IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Roberts,	:	
Petitioner	:	
	:	
v.	:	No. 1126 C.D. 2008
	:	Submitted: September 5, 2008
Workers' Compensation Appeal	:	
Board (Thomson Consumer	:	
Electronics),	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI[1] FILED: December 22, 2008

Joseph Roberts (Claimant) appeals from an order of the Workers' Compensation Appeal Board affirming the Workers' Compensation Judge's (WCJ) decision granting the petition to modify workers' compensation benefits filed by his Employer, Thomson Consumer Electronics. We affirm.

Claimant sustained a work-related injury described as a cervical strain on August 4, 1992. A notice of compensation payable was issued acknowledging

[1] This case was reassigned to the author on November 11, 2008.

the injury and Claimant began receiving total disability benefits. In 1994, Claimant underwent fusion surgery on his back and in 1995, a second surgery was performed on his cervical spine. Both in July 1997 and December 2000, Claimant's benefits were modified when he returned to work with a loss of earnings. Claimant filed a petition to reinstate his benefits as of July 31, 2001, when Employer laid him off due to its plant closing, but subsequently that petition was withdrawn after Claimant and Employer entered into an agreement that provided for the reinstatement of temporary total disability benefits for Claimant.

On June 21, 2002, Employer filed another petition to modify Claimant's benefits, this time as of May 30, 2002, alleging that Claimant had been released to return to work and suitable work had been made available to him; however, he had refused to submit an application or cooperate and return to work to suitable employment. Claimant filed an answer denying the allegations.

At the hearing before the WCJ, Employer offered the expert testimony of Carson J. Thompson, M.D. (Dr. Thompson) who examined Claimant twice and found that Claimant still had complaints of back pain, stiffness in his neck and his lower cervical area of the fusion. Dr. Thompson opined that most of Claimant's symptoms were consistent with a post-fusion syndrome. When Dr. Thompson examined Claimant for the first time on May 1, 2001, Claimant was still working, and he recommended that he be limited to, at most, light-duty, sedentary work. At his second exam on February 14, 2002, Claimant still complained of pain in his neck and Dr. Thompson found no significant change in his neurologic status from his first exam. He again opined that Claimant could work in a light-duty or

sedentary capacity. Dr. Thompson reviewed a job description for a telesurveyor with Dicenzo Personal Staffing and opined that Claimant would be capable of performing the duties of that position. He acknowledged that Claimant had good days and bad days due to his symptomatology which were consistent with his work injury.

Employer also provided testimony from Renee Wallace (Wallace) of Expediter Corporation (Expediter) who testified that she found a position within Claimant's sedentary/light-duty restrictions as a telesurveyor making business-to-business and some customer survey calls using only a telephone. It was a full-time 40-hour per week job paying $10 per hour. Claimant was given a description of the job and was asked to complete an employment application and submit it to the employer in preparation for an interview that was scheduled for March 5, 2002. He was also scheduled for training on March 4, 2002. However, Claimant did not submit the application and the interview did not take place. He eventually submitted the application in June and appeared for the interview on June 18, 2002, and was offered the job. Training was to begin on July 2, 2002, but did not take place because Claimant did not submit tax documents as required. Although follow-up letters were sent to him, he never complied and never advised Wallace of any problem. She was aware that he told the potential employer that the office was hot, but the employer informed Claimant that could be rectified by opening the office door. She finished by stating that the job was still open and available.

Claimant testified that since he was injured in 1992 and had the two surgeries, he believed that his condition had worsened. He was receiving

medications and nerve blocks from his treating physician, Vithalbhai Dhaduk, M.D. (Dr. Dhaduk), who was also a neurologist and a neurosurgeon. Claimant acknowledged that he received a job offer from Expediter, but that he could not work in a little room with no air conditioning and that he had constant pain in his neck and could not sit with a headset to make telephone calls. He also said that he could not concentrate due to his pain.

Claimant also offered the expert medical testimony of Dr. Dhaduk, who stated that he had been treating Claimant since October 9, 2000. He confirmed that Claimant had a herniated disc in his neck, fusion in January 1994, and a second surgery on the cervical spine in 1995. Dr. Dhaduk opined that Claimant's condition was worsening during the time he treated him after October 2000. In August 2002, his symptoms grew much worse with muscle spasm, pain, tingling, numbness and weakness. Dr. Dhaduk stated that Claimant attempted to do light-duty work, but could not work at all. He opined that Claimant was not able to do any consistent work.

The WCJ found Claimant and Dr. Dhaduk credible and determined that Claimant remained totally disabled. The WCJ found that Dr. Thompson's testimony that Claimant could not perform substantial gainful activity on a sustained basis corroborated Claimant's and Dr. Dhaduk's testimony. Therefore, Claimant could not perform the duties of a telesurveyor when the position was offered to him and denied Employer's modification petition by a decision dated October 31, 2003.

Employer filed another modification petition on July 8, 2005, alleging that Claimant had failed to make good-faith applications for suitable job positions referred to him within his physical and vocational restrictions. Claimant filed an answer denying that he had acted in bad faith in applying for jobs.[2]

Employer offered the expert testimony of Benjamin Nakkache, M.D. (Dr. Nakkache), a board-certified neurosurgeon who examined Claimant on February 23, 2004, and April 26, 2005. He stated that based upon his examinations of Claimant and his review of the medical records, he felt that Claimant was capable of doing light-duty work on a full-time basis. He testified that he was sent and reviewed a group of job descriptions by Employer's vocational expert, Michael Smychynsky (Smychynsky), including those requiring walking and standing, and he believed that Claimant was capable physically of performing any of those jobs. He did not believe that Claimant was totally disabled, but that he was partially disabled and could perform up to light-duty work without any problems or complications. On cross-examination, Dr. Nakkache stated that he believed most patients had good results with cervical spine surgery as opposed to lumbar surgery, and in his own practice, he rarely had to refer cervical surgery patients for pain management. He conceded, however, that Claimant still had pain his neck. He did not believe, though, that the pain was disabling in nature as Claimant only took minimal amounts of medications.

[2] Claimant filed a utilization review petition which was also before the WCJ and was granted by the WCJ. That petition is not before the Court for review on appeal.

Smychynsky testified that after meeting with Claimant and determining his ability to perform basic aptitudes, including math and spelling, and relying on Dr. Nakkache's opinion that Claimant was capable of performing sedentary to light-duty work, he supplied Claimant with a copy of a notice of ability to return to work with the report of Dr. Nakkache. He then referred Claimant by certified first-class mail to eight positions that were within his vocational capabilities and physical restrictions.[3] One of those positions was a job with Securitas USA as a security attendant. The work was listed as light and sedentary, full-time, 40 hours per week at $8 per hour. He stated that he observed the position performed and created a job description as he did with all of the positions. He instructed Claimant to apply on May 18, 2005, at 10:00 a.m. Smychynsky testified that Claimant arrived at the job to fill out the application, and the minimum requirements for the job were to have a clear criminal history and to be able to effectively communicate in the English language. On the job application, Claimant was required to check whether he had the ability to effectively speak, read and write English. Claimant answered "no" to this

[3] Those positions were 1) an arcade attendant with Superior Amusements at the Steamtown Mall. Smychynsky testified that Claimant never even opened the referral letter because it was returned to Smychynsky unopened; 2) a gate attendant security position at Eagle Lake housing development. Smychynsky stated that Claimant had filled out an application, but the employer stated that he would not be considered for the position based on his appearance; 3) Petro Travel Plaza as a cashier, but Claimant never applied for the position; 4) a merchant patroller at the Viewmont Mall. Claimant had applied for that job, but was not considered for the position; 5) U.S. Security at Citizens Bank as a security attendant, but Claimant did not apply for that position; 6) insert operator position at The Scranton Times. Claimant never applied for the position; 7) gas attendant at Falcon Oil, but Claimant did not apply for the position. Smychynsky explained that he personally showed up at the appointed time at each place of business when Claimant was supposed to fill out the application so he knew whether Claimant had appeared or not.

question. When Claimant was told that if he did not change his answer to "yes" he would not be considered for the position, Claimant refused to change his answer. He also refused to list any references. Smychynsky testified that it was his opinion that Claimant would not be hired for this position due to his responses on the application. Employer offered into evidence an actual copy of the job application from the Securitas USA position which Claimant had to fill out.

Claimant testified that he was in constant pain and did not believe he could work. He recalled applying for the security position on May 18, 2005, and meeting Smychynsky at the job site and filling out an application. He stated that he was a poor speller and asked the girl who was taking the application to give him a dictionary, which she did. He testified that the application question actually stated: "Can you read, write and spell the English language?" Claimant stated that he could read and write, but could not spell very well and he would not lie on an application. That is why he answered "no" to the question. Claimant stated that he had applied for all of the other jobs, but had not received any offers.[4] On cross-

[4] Claimant testified that he had applied for a job at Superior Amusement and at Eagle Lake. However, Employer provided evidence at the hearing that the application for Eagle Lake indicated Claimant did not complete the application, did not provide references and stated on his application that he was on workers' compensation since his employer closed. Eagle Lake's employer noted concerns over Claimant's "staggering" with "blood shot eyes" and "appearance" and would not consider Claimant's appearance and conduct while at employer. Claimant, nonetheless, alleged that he filled out the application with the head of security. Claimant also testified that he went to Petro Travel Plaza to apply for a position, but that business knew nothing about him coming to apply for a job. Claimant stated that he filled out an application for a merchant patroller at the Viewmont Mall, but the person in charge would not sign the sheet from the agency because it was an official record. Claimant stated that he was neither informed about the security job at Citizen's Bank nor aware of the job until learning about it at the hearing.

examination, Claimant confirmed that he still had a driver's license, and that he still drove himself from time to time as he had done when he had driven himself to two other security jobs to apply for positions at The Scranton Times and Falcon Oil.

Claimant again offered into evidence the expert testimony of Dr. Dhaduk who was still treating him for his pain. In 2006, Dr. Dhaduk testified that Claimant suffered from chronic progressive severe radiculopathy which meant that pain in his neck radiated down into his arms with tingling, numbness and weakness. He also had trouble sitting and riding in a car and had trouble standing and walking. Dr. Dhaduk stated that Claimant had two surgeries which were not successful to the point that he could resume whatever he was doing prior to the injury, and Claimant came to his office every six weeks for medication. Dr. Dhaduk admitted on cross-examination that he had not sent Claimant for any diagnostic tests since 2000 because Claimant came in with recent EMGs and MRIs. Dr. Dhaduk further stated that he did not believe that Claimant was capable of performing any of the positions he had been referred to; however, on his better days, he might be able to do some light-duty work, but he was incapable of doing light-duty work everyday.

The WCJ found Dr. Nakkache's testimony more credible than Dr. Dhaduk's testimony regarding Claimant's physical capabilities and found Smychynsky's testimony more credible than Claimant's concerning the job application for the security position. The WCJ then found that Claimant failed to respond in good faith to a job referral within his abilities and granted Employer's

modification petition by a decision dated May 23, 2007. Claimant appealed to the Board, which affirmed the WCJ's decision, and this appeal by Claimant followed.[5]

I.

Claimant first contends that the Board erred in affirming the WCJ because Employer failed to meet its burden of proof regarding a modification petition. He argues that under *Kachinksi v. Workmen's Compensation Appeal Board (Vepco Construction Company)*, 516 Pa. 240, 532 A.2d 374 (1987), Employer must show that his medical condition has improved in order to seek a modification of benefits, and it failed to do so in this case. He further relies on our Supreme Court's decision in *Lewis v. Workers' Compensation Appeal Board (Giles & Ransome, Inc.)*, 591 Pa. 490, 919 A.2d 922 (2007), for the proposition that an employer must "adduce medical evidence that the claimant's current physical condition is different than it was at the time of the last disability adjudication." *Id.*, 591 Pa. at 501, 919 A.2d at 928. Claimant argues that the medical evidence does not support a change in his condition, and the WCJ failed to acknowledge the prior decision of his total disability. Specifically, he points out that he was injured in 1992 and totally disabled from 1994 through 1997, then partially disabled from 1997 to 2001, then totally disabled again from 2001 to 2002 and ongoing. In October 2003, the WCJ found him totally disabled from any employment relying on Dr. Dhuduk's testimony. None of the physicians were

[5] Our scope of review of the Board's decision is limited to determining whether constitutional rights have been violated, whether an error of law was committed, or whether findings of fact are supported by substantial evidence. *Morella v. Workers' Compensation Appeal Board (Mayfield Foundry, Inc.)*, 935 A.2d 598 (Pa. Cmwlth. 2007).

currently able to testify that his condition improved, and there is no testimony that he suffers from less pain. Employer argues that it met its burden of proving a change in Claimant's condition because Claimant had returned to light-duty work for Employer following his work injury and prior to Employer's plant closing and through Dr. Nakkache's testimony which the WCJ accepted as credible.

Section 413 of the Workers' Compensation Act,[6] which addresses the modification of a claimant's benefits, provides that the WCJ may modify benefits "at any time…upon proof that the disability of an injured employee has increased, decreased, recurred, or has temporarily or finally ceased…" 77 P.S. §772.[7] Further expounding upon Section 413 of the Act, our Supreme Court in *Kachinski* set forth the following four-part test for an employer seeking to modify a claimant's benefits to follow:

> 1. The employer who seeks to modify a claimant's benefits on the basis that he has recovered some or all of his ability must first produce medical evidence of a change in condition.

[6] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §772.

[7] Notably, in *Lewis*, our Supreme Court explained that Section 413 referred to a change of disability while *Kachinski* referred to a change of condition, and the two terms were not synonymous. "Disability" referred to a loss of earning power while a "change of condition" referred to a change in the claimant's physical well being which affected his ability to work. In order to terminate benefits on the theory that a claimant's disability has changed, the employer's petition had to be based upon a change in the claimant's physical condition. Only then could the WCJ determine if the change in the physical change had effectuated a change in the claimant's disability or earning power. *Lewis*, 591 Pa. at 497, 919 A.2d at 926.

> 2. The employer must then produce evidence of a referral (or referrals) to a then open job (or jobs), which fits in the occupational category for 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.

Kachinski, 516 Pa. at 252, 532 A.2d at 380. We believe that Employer met its burden of proving a change in Claimant's medical condition from the previous modification petition it filed on June 21, 2002, to the most recent modification petition it filed on July 8, 2005.

In the previous modification petition in 2002, Claimant's physician, Dr. Dhaduk, opined that Claimant physically could not perform any consistent work and that Claimant tried to perform light-duty work, but could not. Because he was found credible, the modification petition was denied. However, in the 2005 modification petition, the one presently before this Court, the WCJ found employer's physician, Dr. Nakkache, credible, stating the following, in relevant part:

> 4. On February 21, 2006, the Defendant took the deposition testimony of Dr. Benjamin Nakkache. Dr. Nakkache is a board certified neurosurgeon. He examined the Claimant at the request of the Defendant on February 23, 2004, and again on April 26, 2005. The doctor testified that based upon his two (2) examinations of the Claimant, his review of medical records, and his physical examination of the Claimant, **he felt that the**

> **Claimant was indeed capable of doing light duty work on a full-time basis.** The doctor testified that he was sent a group of job descriptions by Mr. Michael Smychynsky and that he reviewed those job descriptions. The doctor identified those job descriptions for the record and they were affixed to his deposition. According to the doctor, **the Claimant would be capable physically of performing any of these jobs. The doctor testified that he does not believe that the Claimant is totally disabled but that he is merely partially disabled.** Dr. Nakkache said the claimant could perform up to light duty work without any problems or complications.
>
> On cross-examination, Dr. Nakkache stated that he believed that most patients get good results with cervical spine surgery as opposed to lumbar surgery. The doctor testified that he was aware that the Claimant had two surgeries in his neck. The doctor stated that these surgeries were performed at two different levels and consisted of discectomy and fusion. The doctor testified that he had examined post surgical MRI's of the Claimant's cervical spine.

(WCJ's May 23, 2007 Decision at 2.) (Emphasis added.) The WCJ did not find Dr. Dhaduk credible and made this finding:

> 5. Dr. Dhaduk is a neurosurgeon who has been treating the Claimant since October of 2000….Dr. Dhaduk testifies that the Claimant suffers from chronic progressive severe radiculopathy which means that pain in his neck radiates down into his arms with tingling, numbness and weakness….Dr. Dhaduk testified that the claimant had two surgeries performed in his neck but that these surgeries were not successful to the point that he could resume whatever he was doing prior to the injury….On cross-examination, Dr. Dhaduk conceded that he had not sent the Claimant for any diagnostic tests since 2000…**The doctor testified that he did not believe that the Claimant was capable of performing any of the positions that he had been referred to.**

> According to Dr. Dhaduk, Claimant, on his better days, **might be able to do some light duty work but that he would be incapable of doing light duty work everyday.**

(WCJ's May 23, 2007 Decision at 2.) The WCJ then went on to make the next finding which indicated that he relied on Dr. Nakkache's testimony that at the time he saw Claimant, Claimant could do light-duty work, showing that *there had been a change in Claimant's condition since the last modification petition*:

> 8. With respect to the Claimant's ability to work, this Judge has considered the respective testimonies of the two (2) doctors. It is noted by this Judge that it is not in dispute that the Claimant returned to light duty work for his employer following his surgery and that the Claimant remained at this light duty work until the plant closed. Presumably, if the plant had not closed, the Claimant would still be doing a light duty job. *Dr. Dhaduk's testimony seems to state that the Claimant has been disabled since the time that he underwent his surgery. Dr. Dhaduk's testimony does not explain how the Claimant became completely disabled when he was able to do light duty work for at least six (6) years following his surgeries. In addition, this Judge believes that Dr. Dhaduk's testimony is less than credible because he says that the Claimant has difficulty in walking and standing. This is not consistent with a cervical injury. The testimony of Dr. Nakkache that the Claimant is capable of working at light duty is consistent with the fact that the claimant did work at light duty for many years following his surgery and is consistent with the functional capacities evaluation which was done of the Claimant*. For this reason, the testimony of Dr. Nakkache is accepted as fact and the testimony of Dr. Dhaduk is rejected. (Emphasis added.)

(WCJ's May 23, 2007 Decision at 7.)

Because finding of fact no. 8 explains the WCJ's reasoning, i.e., that Employer presented medical evidence that Claimant's physical condition had changed from "totally disabled" and not being able to walk and stand, according to Dr. Dhaduk, to being only "partially disabled" and able to work light-duty, including walking and standing, according to Dr. Nakkache, the WCJ made a finding that Claimant's condition had changed. Therefore, the WCJ did not err in concluding that Employer met its burden of proving that Claimant's condition had changed from the prior modification petition to the present modification petition, *Lewis*, and for purposes of the first prong of the *Kachinski* test.

II.

Claimant then argues that the WCJ erred in finding that he did not apply in good faith under the third prong of *Kachinski* to the jobs that were presented to him because he applied or presented to each job referral that he received, and the one isolated incident at the security attendant position cannot constitute bad faith.[8]

The WCJ made the following findings regarding Claimant's testimony on his job search:

> 9. This Judge has carefully considered the testimony of the Claimant and has had the opportunity to observe the

[8] Claimant also argues on appeal that: 1) many of the positions he was referred to were not actually open positions or were not located where he was instructed to go; and 2) Smychynsky's testimony that Claimant would have been hired for the security attendant position if he had filled out the application properly was hearsay. However, because he did not raise these issues before the Board, they are waived before this Court. *See* Pa. R.A.P. 1551(a).

> Claimant's bearing and demeanor as he testified. *This Judge has compared the Claimant's testimony concerning his job **applications** with the testimony of Mr. Smychynsky concerning those **applications***. It is noted by this Judge that Mr. Smychynsky only witnessed the Claimant's first job application, the application to the security position in Dunmore. This Judge has considered Mr. Smychynsky's account of this job application with the testimony of the Claimant concerning the job application. *It is the opinion of this Judge, based upon the Claimant's bearing and demeanor, that the Claimant is a less than credible witness.* Mr. Smychynsky is more credible than the Claimant on the issue of the claimant's job application at the security firm in Dunmore on May 18, 2005.
>
> 10. It is found as fact by this Judge, based upon the testimony of Dr. Nakkache and the testimony of Mr. Smychynsky, that the security guard position in Dunmore was medically and vocationally appropriate for the Claimant. It is found as fact by this Judge that the Claimant responded no when he was asked on a job application if he could read, write and communicate in the English language. This Judge specifically rejects the claimant's testimony that the question asked him if he could spell. This Judge also finds as fact that the Claimant failed to list any references on the job application. This Judge finds as fact that the Claimant did not apply for the security job position in Dunmore on May 18, 2005, in good faith.

(WCJ's May 23, 2007 Decision at 7.) (Emphasis added.) Although Claimant insists that the WCJ only focused on the security attendant position and was required to consider that Claimant applied to all of the positions when determining if he acted in bad faith, it is clear that the WCJ listened to all of Claimant's testimony regarding his application to all of the positions, and did not find Claimant to be a credible witness. Because the WCJ is the ultimate factfinder and

sole arbiter of credibility in a workers' compensation proceeding, *Rissi v. Workers' Compensation appeal Board (Tony DePaul & Son)*, 808 A.2d 274 (Pa. Cmwlth. 2002), we will not disturb those findings on appeal.

Accordingly, the order of the Board is affirmed.

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DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Roberts, Petitioner	:	
v.	:	No. 1126 C.D. 2008
Workers' Compensation Appeal Board (Thomson Consumer Electronics), Respondent	:	

O R D E R

AND NOW, this 22nd day of December, 2008, the order of the Workers' Compensation Appeal Board, dated May 21, 2008, at A07-1175, is affirmed.

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DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Roberts,	:	
Petitioner	:	
	:	
v.	:	No. 1126 C.D. 2008
	:	Submitted: September 5, 2008
Workers' Compensation Appeal Board	:	
(Thomson Consumer Electronics),	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY SENIOR JUDGE McCLOSKEY FILED: December 22, 2008

I respectfully dissent. I write here to emphasize that the Workers' Compensation Judge (WCJ) in this case never made a finding of a change in the physical condition of Joseph Roberts (Claimant). In an October, 2003, decision, another WCJ had found Claimant totally disabled and unable to perform any work on a sustained basis as a result of constant pain and muscle spasm in his neck, as well as pain, numbness and tingling into his extremities.

In the present case, in his finding regarding the testimony of Employer's medical expert, the WCJ notes that said expert testified that Claimant was capable of performing light-duty work. However, the WCJ references no testimony in this finding regarding how Claimant's physical condition had changed or improved since the prior WCJ determination. I believe such a finding is required based upon our Supreme Court's decision in Lewis v. Workers' Compensation Appeal Board (Giles), 591 Pa. 490, 919 A.2d 922 (2007), as well as

our recent decision in Prebish v. Workers' Compensation Appeal Board (DPW/Western Center), 954 A.2d 677 (Pa. Cmwlth. 2008).

Further, I believe that the WCJ in this case made an improper inference that a change of condition occurred based solely on testimony concerning a change in disability or earning power. I believe it is this type of factual leap, from a finding of capability to work to an inferred finding that a physical change has occurred, that our Supreme Court was attempting to eliminate in Lewis. While the Court's decision in Lewis mandates a finding that a physical change has occurred, the WCJ and the majority breach the absence of such a finding in this case by inferring that the testimony of Employer's expert that Claimant can perform a light-duty job was the equivalent of a finding that a change in condition had occurred. I cannot agree with such an inference.

For these reasons, I would vacate the order of the Workers' Compensation Appeal Board and remand the matter to the Board, with specific instructions to remand to the Workers' Compensation Judge, for further findings.

JOSEPH F. McCLOSKEY, Senior Judge