 pounds.

Employer presented the testimony of Carol Veitch (Supervisor), Control Supervisor in its Department of Finance. Supervisor explained Claimant's duties in the tax office required him to separate, open, review, copy, stack and sort tax documents. She testified Claimant could make frequent changes in position, elevate his legs, and move around the work area as needed. Claimant worked in the tax office for only two days.[2]

Employer also presented the testimony of Dr. Richard Kasdan (Employer's medical expert), a board-certified neurologist and psychiatrist. Employer's medical expert conducted an October 18, 2004 IME of Claimant. Based on his examination and medical records review, Employer's medical expert opined Claimant sustained a lumbar strain and right knee strain as a result of the April 12, 2004 work incident. Employer's medical expert testified the work incident did not cause Claimant's herniated disc and his symptoms did not correlate to a herniated disc at the L4-5 level. Employer's medical expert stated Claimant completely recovered from the April 12, 2004 lumbar strain and right knee strain and he could return to unrestricted work.

[2] In February 2005, Employer suspended Claimant from work due to excessive absenteeism unrelated to a work disability. Claimant's Ex. 6. Claimant failed to respond to Employer's letter and, consequently, Employer discharged Claimant from work in March 2005 for failing to abide by a collective bargaining agreement. Claimant grieved his discharge, the resolution of which is not of record.

The WCJ determined Claimant met his burden of proving an April 12, 2004 work injury in the nature of a lumbar sprain and right knee sprain. Regarding Claimant's ability to perform the light duty work in Employer's tax office, the WCJ found:

> 15. I reject the testimony of [Claimant] that he was not capable of performing the modified sedentary duty work made available to him by [Employer]. Claimant worked a modified duty job in the mailroom between May 7, 2004 and August 30, 2004. Claimant was then moved to a modified duty job in the Tax Preparation Department on August 30, 2004. Claimant worked this position for only two days and alleged that increased pain made him stop working. Claimant admitted during his own testimony that his restrictions were accommodated by [Employer] in this second modified duty position, and in fact, [Supervisor] allowed him to change positions as needed, and do his work either standing or sitting. He was also permitted to walk around if needed, and he could elevate his legs. Claimant's testimony that he was unable to sit, stand, or walk as needed and thus unable to perform this position due to his pain complaints is incredible and is rejected.
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> …
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> 18. I reject [C]laimant's testimony that he was disabled from performing the modified sedentary duty position he was performing on September 2, 2004. … I find that [C]laimant was not disabled from performing that position on or after September 2, 2004 as a result of his work injury or his non-work-related complaints.
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> …
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> 21. I find [Employer] was entitled to a suspension effective September 3, 2004, as modified sedentary duty was available which [C]laimant was capable of performing. I find [C]laimant was capable of performing

> that position considering his work related injury and non-work-related pain complaints.
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> 22. I find [E]mployer is entitled to a termination effective October 18, 2004 when [Claimant] had fully recovered from his work related back sprain and knee sprain.

WCJ Op., 5/30/06, at 15-17. Important for current purposes, the WCJ found Employer was entitled to a suspension of benefits because Claimant stopped working a light duty position he was capable of performing.

Based on the credible testimony of Employer's medical expert, the WCJ found Claimant fully recovered from the April 12, 2004 work injury as of Employer's medical expert's examination. The WCJ further accepted Employer's medical expert's opinion the work incident did not cause Claimant's herniated disc. In accord with the above findings, the WCJ suspended Claimant's benefits effective September 3, 2004 because Employer provided Claimant modified duty work. The WCJ terminated Claimant's benefits as of the October 18, 2004 IME.

Claimant appealed to the Board. Relevant to this appeal, Claimant alleged Employer was not entitled to a suspension of benefits because it failed to issue a notice of ability to return to work. Claimant further maintained the WCJ erred by failing to specify that benefits were payable through the date of her decision. The Board found no error in the WCJ's order relating to these two issues and, therefore, affirmed.[3]

[3] Claimant also alleged Employer's medical expert's testimony was incompetent as a matter of law because the expert failed to recognize an accepted work injury. The Board rejected this claim, specifically comparing the NCP description of the work injury to Employer's medical
(Footnote continued on next page…)

Claimant now appeals to this Court raising the same issues. We are limited to determining whether the necessary findings of fact were supported by substantial evidence, whether errors of law were made, or whether constitutional rights were violated. Pryor v. Workers' Comp. Appeal Bd. (Colin Serv. Sys.), 923 A.2d 1197 (Pa. Cmwlth. 2006).

Claimant first assigns error in the suspension of benefits because Employer failed to comply with the statutory prerequisites of Section 306(b)(3) of the Workers' Compensation Act (Act), relating to notice of ability to return to work.[4] He distinguishes case law holding an employer is not required to issue a notice of availability to return to work under certain circumstances on the basis he stopped working prior to Employer's request for a suspension of benefits.

At the outset, we note, Claimant initiated the instant proceeding by way of a claim petition. A claimant bears the burden of proving all elements

(continued…)

expert's testimony. Employer's medical expert opined Claimant sustained a lumbar sprain and right knee sprain, which were consistent with the injuries described in the NCP. Additionally, the Board noted the WCJ accepted Employer's medical expert's opinion that the April 12, 2004 work incident did not cause Claimant's herniated disc.

Claimant asserted further error in the WCJ's failure to address Claimant's subrogation lien presented on behalf of UPMC Health Plan. The Board agreed and remanded the matter to the WCJ for resolution of this issue. On remand, the WCJ ordered Employer to reimburse UPMC for monies expended for treatment of Claimant's low back sprain to the extent UPMC provided treatment prior to May 30, 2006. The WCJ affirmed her previous order in all other respects. Claimant appealed to the Board a second time preserving the above issues. In this appeal, Claimant does not raise issues addressing the subrogation lien or termination of benefits.

[4] Act of June 2, 1915, P.L. 736, as amended, added by the Act of June 24, 1996, P.L. 350, 77 P.S. §512(3).

necessary to support an award of workers' compensation benefits, including the duration and extent of disability. Inglis House v. Workmen's Comp. Appeal Bd. (Reedy), 535 Pa. 135, 634 A.2d 592 (1993). Not only must a claimant establish a work-related injury, he must also prove the injury resulted in a loss of earning power. Sch. Dist. of Phila. v. Workers' Comp. Appeal Bd. (Lanier), 727 A.2d 1171 (Pa. Cmwlth. 1999).

Here, Employer's issuance of the March 2005 NCP relieved Claimant of the burden of proving the occurrence of a work injury. It did not, however, relieve Claimant of showing the duration and extent of disability. In workers' compensation matters, the term disability is synonymous with loss of earning power. Coyne v. Workers' Comp. Appeal Bd. (Villanova Univ.), 942 A.2d 939 (Pa. Cmwlth.), appeal denied, ___ Pa. ___, ___ A.2d ___ (No. 192 MAL 2008, filed October 28, 2008). The credible evidence proved Employer provided Claimant with occupationally appropriate work. As the WCJ found, Claimant was capable of performing the modified position beyond September 2, 2004. Thus, Claimant failed to prove the work injury caused a loss of earnings.

Moreover, Employer did not have to issue a notice of ability to return to work under the present circumstances. Section 306(b)(3) of the Act provides:

> If the insurer receives medical evidence that the claimant is able to return to work in any capacity, then the insurer must provide prompt written notice, on a form prescribed by the department, to the claimant, which states all of the following:
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> (i) The nature of the employe's physical condition or change of condition.

> (ii) That the employe has an obligation to look for available employment.
>
> (iii) That proof of available employment opportunities may jeopardize the employe's right to receipt of ongoing benefits.
>
> (iv) That the employe has the right to consult with an attorney in order to obtain evidence to challenge the insurer's contentions.

Compliance with Section 306(b)(3) is a threshold burden that must be met in order to obtain a modification or suspension of benefits. Burrell v. Workers' Comp. Appeal Bd. (Phila. Gas Works & Compservices, Inc.), 849 A.2d 1282 (Pa. Cmwlth. 2004). The purpose of Section 306(b)(3) is to require an employer to share new medical information about a claimant's physical capacity to work and its possible impact on existing benefits. Id. However, this Court recognizes an employer is not required to issue a notice of ability to return to work pursuant to Section 306(b)(3) under certain circumstances. Burrell.

Here, Employer's actions did not trigger Section 306(b)(3). Employer did not seek a suspension or modification of benefits based on new medical evidence. Rather, compensation was suspended based on Claimant's actions. Notes of Testimony (N.T.) 11/8/04, at 24; Bureau Ex. B (Notice of Compensation Payable).

In Burrell, this Court held "that it is unnecessary to give a 'notice of ability to return to work' to a person found actually performing work." Burrell, 849 A.2d at 1286. Because Claimant actually returned to work shortly after the

work injury, and then left suitable, available work with Employer, we discern no error in the WCJ's finding Employer was entitled to a suspension of benefits notwithstanding the fact Employer did not issue Claimant a notice of ability to return to work.[5]

Claimant asserts additional error in the WCJ's failure to award indemnity benefits through the date of her decision, May 23, 2006. He argues the WCJ failed to rule on Employer's request for supersedeas and, as a result, Employer had an obligation to pay benefits until the time of WCJ's decision. See 34 Pa. Code §131.43 (supersedeas request is deemed denied unless granted by written order).

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[5] Our decision in Hoover v. Workers' Compensation Appeal Board (Harris Masonry, Inc.), 783 A.2d 886 (Pa. Cmwlth. 2001), upon which Claimant relies, does not compel a different result. There, the employer's medical expert testified the claimant's back injury improved to the degree that the claimant could perform sedentary work. Based on this evidence, the employer's agent testified he could find sedentary work for the claimant. The employer later extended a formal offer of work to the claimant but failed to issue a notice of ability to return to work.

A WCJ suspended the claimant's workers' compensation benefits as of the date of the employer's formal offer of work. We reversed. First, we determined the record lacked evidence the modified job fit within the category of light duty work. See Kachinski v. Workmen's Comp. Appeal Bd. (Vepco Constr. Co.), 516 Pa. 240, 532 A.2d 374 (1987). In addition, we rejected the employer's argument the WCJ could suspend benefits under Section 306(b) of the Act where evidence of a job offer proved the claimant had an earning power equal to his average weekly wage. Procedurally, the employer failed to provide the claimant with a notice of ability to return to work as required by Section 306(b)(3).

Here, however, Claimant returned to modified work shortly after his injury and continued to work light duty until September 2, 2004. Claimant admitted the light duty position fell within his restrictions and Employer accommodated him at all times. Employer did not seek a suspension of benefits based on medical evidence or an offer of suitable work. Rather, the WCJ suspended benefits on the basis Claimant voluntarily left a light duty job he could perform. Findings of Fact Nos. 15, 18.

Claimant's vague argument lacks merit. Here, benefits were suspended when Claimant initially returned to work. Although Claimant failed to establish his right to indemnity benefits thereafter, he contends that Employer was not excused from indemnity payments during litigation where no supersedeas was granted. Claimant suggests that payments should be made, and Employer should recover these amounts from the Supersedeas Fund.

Claimant does not specify the period in question, nor does he contend that he has not been paid benefits which are due and owing to him. Under these circumstances, Claimant's remedy is a penalty petition.

Accordingly, we affirm.

ROBERT SIMPSON, Judge

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O R D E R

AND NOW, this 17th day of December, 2008, the order of the Workers' Compensation Appeal Board is **AFFIRMED**.

ROBERT SIMPSON, Judge