IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Charles Ricci,	:	
Petitioner	:	
	:	
v.	:	No. 1253 C.D. 2012
	:	Submitted: December 28, 2012
Workers' Compensation Appeal	:	
Board (MMI Electrical Contractors),	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: January 24, 2013

Charles Ricci (Claimant) petitions for review of the order of the Workers' Compensation Appeal Board (Board) affirming the decision of a workers' compensation judge (WCJ) that granted the petition of MMI Electrical Contractors (Employer) to modify Claimant's benefits pursuant to the Pennsylvania Workers' Compensation Act (Act).[1] We affirm.

On February 1, 2003, Claimant sustained a work-related injury described in a notice of temporary compensation payable as a "SPRAINED/L SIDE

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

RADICULOPATHY" to his "LOW BACK AREA." Claimant had returned to work intermittently after the injury but eventually Employer filed a notice of compensation payable acknowledging an aggravation of the previously accepted injury and compensation resumed.

In January 2006, Employer filed a petition to modify compensation benefits based upon a Labor Market Survey/Earning Power Assessment which was denied by the WCJ because Employer had not met its burden of proving that the positions identified in the Labor Market Survey/Earning Power Assessment were vocationally suitable for Claimant, actually available to him, and within his physical capabilities. In December 2009, Employer filed another petition to modify compensation benefits based upon a Labor Market Survey/Earning Power Assessment alleging that work was available that Claimant was capable of performing as of November 30, 2009, and asking that Claimant's benefits be modified according to the wages available from such work.

Before the WCJ, Employer submitted the deposition testimony and report of Rosemary Hieronymous (Hieronymous), a Licensed Professional Counselor who testified based on her vocational assessment interview with Claimant and Stephen Horowitz, M.D.'s (Dr. Horowitz) medical evaluation that eight of the ten job positions she found were available to Claimant because Dr. Horowitz found that two were not within his capabilities. Hieronymous testified that she contacted Employer in January 2009 regarding the availability of a position with Employer, but she did not receive a written response from Employer until September that no work was available. Employer sought to introduce into evidence the September 1, 2009 letter

from its president to Hieronymous stating that there were no available positions, but the WCJ sustained Claimant's hearsay objection to the letter's admission and Hieronymous's testimony in this regard.[2]

Employer submitted the deposition testimony of Dr. Horowitz who opined, based on his examinations of Claimant and his review of various medical records, that Claimant could return to a lighter sedentary position and that Claimant was capable of performing all but two of the positions if he could change positions as needed.

Claimant testified that his current symptoms involved pain in his lower left back, numbness in his left leg, numbness in the foot and pain that radiates at varying intensity. Claimant stated that he cannot sit for more than an hour at maximum before feeling extreme pain and that sitting for 30 to 40 minutes "is really pushing it."

Claimant also presented the deposition testimony of Geoffrey Temple, D.O. (Dr. Temple), who diagnosed Claimant with a work-related L4-5 disc injury

[2] It should be noted that while Employer's letter may have constituted impermissible hearsay, Hieronymous's testimony that Employer had no available positions to offer to Claimant was admissible. Expert testimony, "although based upon data not admissible in evidence, is legally competent if that data is of the type reasonably relied on by an expert in the particular field in forming an opinion on the subject." *Acme Markets, Inc. v. Workmen's Compensation Appeal Board (Pivalis)*, 597 A.2d 294, 298 n.3 (Pa. Cmwlth. 1991) (citation omitted). While the WCJ did not make any findings with respect to the availability of a position with Employer, Hieronymous's testimony regarding her understanding that Employer did not have an available position to offer to Claimant constitutes competent evidence to support such a WCJ finding.

with subsequent laminectomy and two subsequent surgeries as well as lumbar radiculopathy. Dr. Temple reviewed the job information from Hieronymous and opined that Claimant could not perform any of those jobs. Dr. Temple also opined that Claimant could perform part-time sedentary work with the conditions that he would normally miss days when he didn't feel well, days when he was in a lot of pain or days when he had to take more medication.

Claimant also presented the deposition and live testimony of John Dieckman (Dieckman), a certified vocational expert. Dieckman met with Claimant to review Hieronymous's vocational report to decide whether it was appropriate or not. Dieckman visited the ten job locations identified by Hieronymous and opined that eight of the named jobs were inappropriate while two of the jobs were "arguably appropriate" in that they were marginally within Claimant's physical and vocational limitations, and that Claimant could learn to perform the duties of the positions even though he was a weak candidate for the jobs.

Finding Dr. Horowitz's and Hieronymous's testimony credible and Dr. Temple's and Dieckman's not, the WCJ found that Employer met its burden of establishing Claimant's residual earning power.[3] However, the WCJ modified

[3] The WCJ rejected Claimant's argument that Employer failed to meet its purported burden of proving work availability, stating:

> a. Claimant avers that Employer did not comply with 34 Pa. Code §123.301 in failing to demonstrate that it did not have work available which Claimant was capable of performing. Specifically, Claimant argues that the only such indication presented by employer was the hearsay letter of [Employer's president]. However, the Commonwealth Court has determined that Claimant has the duty to

(Footnote continued on next page…)

Hieronymous's conclusion that Claimant had an average earning power of $383.00 per week, instead determining that based on Hieronymous's credible testimony, that Claimant had an average earning power of $316.32 per week. Claimant appealed to the Board, which affirmed the WCJ's decision, and this appeal by Claimant followed.[4]

The sole claim raised by Claimant is that the WCJ erred in granting Employer's modification petition because Employer had the burden to present evidence that it did not have a suitable position as part of its case-in-chief under Section 302(b)(2) of the Act[5] and Section 123.301(a) and (c) of the Department of Labor and Industry's regulations.[6]

(continued…)

> place into the record prima facie evidence that a position was available with Employer that he was physically capable of performing during the time period between the issuance of the Notice of Ability to Return to Work and the filing of the Petition to Modify Compensation Benefits. Kleinhagan v. WCAB (KNIF Flexpack Corp.), 993 A.2d 1269[, 1275] (Pa. Cmwlth. 2010). Insofar as Claimant has presented no evidence or testimony that any such position was available, his duty was not met.

(WCJ Decision at 15.)

[4] Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence, and whether constitutional rights were violated. *Sysco Food Services of Philadelphia v. Workers' Compensation Appeal Board (Sebastiano)*, 940 A.2d 1270, 1272 n.1 (Pa. Cmwlth. 2008).

[5] Added by the Act of June 24, 1996, P.L. 350, *as amended*, 77 P.S. §512(2). Section 302(b)(2) states, in pertinent part:

(Footnote continued on next page…)

(continued…)

> (2) "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. … *If the employer has a specific job vacancy the employe is capable of performing, the employer shall offer such job to the employe*…. (Emphasis added).

[6] 34 Pa. Code §123.301(a), (c). Section 123.301(a), (c) states:

> (a) For claims for injuries suffered on or after June 24, 1996, if a specific job vacancy exists within the usual employment area 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*.
>
> * * *
>
> (c) *The employer's duty under subsections (a) and (b) may be satisfied if the employer demonstrates facts which may include the following*:
>
> (1) The employee was notified of a job vacancy and failed to respond.
>
> (2) A specific job vacancy was offered to the employee, which the employee refused.
>
> (3) The employer offered a modified job to the employee, which the employee refused.
>
> (4) *No job vacancy exists within the usual employment area*. (Emphasis added.)

Our interpretation of Section 302(b)(2) of the Act and Section 123.301(a) and (c) of the Department of Labor and Industry's regulations began with *Burrell v. Workers' Compensation Appeal Board (Philadelphia Gas Works)*, 849 A.2d 1282 (Pa. Cmwlth. 2004). In that case, regarding the employer's burden of proof regarding whether it has a specific position available, we explained:

> [Section 306(b)(2)] altered an employer's burden of proof in modification proceedings. There is no longer a requirement that it establish the existence of actual job referrals; instead, an employer must only show that the claimant is able to perform his previous work or that he can engage in any other "substantial gainful employment" in his employment area.
>
> "Thus, in order to prevail in seeking a modification of benefits, an employer must either: (1) offer to a claimant a specific job that it has available, which the claimant is capable of performing, or (2) establish "earning power" through expert opinion evidence...."
>
> Neither the express language of Section 306(b)(2) nor the cases decided under it require proof of the absence of specific jobs with employer as a prerequisite to expert testimony of "earning power." While the statute requires an employer to offer an available position if one exists, it does not require employer to prove the non-existence of such a position. Nor does the statute preclude a claimant from proving the existence of such a position as a defense to modification.

Burrell, 849 A.2d at 1287 (citations omitted).

In *Rosenberg v. Workers' Compensation Appeal Board (Pike County),* 942 A.2d 245 (Pa. Cmwlth. 2008), with three judges dissenting, we addressed what

the employer's burden is when a claimant introduces uncontradicted evidence that a new worker had replaced her and the WCJ did not address that evidence in granting a modification of the claimant's benefits. We explained:

> This testimony raises the defense that the position Claimant was actually performing was available for her continuing employment at the time she was terminated.
>
> Section 306(b)(2) of the Act speaks in mandatory language on this point: "If the employer has a specific job vacancy the employe is capable of performing, the employer shall offer such job to the employe." Recognizing that the Act does not address presentation of evidence, we are mindful that the burden of proof may be placed on a party who must prove existence of a fact rather than on a party who must prove its non-existence.
>
> However, where, as here, the question of an available, suitable job with the employer is raised with evidence, the employer ignores the question at its peril. As with all other elements necessary to succeed in a modification petition, once the issue is raised by evidence of a possible opening with employer, the employer has the burden of proof. Consistent with the plain language of the Act, once the issue is raised with evidence, satisfaction of this element of proof is a prerequisite to employer's reliance on expert testimony of earning power.

Rosenberg, 942 A.2d at 250-51 (citations omitted).

The dissent, however, would have found that the Employer has the burden, stating that:

> [S]ection 306(b)(2) requires an employer that relies on expert testimony to establish earning power to establish the absence of a suitable position with the employer as part of

> its case-in-chief. First, such a procedure is eminently sensible. In the seminal workers' compensation case of *Barrett v. Otis Elevator Co*., 431 Pa. 446, 246 A.2d 668 (1968), the Supreme Court noted that when the existence or nonexistence of a fact can be established by one party much more easily than by the other party, the burden may be placed on the party who can discharge it most easily. Whether an employer has a suitable position available is a matter peculiarly within that employer's knowledge and is not likely to be within the claimant's knowledge. Whatever inkling an employee might have concerning possible positions cannot compare to the comprehensive knowledge of the employer of its own operations. Enforcement of the mandatory duty to offer a suitable job if one is available plainly should not be made to turn on the chance that an individual employee, perhaps one among hundreds or more, somehow gains knowledge of a suitable position somewhere in the employer's business.

Id. at 254 (Smith-Ribner, J., dissenting).

Based on the foregoing, in *Kleinhagan*, we affirmed our previous holdings, stating:

> [I]n interpreting Section 306(b)(2), we previously found that while Section 306(b)(2) provides that the employer shall offer the claimant a specific job if it has one available, it does not require proof of the absence of specific jobs with the employer as a prerequisite to pursuing modification. [*Burrell*]. Rather, we stated that the claimant may present proof of the existence of such a position as a defense to modification. *Id.* The holding of Burrell has since been distinguished by [*Rosenberg*].
>
> In *Burrell*, modification was sought after the claimant was discovered working alternative employment via surveillance evidence. In [*Rosenberg*], however, like the present matter, the employer sought modification based on

> the contents of a labor market survey. This Court, in [*Rosenberg*], held that the claimant still had the duty to place into the record prima facie evidence that a position was available with employer that he was physically capable of performing during the time period between the issuance of the Notice of Ability to Return to Work and the filing of the modification petition. We stated, however, that once the claimant has done so, the employer bore the burden of proof.

Kleinhagan, 993 A.2d at 1275.

While acknowledging that those cases held that an employer does not bear such a burden in obtaining a suspension of benefits, Claimant argues that this Court should reconsider this binding precedent and adopt the reasoning of the dissent in *Rosenberg* as to the meaning of Section 302(b)(2) of the Act. We decline to do so, especially when, even if we were inclined to do so, benefits still would be suspended.

Under established precedent, the WCJ did not have to consider whether Employer had available a suitable job because Claimant did not present any evidence demonstrating such as a defense to modification. However, even under the *Rosenberg* dissent, which placed the burden on the employer to show that it did not have an available job, and while the WCJ did not make any finding in this regard because he did not need to do so, Employer presented competent evidence that it did not have an available position to offer to Claimant. In sum, the Board did not err in affirming the WCJ's decision modifying Claimant's benefits and Claimant's assertion to the contrary is without merit.

Accordingly, the Board's order is affirmed.[7]

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DAN PELLEGRINI, President Judge

[7] Finally, Employer requests the imposition of fees pursuant to Pa. R.A.P. 2744 which states that we "may award as further costs damages as may be just, including … a reasonable counsel fee … if [we] determine that an appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious." However, Employer may not be awarded such fees. *Phillips v. Workmen's Compensation Appeal Board (Century Steel)*, 554 Pa. 504, 510-11, 721 A.2d 1091, 1094 (1999).

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O R D E R

AND NOW, this 24th day of January, 2013, the order of the Workers' Compensation Appeal Board dated June 6, 2012, at No. A11-1141, is affirmed.

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DAN PELLEGRINI, President Judge