IN THE COMMONWEALTH COURT OF PENNSYLVANIA

George Smith, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Franco Construction), Respondent	:	No. 1108 C.D. 2007
	:	Submitted: November 16, 2007

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: January 16, 2008

George Smith (Claimant) petitions for review from the order of the Workers' Compensation Appeal Board (Board) which affirmed the order of the Workers' Compensation Judge (WCJ) that granted the modification petition of Franco Construction (Employer) and ordered Employer to pay Claimant partial disability benefits at the rate of $21.60 per week.

Claimant worked as a construction laborer for Employer. On September 26, 1991, Claimant suffered a work-related injury. The injury was described in the notice of compensation payable as a sprained right ankle and arm. On May 10, 2001, Claimant petitioned to review benefits to expand the description to include a right rotator cuff tear, a right biceps tendon tear, and mental depression. The WCJ granted the review petition and ordered that the description of Claimant's work-related injury be expanded to include "mental depression; right

rotator cuff tear and status post biceps tenodesis." WCJ's Decision, May 22, 2002, at 8; Reproduced Record (R.R.) at A-041.

On February 25, 2005, Employer petitioned to modify/suspend benefits and alleged that "Claimant failed to pursue offer of position that was within his current work capabilities. This failure to appear and/or attempt employment constitutes bad faith." Petition to Modify/Suspend Compensation Benefits, February 25, 2005, at 1; R.R. at A-003.

Employer presented the deposition testimony of Richard Korber (Korber), president of Employment Alternatives, Incorporated (EAI). Korber testified that EAI provides work opportunities to individuals injured at work who are unable to perform their time of injury jobs. Deposition of Richard Korber, June 20, 2005, (Korber Deposition) at 3.[1] EAI found a job for Claimant in November 2004, but Claimant did not report for work. Korber Deposition at 7; R.R. at A-068. Claimant was subsequently scheduled to begin work as a document preparer with Vital Records Center through EAI on February 14, 2005, but he did not report. Korber Deposition at 8; R.R. at A-069.

Employer also presented the deposition testimony of Lisbeth Mihok (Mihok), a vocational rehabilitation specialist. Mihok conducted a vocational evaluation of Claimant on July 26, 2004. Mihok believed that Claimant was qualified for the document preparer position. Deposition of Lisbeth Mihok, June 20, 2005, at 14.

[1] Portions of the deposition transcripts are not included in the reproduced record.

Employer also presented the deposition testimony of Arnold S. Broudy, M.D. (Dr. Broudy), a board-certified orthopedic surgeon. Dr. Broudy examined Claimant on April 8, 2004, took a history, and reviewed medical records. Dr. Broudy had previously evaluated Claimant in 1997. Dr. Broudy diagnosed Claimant as "status post recurrent tear of the right rotator cuff . . . . He was status post biceps tenodesis . . . . And that he also had some evidence of arthritis of the shoulder." Deposition of Arnold S. Broudy, M.D., July 11, 2005, (Dr. Broudy Deposition) at 18; R.R. at A-138. Dr. Broudy did not consider Claimant fully recovered from his work-related injury because he had less than normal range of motion in his shoulder. Dr. Broudy Deposition at 19; R.R. at A-139. Dr. Broudy stated within a reasonable degree of medical certainty that Claimant was capable of sedentary employment which did not entail any overhead lifting or use of his right arm at or above shoulder level with a maximum lifting restriction of ten pounds. Dr. Broudy Deposition at 19-20; R.R. at A-139 – A140. Dr. Broudy opined that Claimant was physically able to perform the document preparer position. Dr. Broudy Deposition at 21; R.R. at A-141.

Employer also presented the deposition testimony of Patton Nickell, M.D. (Dr. Nickell), board-certified in psychiatry and internal medicine. Dr. Nickell examined Claimant on June 8, 2004, took a history, and reviewed medical records. Dr. Nickell diagnosed Claimant with "major depression, a single episode, one he was currently experiencing of moderate severity on a mild, moderate, severe, psychotic increase in severity." Deposition of Patton Nickell, M.D., July 14, 2005, (Dr. Nickell Deposition) at 20; R.R. at A-161. Dr. Nickell rated Claimant at "50 to 55" on a scale of zero to one hundred on a global assessment of

the overall level of psychological health and functioning. Dr. Nickell Deposition at 22; R.R. at A-163. Dr. Nickell testified that even though Claimant had some persistent depressive symptoms, these symptoms were not severe enough to keep him from performing a job for which he was otherwise qualified. Dr. Nickell Deposition at 24; R.R. at A-165. Dr. Nickell believed that from a psychiatric standpoint Claimant could perform the job of document preparer. Dr. Nickell Deposition at 25; R.R. at A-166.

Claimant testified that when he first received notice of the document preparation position, he took a bus from Monroeville, where he lived, to downtown Pittsburgh, and then took another bus to the South Side where the job was located. Claimant estimated that it was a one hour forty minute trip to the work location. He said that he experienced problems because he

> had to stand all the way [on the bus] in to begin with. I can't take congested places where people are on top of each other. Once I got off with my wife, I was all right. And then I went to the bus on the south side and I had problems just finding the right bus. Once I got to the south side I asked the driver to drop me off at the closest location, and he dropped me off on 10th Street, so I had to walk back from 10th Street to 4th Street, which I had a lot of difficulty with that.

Notes of Testimony, April 18, 2005, (N.T.) at 12; R.R. at A-014. Claimant testified that he can't take his medication if he has to go somewhere because he has a "hard time focusing on where I'm going, what I have to do. I just have a hard time getting out of bed, period." Notes of Testimony, November 17, 2005, at 17; R.R. at A-029.

Claimant presented the deposition testimony of Michael J. Rogal, M.D. (Dr. Rogal), a board-certified orthopedic surgeon and Claimant's treating physician since January 7, 1992. As a consequence of the work-related injury, Claimant underwent the following surgeries: subacromial decompression, right shoulder rotator cuff repair, median nerve exploration in his right upper extremity from the elbow through the carpal tunnel, a Hitchcock tenodesis of his biceps tendon, a re-repair of his rotator cuff, and a lysis of adhesions around the biceps tendon. Deposition of Michael J. Rogal, M.D., September 13, 2005, (Dr. Rogal Deposition) at 7; R.R. at A-202.. Dr. Rogal diagnosed Claimant with chronic mechanical pain symptoms, chronic shoulder pain, and dysfunction of his shoulder. Dr. Rogal Deposition at 9; R.R. at A-204. Dr. Rogal testified that "it would be very difficult for him to be able to function with his shoulder in an employment situation." Dr. Rogal Deposition at 12. Dr. Rogal testified that the document preparer position and the travel necessary to get to the job would be difficult for Claimant to do without pain. Dr. Rogal Deposition at 15; R.R. at A-206.

Claimant also presented the deposition testimony of Jordan F. Karp, M.D. (Dr. Karp), board-certified in psychiatry and neurology and Claimant's treating psychiatrist. Dr. Karp first treated Claimant on May 17, 2004. Dr. Karp initially diagnosed Claimant with major depressive disorder. Over the course of his treatment, Dr. Karp expanded his diagnosis to "major depressive disorder recurrent. That's as specific as I've been able to get, moderate severity since then. It really is a dynamic illness, it gets better, but it comes back. He doesn't have a single episode illness." Deposition of Jordan F. Karp, M.D., October 6, 2005, (Dr. Karp Deposition) at 14; R.R. at A-218. Dr. Karp concluded that Claimant could

not perform the document preparer position because of the transportation and the repetitive movement of his arm. Dr. Karp explained that if Claimant's pain were exacerbated, his depression could worsen. Dr. Karp Deposition at 20; R.R. at A-221.

The WCJ granted Employer's modification petition and directed Employer to pay Claimant partial disability benefits at the rate of $21.60 per week. The WCJ ordered Employer to reimburse Claimant's counsel for costs of prosecution in the amount of $3,799.69. The WCJ denied Employer's suspension petition. The WCJ found Korber and Mihok credible. He rejected Claimant's testimony where it conflicted with Korber and Mihok. The WCJ found little to differentiate between Dr. Nickell and Dr. Karp. The WCJ made the following relevant finding of fact:

> 12. Considering the medical evidence presented, I find the testimony of Dr. Broudy to be more credible and convincing than that of Dr. Rogal, the claimant's treating physician. Dr. Rogal opined that claimant was not able to perform the position of Document Preparer even though he admitted that he had not reviewed the job description and knew little details of the job such as what in fact the claimant would be pulling, reaching and grasping in performing that job, or how many times a day the claimant would be required to do these tasks. Dr. Rogal's opinion that the claimant was not able to perform this position is not consistent with his position that it would be reasonable for the claimant to actually try and perform the job to determine whether it would cause him pain or not.

WCJ's Decision, August 9, 2006, Finding of Facts No. 12 at 4.

Claimant appealed to the Board which affirmed.

Claimant contends[2] that the Board misapplied Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Company), 516 Pa. 240, 523 A.2d 374 (1987) when it affirmed the grant of Employer's modification petition because the Board failed to evaluate whether Claimant could physically and psychologically tolerate a significant daily commute by bus.[3]

Initially, Claimant contends that the Board erred when it failed to properly apply Kachinski. The employer bears the burden of proof to modify a claimant's benefits based on a claimant's alleged ability to return to work. In Kachinski, our Pennsylvania Supreme Court adopted the following requirements which an employer must meet to satisfy its burden to modify compensation payments:

> 1. The employer must produce medical evidence of a change in the employee's condition.
>
> 2. The employer must produce evidence of a referral or referrals to a then open job (or jobs), which fits the occupational category which the claimant has been given medical clearance e.g, light work, sedentary work, etc.
>
> 3. The claimant must then demonstrate that he has in good faith followed through on the job referral(s).
>
> 4. If the referral fails to result in a job then claimant's benefits should continue.

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[2] This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

[3] Claimant also contends that the Board failed to determine if the WCJ issued a reasoned decision and that critical findings of fact by the WCJ were not supported by substantial evidence. Because of this Court's disposition of the Kachinski issue, this Court need not address these issues.

Kachinski, 516 Pa. at 252, 532 A.2d at 380.

In terms of whether a position is available, our Pennsylvania Supreme Court explained in Kachinski:

> [A] position may be found to be actually available, or within the claimant's reach, only if it can be performed by the claimant, having regard to his physical restrictions and limitations, his age, his intellectual capacity, his education, his previous work experience, and other relevant considerations, such as his place of residence.

Kachinski, 516 Pa. at 251, 532 A.2d at 379.

This Court has determined that a claimant's commute is a relevant factor in an evaluation of whether a job is available. In Roadway Express, Inc. v. Workmen's Compensation Appeal Board (Palmer), 659 A.2d 12 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 543 Pa. 699, 670 A.2d 1245 (1995), Scott Palmer (Palmer) had suffered a work-related injury and received benefits. Roadway Express, Inc. (Roadway), Palmer's employer, petitioned to suspend benefits and alleged that it offered Palmer a dispatcher's job in Greenville, South Carolina at wages equal or greater to his time of injury wages but Palmer declined the offer because he did not want to work as a dispatcher. Palmer answered that he did not accept the offer because the position was not within his physical limitations and was not within reasonable proximity to his residence. The referee determined that the dispatcher position was unavailable to Palmer and denied the suspension petition.[4] The Board affirmed. Roadway, 659 A.2d at 13-15.

[4] At the time, WCJs were known as referees. The referee also ruled on other petitions which are not relevant to the Court's discussion here.

Roadway petitioned for review with this Court which affirmed. This Court determined:

> Here, Claimant [Parker], who resides in Charlotte, North Carolina, was offered a dispatcher job in Greenville, South Carolina, 120 miles away from Claimant's [Parker] residence. As a dispatcher, Claimant [Parker] would have to work twelve-hour shifts for seven consecutive days, followed by seven days off. . . . Although both medical experts testified that Claimant [Parker] could physically perform the work duties of a dispatcher, Dr. Joyce, Employer's [Roadway] own medical expert, testified that Claimant [Parker] could not perform the work duties of a dispatcher if he was also commuting 120 miles to and from work each day. . . . Dr. Joyce further testified that if Claimant [Parker] took the dispatcher job, Claimant [Parker] would mentally break down within a week because of a psychological overlay with regard to his injuries. . . . We believe that this evidence is sufficient to support the referee's finding that the dispatcher job in Greenville, South Carolina was not actually available to Claimant [Parker]. . . . (Citations and footnotes omitted).

Roadway, 659 A.2d at 18-19.

This Court confronted a similar situation in Goodwill Industries of Pittsburgh v. Workmen's Compensation Appeal Board (Friend), 631 A.2d 794 (Pa. Cmwlth. 1993). Gertrude Friend (Friend) suffered a work related injury while in the employ of Goodwill Industries of Pittsburgh (Goodwill). Goodwill petitioned to suspend Friend's benefits and alleged that there was light duty work available to Friend at Goodwill's location on the South Side of Pittsburgh. The referee concluded that while there was light duty work available at that location it was not reasonable for Friend to work there because of the distance from her home, the time and expense of travel, and the low income the job provided. Goodwill

appealed to the Board which remanded on the basis that the referee should not have considered the economics of the position and directed the referee to determine whether a thirty mile commute would place the position outside of Friend's geographic reach. The referee determined the position was outside Friend's reach. The Board affirmed. Goodwill, 631 A.2d at 794-795.

Goodwill petitioned for review with this Court. The issue before this Court was whether the referee erred when he found that a twenty hour per week, light duty job on the South Side of Pittsburgh was unavailable to Friend because it was thirty miles from her residence in Ambridge with a three hour daily commute by bus which involved four transfers. Goodwill, 631 A.2d at 795. This Court determined:

> Although other Ambridge residents work in Pittsburgh, some of whom obviously use the available public transportation at issue here, that does not mean that another resident would accept a four-hour per day job involving a three-hour per day bus commute. This job was outside of Claimant's [Friend] geographic area, not because others from her community would not accept work in the City, but because the Referee found that the three-hour per day bus commute when compared with the four-hour work day was not reasonable for other persons as well as for Claimant [Friend].
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> . . . .
>
> A referee as factfinder must have some latitude in determining what is 'available' to a specific claimant on the basis of the numerous factors set forth in Titusville [Hospital v. Workmen's Compensation Appeal Board (Ward), 552 A.2d 365 (Pa. Cmwlth. 1989)]. This 'totality of circumstances' approach does not rob the availability determination of the objectivity which our Court sought to impose in Scheib [v. Workmen's Compensation Appeal Board (Ames Department Store), 598 A.2d 1032 (Pa. Cmwlth. 1991)]. Obviously, although the test to be applied . . . may not be based upon

> the subjective personal preferences of the claimant as to job location, cases involving relatively long commutes and relatively short work days must be examined on their individual fact patterns as deemed appropriate for a reasonable person in the position of the claimant.

Goodwill, 631 A.2d at 796.

Here, Claimant asserts that Employer failed to meet its burden under Kachinski because neither Dr. Broudy nor Dr. Nickell addressed the proposed job's impact on Claimant's chronic pain, its aggravation of his depression, and the effect of the one hour and forty minute bus trip. Claimant asserts that neither of Employer's medical witnesses rendered an opinion whether Claimant's chronic pain and depression would be aggravated by the commute. Essentially, Claimant argues that the job was unavailable to him because the length and difficulty of the commute would aggravate his chronic pain and depression.

Claimant explained his difficulties with traveling for one hour and forty minutes from his home in Monroeville to the work site on the South Side of Pittsburgh.

When asked whether Claimant could handle the bus trip to the South Side, Dr. Rogal responded:

> The second question was whether or not riding an hour and 40 minutes to and from a job in a bus or two buses is a reasonable thing for him. I suspect that would be pretty uncomfortable for him with his shoulder condition.
>
> When you have chronic pain, it's difficult to be put into those kinds of environments, not only from bouncing around in the bus, but just having to sit on the bus and get

> back and forth. So I think that would be a difficult thing for him, as well.
>
> As a physician, I would certainly prefer if he didn't have to ride an hour and 40 minutes back and forth on a bus to get to a job. . . .

Dr. Rogal Deposition at 15; R.R. at A-206.

Dr. Karp testified that in his opinion Claimant could not perform the document preparer position because of "the transportation and the repetitive movement of his arm." Dr. Karp Deposition at 20. Dr. Karp further explained that pain caused by those activities could make Claimant's depression worse. Dr. Karp Deposition at 20.

Employer's medical witnesses did not address the availability of the position in the context of the commute and its effect on Claimant. Mihok testified on cross-examination that Claimant would have to catch a bus in Monroeville between 6:30-7:00 a.m. to arrive at the job location by 8:30. Mihok explained that Claimant could arrange his hours to best suit him as the organization was open from 4:30-4:30. Mihok Deposition at 52-53.

Claimant correctly points out that neither the WCJ nor the Board addressed the impact of Claimant's commute on the availability of the offered job. Given the importance placed on this factor in cases such as Goodwill, this Court must remand this case to the Board with instructions to remand to the WCJ to address whether Claimant's commute and its effect on his work-related injuries, if any, would change the availability of the job.

Accordingly, this Court vacates and remands for proceedings consistent with this opinion.

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BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

George Smith, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Franco Construction), Respondent	:	No. 1108 C.D. 2007

O R D E R

AND NOW, this 16th day of January, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is vacated and this case is remanded to the Workers' Compensation Appeal Board with instructions to remand to the Workers' Compensation Judge for proceedings consistent with this opinion.

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BERNARD L. McGINLEY, Judge