IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Arthur Lewis,	:	
Petitioner	:	
	:	
v.	:	No. 1128 C.D. 2008
	:	Submitted: September 19, 2008
Workers' Compensation Appeal	:	
Board (National Freight, Inc.),	:	
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 FILED: October 9, 2008

Arthur Lewis (Claimant) appeals from an order of the Workers' Compensation Appeal Board (Board) affirming the decision of the Workers' Compensation Judge (WCJ) granting the petition filed by National Freight, Inc. (Employer) to modify his disability benefits because his physical restrictions did not allow him to return to his pre-injury job, he did not qualify for Employer's light-duty program, and Employer had no light-duty work available for him.

On October 5, 2000, Claimant was working as a truck driver when he sustained a hernia/groin strain during the course and scope of his employment with Employer. The injury was recognized by the issuance of a notice of compensation

payable and provided for weekly benefits in the amount of $496 based upon a pre-injury average weekly wage of $744.07. Pursuant to a stipulation approved by a WCJ order dated May 24, 2002, Claimant's benefits were reinstated for total disability between October 31, 2001, through March 25, 2002, when Claimant returned to work for Employer in a modified-duty position and executed a supplemental agreement stating that he would receive partial disability benefits from March 25, 2002 onward. Claimant underwent surgery on October 31, 2002, to repair his left inguinal hernia.

On February 1, 2006, Employer filed a modification petition alleging that work was generally available to Claimant as of October 10, 2005, the day an independent medical examination was performed. Claimant filed an answer denying the allegations. At that time, Claimant was receiving total disability benefits because he was no longer working at the modified-duty position.

At the hearing before the WCJ, in support of the modification petition, Employer offered the expert testimony of Arnold Baskies, M.D. (Dr. Baskies), a board-certified surgeon who had performed between 2,000 and 3,000 inguinal hernia repairs. Dr. Baskies examined Claimant twice, first on August 2, 2004, and next on October 10, 2005. He reviewed numerous medical and surgical reports and listened to Claimant's complaints of pain. He saw that Claimant walked with an abnormal gait which he found unusual after a hernial repair. He diagnosed Claimant with postherniorrhapy pain syndrome of unknown etiology. Dr. Baskies also completed a physical capacities form on August 2, 2004, indicating that he did not believe that Claimant could drive at that time. However, he revised that

decision and concluded that Claimant could return to work full-time with restrictions and could perform sedentary work,[1] and Dr. Baskies issued a "notice of ability to return to work" form, an LIBC-757 form, dated October 19, 2005. At no time did Dr. Baskies state that Claimant was permanently disabled. Claimant did not provide any rebuttal medical evidence.

Dr. Baskies also testified that he reviewed three job analyses regarding jobs that were available for Claimant which were prepared by Mary McGuire (McGuire), a certified vocational case manager and certified rehabilitation counselor licensed and accredited to perform labor market surveys and earning power assessments under the Workers' Compensation Act (Act).[2] On November 22, 2005, he opined that Claimant was able to perform a telemarketer job with Fanelli Home Improvement Company; a valet parking attendant position with Healthcare Parking Systems of America; and a telephonic interviewer with American Interviewing Services.

Paul Abrams (Abrams), Employer's Risk Manager for six and one-half years, testified that he was contacted by McGuire in November 2005 regarding any light-duty jobs available for Claimant with Employer given his physical restrictions. He also stated that she faxed him the physical capacities form from Dr. Baskies dated October 18, 2005, that showed that Claimant was released to

[1] Dr. Baskies specified that Claimant could stand and walk for an hour; drive for up to four hours; use his hands extemporaneously and without restrictions; but he could not bend at the waist, squat, climb, kneel, push or pull, reach overhead, crawl or use his feet.

[2] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§1-1041.4, 2501-2708

sedentary duty and could not return to work as a truck driver. He responded to her by e-mail on December 6, 2005, and told her that he could not accommodate Claimant because Claimant's restrictions were permanent as he could not return to truck driving. Abrams explained that due to that restriction, Claimant was eliminated from the light-duty program because that program was designed to get employees who had light-duty or sedentary restrictions back to their original job in 30-day intervals, which he would not be doing. Abrams stated that the program was not intended for employees with permanent restrictions which he believed Claimant had based on the physical capacities form. In any event, Abrams stated that the light-duty program was at full capacity as of November 2, 2005, with no positions available because there were three or four drivers in the program on light-duty. Abrams was not asked and did not state whether he ever received and responded to McGuire's September 23, 2005 letter.

McGuire testified that she was a vocational expert who interviewed Claimant on September 8, 2005, to conduct an initial vocational evaluation to determine his educational abilities, scholastic aptitudes and the completion of a transferable skills analysis to aid in a labor market survey and ultimately an earning power evaluation. She opined that Claimant's earning capacity was $240 to $400 per week. She stated that she forwarded a letter to Abrams on September 23, 2005, to determine whether alternative employment was available, but when she received no response, she sent another letter dated November 2, 2005, indicating that she had made several attempts to reach Abrams to conduct an onsite job analysis of his pre-injury truck driver position and to determine if alternative

work was available. Ultimately, Abrams told her that no work was available for Claimant.

McGuire further stated that based on her evaluation of Claimant and lack of work available by Employer, as well as Dr. Baskies' LIBC-757 form releasing Claimant to sedentary work, she found other appropriate employment opportunities for Claimant within his physical capabilities. Specifically, McGuire testified that she found seven positions that were open and available at the time of the labor market study which was completed in November 2005. Further, through contacts of employment agencies, there were an additional five sedentary positions available, all within Claimant's physical restrictions. She ultimately determined that three positions were suitable for Claimant by conducting a job analysis for them and actually viewing each job. She then sent the job analyses to Dr. Baskies for review. After receiving his approval, she determined that they were open and available on November 11, 2008, or November 21, 2008.

Claimant also testified that he injured himself when he slipped and fell out of the back of the trailer truck he was on and ended up on his knees. When he got up, he felt that he pulled something in his groin. He stated that he had two surgeries, but still had terrible pain in his left testicle which had worsened over time with no relief. Claimant stated that there was no position in which he was comfortable, he did not sleep well, and if castration would help, he would get it done. He testified that he last worked in the summer of 2003, but had looked for some work as a guard more recently because he preferred to work by himself and

not be around people. He also stated that he had trouble reading and spelling and only achieved the 10th grade in high school.

The WCJ granted Employer's modification petition finding that Employer met its burden of proving that as of November 28, 2005, Claimant had an earning power of $240 per week which entitled Employer to modify Claimant's benefits to the partial disability rate of $336.04 per week. The WCJ also found that Employer did not have the burden of proving that at the time of injury, Employer did not have work available to Claimant within his restrictions in order to have an earning power assessment completed. Further, relying on *Burrell v. Workers' Compensation Appeal Board (Philadelphia Gas Works and Comp. Services),* 849 A.2d 1282 (Pa. Cmwlth. 2004), the WCJ found that there was no provision in the Act that required the insurer to possess proof that the time-of-injury employer had no specific job for the claimant in order to file a modification petition based upon the completion of an earning power assessment.[3]

Claimant appealed to the Board which affirmed the WCJ's decision stating that Employer was not obligated to establish that it did not have an

[3] Finally, the WJC found that Employer properly complied with Section 306(b) of the Act, 77 P.S. §512(3), when it issued the LIBC-757 dated October 19, 2005, in a prompt manner, and even if it was not prompt, it was irrelevant because the medical evidence which really required the issuance of the LIBC-757 was Dr. Baskies' report. Claimant argues on appeal before this Court, as he did before the WCJ, that the WCJ erred by granting the modification petition because the insurer did not provide prompt written notice of his ability to return to work on a form prescribed by the Department of Labor relative to a change in his physical condition. However, because this issue was not raised before the Board, it is waived on appeal. *See* Pa. R.A.P. 1551(a).

available job prior to undertaking a labor market survey. The Board explained that there was no requirement for an employer to prove the absence of specific jobs being available prior to undertaking a labor market survey, but rather, if an employer had a specific job vacancy that the employee was capable of performing, the employer had to offer that job to the employee before it could rely on expert testimony of earning power for a modification of benefits. The Board further found that because Claimant's restrictions did not allow him to return to his pre-injury job, he did not qualify for the light-duty program and, therefore, there was no light-duty work available for him with Employer. This appeal by Claimant followed.[4]

The only issue Claimant raises on appeal is that the WCJ erred in granting Employer's modification petition because Employer failed to establish that it did not have appropriate, available work for Claimant. More specifically, Claimant argues that it was not until after Employer sought a modification of Claimant's benefits and until after the labor market survey was completed and that survey was forwarded to Employer that Employer determined that there was no work available for Claimant. Claimant also points out that nowhere in Dr. Baskies' physical capacities form does it state that his condition was permanent.

[4] 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).

Claimant directs our attention to 34 Pa. Code §123.301(a) to support this argument. That section provides:

> (a) For claims for injuries suffered on or after June 24, 1996, if a specific job vacancy exists within the usual employment are within this Commonwealth with the liable employer, *which the employee is capable of performing*, the employer shall offer that job to the employee prior to seeking a modification or suspension of benefits based on earning power.
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> * * *
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> (c) The employer's duty under subsections (a) and (b)[5] may be satisfied if the employer demonstrates facts which may include the following:
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> * * *
>
> (4) No job vacancy exists within the usual employment area.

Initially, we note that contrary to Claimant's timeline of events, the WCJ found McGuire credible that she performed a labor market study in November 2005; that Abrams' credibly testified that he responded to McGuire on December 6, 2005; that there were no light-duty jobs available for Claimant; and Employer filed its modification petition on February 1, 2006.

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[5] Subsection (b) provides, in relevant part:

> (b) The employer's obligation to offer a specific job vacancy to the employee commences when the insurer provides the notice to the employee required by section 306(b)(3) of the act (77 P.S. §512(b)(3)) and shall continue for 30 days or until the filing of a Petition for Modification or Suspension, whichever is long.

As for Claimant's contention that Employer failed to establish that it did not have work available for Claimant, Abrams testified that when he received the physical capacities form from Dr. Baskies dated October 18, 2005, it showed that Claimant was released to sedentary duty and he could not return to work as a truck driver. Abrams believed that meant Claimant was permanently restricted, explaining as follows:

> Q. Could you explain for the Judge why the restrictions as given to you would not fit within those light duty restrictions? [the light duty program]
>
> A. Sure. Our return to work program is a – or I'm sorry, our light duty program is a return to work tool that we use to get an employee who has a light duty or sedentary restriction back to their original job function. In Mr. Lewis's case, *he has permanent restrictions* which will not allow him to return to a truck driver. So because of that, it was not a fit where we could get him into the program to get him back to his original job, because based on the restrictions, he will not be able to get back to that function. (Emphasis added.)

(Abrams' August 1, 2006 Transcript at 10-11.) Claimant's counsel never objected to this line of questioning or asked Adams on cross-examination why he determined that Claimant was permanently disabled from driving when the physical capacities form stated otherwise. Nonetheless, the WCJ found Adams' testimony credible that he believed Claimant could not go back to truck driving despite the fact that nowhere on the physical capacities form did Dr. Baskies state that Claimant was permanently disabled from driving. Specifically, the WCJ made the following finding:

41. I find as facts that: (a) As of October, 2005, National Freight had a light-duty program, which is a return-to-work tool to get employees who has light duty or sedentary duty restrictions back to the pre-injury job. (Abrams deposition, pages 10-11). (b) Mr. Abrams considers the Claimant's restrictions to be permanent, which would not allow him to return to truck driving, and the Claimant did not qualify for the light duty program. (Id.) Reasoning Comment: It is noted that there was no medical testimony that the Claimant's restrictions were permanent. On the other hand, the testimony of Dr. Baskies indicates that there was little change in the restrictions between August, 2004, and October, 2005. Furthermore, there is no indication on the Estimated Physical Capacities Form that these restrictions are temporary. Therefore, the belief of Mr. Abrams, that the Claimant's restrictions were permanent, was a reasonable belief. It is recognized that the Claimant had previously returned and worked at a light duty position. (N.T. 3/8/06, page 30). That was, however, some years ago. One of the issues in this proceeding is whether work was available to the Claimant as of October, 2005. The credible and persuasive testimony of Mr. Abrams establishes that as of October 18, 2005, light duty work was not available to the Claimant.

42. I find as facts that: (a) Because the Employer considered the Claimant's restrictions to be permanent as of October 18, 2005, the Claimant was not qualified for the Employer's light duty program and light duty work was therefore not available at National Freight as of October 18, 2005. See Id. page 11 and the totality of Mr. Abrams' testimony. (b) The light duty program first referenced in Finding 41 above, was in effect as of October 18, 2005, and remained in effect as of August 1, 2006. (Id. page 14). (c) As of on or about November 2, 2005, when Mr. Abrams recalls being contacted by Ms. McGuire, National Freight's light duty program was at full capacity with no positions available. (Id. page 8, lines 48 and page 11, line 10-page 12, line 19). Reasoning Comment: As indicated in Finding 45 below, Ms. McGuire testified as to sending a letter to Mr. Abrams dated September 23, 2005. There is on

> persuasive evidence that Mr. Abrams saw the September 23, 2005 correspondence. He did however, acknowledge being contacted in November, 2005. See the totality of Mr. Abrams' testimony and see especially Abrams' deposition, page 8, lines 4-8. In any event, the credible testimony of Ms. McGuire as well as that of Mr. Abrams establishes that his only communication to Ms. McGuire occurred on December 6, 2005. In this regard, see Finding 43 below.
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> 43. I find as a fact that Mr. Abrams e-mailed Ms. McGuire on December 6, 2005, and told her that the Employer could not accommodate light duty. (Id. page 15.)

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 his findings of fact. Because there was not a job with Employer that Claimant was capable of performing, Employer satisfied the requirements under 34 Pa. Code §123.301(a).

Accordingly, the order of the Board is affirmed.

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DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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	:	
v.	:	No. 1128 C.D. 2008
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Workers' Compensation Appeal	:	
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Respondent	:	

O R D E R

AND NOW, this 9th day of October, 2008, the order of the Workers' Compensation Appeal Board, dated May 21, 2008, at A07-1488, is affirmed.

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DAN PELLEGRINI, JUDGE