IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Colleen Rosenberg, Petitioner	:	
v.	:	No. 1374 C.D. 2009
Workers' Compensation Appeal Board (Pike County), Respondent	:	Submitted: November 20, 2009

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: February 5, 2010**

This appeal from the modification of workers' compensation benefits returns to us after remand in Rosenberg v. Workers' Compensation Appeal Board (Pike County), 942 A.2d 245 (Pa. Cmwlth. 2008) (*en banc*). A majority of this Court[1] remanded so that the fact-finder could address a crucial conflict in the evidence: whether work available with Pike County (Employer) was suitable for Colleen Rosenberg (Claimant). On remand, the Workers' Compensation Judge (WCJ) declined to infer that a full-time position with Employer was suitable. Accordingly, he again rejected Claimant's position that Employer failed to prove a prerequisite of modification, offer of available, suitable employment, and he

[1] Judge Smith-Ribner authored a dissenting opinion in which Judges Pellegrini and Friedman joined.

confirmed his previous grant of modification. Deferring to the decision of the fact-finder, we affirm.

By way of background, the factual basis for this dispute was set forth in our previous decision, and it will be repeated here as necessary. Claimant was employed by Employer as a corrections officer when, in January 2002, she suffered an injury to her right knee from which she did not recover. However, she returned to light duty work with Employer for about 10 months in a clerical position with the Board of Elections.

In December, 2002, the County Commissioners sent a letter to Claimant terminating her clerical employment with the Board of Elections. The letter stated in part (with emphasis added):

> It has come to the Commissioners' attention that the functional capacity evaluation performed on you indicates that there is no reasonable prospect that you can return to full time duty at the Pike County Correctional Facility, and since the County has no provision for a permanent light duty position, the Commissioners find it necessary to terminate your light duty employment effective January 17, 2003.

Rosenberg, 942 A.2d at 246. According to Claimant, and significant to the controversy, she was replaced in the Board of Elections clerical position by a newly-hired person. Id.

After the Board of Elections clerical employment ended, Claimant looked for work elsewhere. She found part-time work with varied hours as a

dispatcher between January and March, 2004. She also found employment as a bank teller working 24 hours over four days a week beginning in March, 2004. Id.

Claimant was evaluated by an orthopedic surgeon on behalf of Employer. He opined that she was capable of work in a light-duty to medium-duty capacity. He also concluded that Claimant could not return to her original corrections officer position. These opinions were not challenged. Claimant received a notice of ability to return to work in November, 2002. Id.

As a result of the orthopedic evaluation, Charles Grande, a certified rehabilitation counselor (Rehabilitation Counselor), evaluated Claimant on behalf of Employer. He met with Claimant, took a vocational background of her, and conducted a labor market survey. Id.

Employer filed a petition for modification as of March, 2003, based on the results of Rehabilitation Counselor's labor market survey. Hearings before a WCJ followed. Id.

At the hearings, Employer presented deposition testimony from its orthopedic surgeon and from Rehabilitation Counselor. Thereafter, Claimant testified, but she did not present other witnesses. The WCJ accepted the testimony of Employer's witnesses and partially accepted Claimant's testimony. In particular, the WCJ found that there were three positions available to Claimant which she was capable of performing, and he imputed the income of one of the

jobs to her, resulting in a reduced compensation rate. In sum, the WCJ granted the modification petition. Id.

Ultimately, the Workers' Compensation Appeal Board (Board) affirmed. Thereafter, Claimant appealed to this Court advancing two assignments of error. First, she contended the compensation authorities committed an error of law in concluding Employer was not required to prove it had no positions available within Claimant's abilities during the relevant period. Second, she argued that the termination letter, upon which the fact-finder relied in finding no permanent light duty positions available, was incompetent hearsay. Consequently, Claimant contended Employer could not prevail in a modification petition under Section 306(b)(2) of the Pennsylvania Workers' Compensation Act (Act), 77 P.S. §512(2).[2]

[2] Act of June 2, 1915, P.L. 736, as amended. Section 306(b)(2) provides, with emphasis added:

> '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. In order to accurately assess the earning power of the employe, the insurer may require the employe to submit to an interview by a vocational expert who is selected by the insurer and who meets the minimum qualifications established by the department through regulation. …

We concluded that the WCJ's failure to address evidence of suitable employment with Employer precluded effective appellate review. In particular, we stated:

> After Employer submitted its evidence, Claimant offered evidence of a suitable position available with Employer. In particular, she testified that after she was terminated from her clerical position with the Board of Elections, another person was hired by Employer to replace her. This testimony was not contradicted. This testimony raises the defense that the position Claimant was actually performing was available for her continuing employment at the time she was terminated.
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> 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. Accordingly, we vacated the modification and remanded with instructions that the WCJ address the conflict in evidence on suitable work available with Employer and address proof of Claimant's residual productive skill.

On remand, the WCJ did not receive additional evidence. Based on a further careful review of the existing record, the WCJ determined that there was no

proof that the full-time position with Employer for which Claimant applied was suitable.[3] In the absence of competent evidence that suitable work was available

[3] The WCJ made an extensive finding on this point, which stated in full, with emphasis added:

> The argument of the claimant herein flows from the analysis within the Commonwealth Court's opinion where the Court noted that claimant offered at time of hearing before this Judge evidence that between the time of the Notice of Ability to Return to Work, November 2002, and the filing of the Petition for Modification, July 2003, "a position with employer that claimant was capable of performing was announced and filled. The position was the clerical position with the Board of Elections that claimant performed for ten (10) months." (See page 14, Commonwealth Court Decision)
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> After another most careful and strict reading of the entire record herein by this Judge there cannot however be found any competent evidence from the claimant that there was indeed employment available with the employer that claimant was capable of performing and was filled. Thus, the reason for not previously rejecting that evidence.
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> Again, having read and reviewed most carefully the Commonwealth Court's decision together with the record and arguments proffered by both parties herein as to their respective positions concerning this particular issue on remand, this Judge agrees with the position set forth by the defendant/employer to the extent that there is no evidence to support that the actual job that the claimant returned to with the Board of Elections was indeed the same position that was offered to a subsequent employee, hence, not a position with the employer that claimant was capable of performing.
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> The county had already stated to the claimant as of December 3, 2003 that they had no permanent light duty work. The same at least suggests that the position therefore offered to the subsequent employee was not the same. Moreover, and perhaps more on point

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> in response to the Commonwealth Court's analysis within page 15 of its decision that "the WCJ did not give any reason for rejecting claimant's evidence that their [sic] was suitable employment available with employer," is the following.
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> There is no dispute claimant returned to a light duty part-time job in the Board of Elections office for ten (10) months which position she described as being a secretarial type job. Claimant acknowledged that this was a limited job to the extent that it was not a permanent job and was light duty and part-time. (Notes of testimony, page 21) While claimant did testify a "full time" position was available in December 2002 in the Board of Elections and she applied for the same, there is no indication in the record, particularly on behalf of the claimant, that this work was indeed "suitable employment", that this work contained the same accommodations that the claimant was provided for some ten (10) months to the extent that it was light duty and part-time. It did not by claimant's own testimony. The termination letter forwarded to the claimant which indicated the county has no provision for a permanent light duty position would therefore indicate that in fact the job was not the same that the claimant was performing. The only evidence on this before this Judge is the claimant's testimony. Even she indicated that this subsequent position was a "full time" position in the Board of Elections which was filled by another female, younger and less qualified. (Notes of testimony, page 24) The same does not allow this Judge to make any finding that there was indeed competent evidence presented by the claimant that there was "suitable employment" available with the employer that needs to be addressed or more specifically rejected for some reason. The same need not be rejected inasmuch as the evidence again does not rise to the level of the actual position referenced by the claimant with the Board of Elections as being the same light duty position that claimant previously performed on a part-time basis. The same cannot be found suitable for claimant.
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> In addressing claimant's argument touched on in Finding Number 16 above – defendant had to establish that the clerical position … was somehow not available to the claimant – reference to Section

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123.301 of the Regulations is necessary. Section (b) therein provides as follows:

> "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. section 412(b)(3)) and shall continue for thirty (30) days or until the filing of a petition for modification or suspension, whichever is longer. When an insurer files a petition for modification or suspension which is not based upon a change in medical condition, the employer's obligation to offer a specific job vacancy commences at least thirty (30) days prior to the filing of the petition."

Defendant has relied through these proceedings upon the Commonwealth of [sic] Burrell v. WCAB (Philadelphia Gas Works), 849 A.2d 1282 (Pennsylvania Commonwealth Court 2004) Therein, the employer sought a modification of workers' compensation benefits and the workers' compensation judge granted the same. Appeals followed and the claimant assigned error to the judge modifying benefits because the employer failed, inter alia, to prove that it had no position available within claimant's limitations pursuant to Section 306(b)(2), [77] P.S. Section 512(2). In addressing the same, the Commonwealth Court specifically noted in considering claimant's argument, the following:

> "Neither the express[] language of Section 306(b)(2) nor the cases 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

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to Claimant, Employer was not required to prove the non-existence of such a position. The WCJ confirmed his earlier decision granting a modification. The Board affirmed.

On appeal to this Court,[4] Claimant contends the WCJ erred by failing to apply the standard set forth in our prior Rosenberg decision. In particular, Claimant contends the WCJ erred by failing to address Claimant's evidence that there was suitable employment available and by failing to resolve any conflicts in

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> defense to modification." See Burrell v. WCAB (Philadelphia Gas Works), 849 A.2d at 1287.
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> Hence, in addressing claimant's argument herein that "defendant has failed to establish that no work was available to claimant in her usual employment area," as Burrell clearly found, 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. Defendant was not required here to prove the non-existence of a part-time light duty job in the office of the Board of Elections. Claimant was fully aware as of December 3, 2002 that there was no light duty part-time employment available for her effective January 17, 2003. To find otherwise herein as claimant argues would again surely allow such a strict scrutiny of the Act and the Regulations as never intended when enacted nor allowed by the Commonwealth Court in Burrell.

WCJ Op., 9/29/08, Finding of Fact No. 17.

[4] This Court's review is limited to determining whether the WCJ's findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Minicozzi v. Workers' Comp. Appeal Bd. (Indus. Metal Plating, Inc.), 873 A.2d 25 (Pa. Cmwlth. 2005). Substantial evidence is such relevant evidence a reasonable person might find sufficient to support the WCJ's findings. Id.

Claimant's uncontested evidence that Employer had a position she could perform. Also, the WCJ erred by finding that Claimant's testimony that she could perform a full-time position was insufficient to trigger Employer's obligation to prove the same position was not suitable. Additionally, the WCJ erred by not shifting the burden to Employer to prove that no available position was suitable for Claimant, given her restrictions.

Employer counters that Claimant returned to work with Employer at a specially created light-duty, part time position of finite duration. The record does not support a conclusion that the full time clerical position subsequently available with Employer was the same position the Claimant worked. To the contrary, the evidence was that Employer had no permanent light-duty work. Thus, the fact-finder could determine the full time clerical position subsequently available with Employer was not the identical position Claimant worked. Also, Employer asserted that since Claimant acknowledged that she returned to work with a different employer, modification was warranted.

It is for the WCJ, and not this Court, to determine the facts and all reasonable inferences flowing from them. Rosenberg; Lehigh County Vo-Tech Sch. v. Workmen's Comp. Appeal Bd. (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995). This Court must review the record in a light most favorable to the party prevailing before the fact-finder. Rosenberg; 3D Trucking Co., Inc. v. Workers' Comp. Appeal Bd. (Fine & Anthony Holding Int'l), 921 A.2d 1281 (Pa. Cmwlth. 2007).

Here, no party offered direct evidence as to whether the full time clerical position subsequently available with Employer was suitable for Claimant. Therefore, the fact-finder was required to review the circumstances. One of the circumstances was that Claimant applied for the full time position, thereby indicating her belief that it was suitable. Other circumstances include:

1) the termination letter from Employer to Claimant indicating no permanent light-duty position was available, which could support inferences that no suitable work was available, that the subsequent full time clerical position was not light-duty, and that the light-duty position was different from the full time clerical position;

2) the failure to hire Claimant for the full time clerical position, which could support an inference that the position was not suitable;

3) the lack of any description of the duties of the full time clerical position; and

4) the lack of any statement that the full time clerical position was the same as the light-duty clerical position Claimant previously performed.

Judging the lack of direct evidence and the circumstances, the WCJ declined to infer that the full time clerical position was suitable for Claimant.

The decision to draw or to refrain from drawing inferences from circumstances is within the exclusive province of the fact-finder. Thus, a WCJ may decline to draw an inference where the circumstantial evidence lacks detail.

We will not disturb the decision where, as here, the record supports the WCJ's explanation.

Further, because the WCJ specifically declined to find that the full time clerical position available with Employer was suitable for Claimant, there are no facts upon which to base a determination that Employer failed to offer available suitable employment. Concomitantly, there is no basis to preclude Employer from relying on expert testimony of earning power. Rosenberg. Thus, no error is law is apparent in the WCJ's grant of modification.

We reject Claimant's argument that the WCJ failed to follow our remand directions. Our review of the WCJ's decision on remand in general, and of Finding of Fact 17 in particular, supports the opposite conclusion. The WCJ offered a detailed explanation of why he declined to find the full time clerical position to be suitable for Claimant.

Finally, we reject Claimant's argument that the WCJ should have shifted the burden to Employer to prove that no available position was suitable for Claimant given her restrictions. We addressed this point in Rosenberg: where the question of an available, suitable job with the employer is raised with evidence, the employer has the burden of proof, and satisfaction of this element of proof is a prerequisite to an employer's reliance on expert testimony of earning power. Rosenberg, 942 A.2d at 252.

On remand, the WCJ explained that the circumstantial evidence of job suitability was insufficient to raise an issue requiring further fact-finding. Consistent with our discussion regarding deference to the fact-finder, we discern no error.

Moreover, the burden of proof argument has no relevance here. This is because our directions on remand precluded further evidence; rather, we required an explanation based on the existing record, regardless of which party offered the evidence or when the evidence was offered. As a result, our remand contemplated resolving a factual dispute, not a legal one.

For all the reasons discussed, we affirm.

ROBERT SIMPSON, Judge

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Workers' Compensation Appeal Board (Pike County), Respondent	:	

O R D E R

AND NOW, this 5th day of February, 2010, the decision of the Workers' Compensation Appeal Board dated June 17, 2009, affirming the decision after remand circulated September 29, 2008, is **AFFIRMED**.

ROBERT SIMPSON, Judge