IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Barbara Bollman, Petitioner	:	
v.	:	No. 1409 C.D. 2007
Workers' Compensation Appeal Board (HCR Manorcare), Respondent	:	
HCR ManorCare, Petitioner	:	
v.	:	No. 1511 C.D. 2007
	:	Submitted: January 4, 2008
Workers' Compensation Appeal Board (Bollman), Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: February 12, 2008

Barbara Bollman (Claimant) appeals the order of the Workers' Compensation Appeal Board (Board) affirming the Workers' Compensation Judge's (WCJ) granting of HCR ManorCare's (Employer) suspension petition based on job availability because the position offered was not within her physical limitations, as

well as the amount of the penalty imposed, because the penalty failed to include other unpaid medical bills. Employer cross-appeals the portion of the Board order affirming the decision of the WCJ as to the reinstatement petition for a limited period and the award of penalties.

Claimant was employed by Employer as a certified nursing assistant. On November 13, 2001, Claimant sustained a lumbar strain when she prevented a patient from falling. A notice of temporary compensation payable (later converted to a notice of compensation payable) was issued by Employer in December 2001, and Claimant began receiving workers' compensation benefits of $322 per week. Unable to return to her pre-injury position, Employer provided Claimant modified-duty work as a receptionist. Over the next several years, Employer and Claimant entered into numerous supplemental agreements reflecting changes in her disability status. The last of those agreements was entered into on July 15, 2004, stating that Claimant would return to work with a loss of earnings and benefits reduced to $131.18 per week.

By August 2004, Claimant was working hours 40 hours per week. On September 2, 2004, Claimant left work because she was in such pain that she was unable to work. Claimant then filed a petition to reinstate compensation benefits alleging that she had suffered a recurrence of her total disability related to her work injury as of September 2, 2004. She also filed a petition for penalties claiming that Employer had violated Section 306(f)(5) of the Workers' Compensation Act (Act),[1]

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §531. Section 306(f)(5) of the Act, provides that "[a]ll payments to providers for treatment provided pursuant to this act shall be made
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by failing to timely pay medical bills for an intradiscal electrothermal annuloplasty (IDET) procedure associated with her work injury.[2] In response, Employer filed a petition to suspend compensation benefits stating that Claimant was offered work with Employer at wages equaling or exceeding her time-of-injury earnings as of February 14, 2005.[3] All petitions were consolidated and assigned to a WCJ for a hearing.

At the hearing, Claimant testified that she stopped working half-way through her shift on September 2, 2004, because she was in a lot of pain and had to

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within thirty (30) days of receipt of such bills." Section 435(d)(i) of the Act, 77 P.S. §991, empowers the Board or other adjudicatory body to impose penalties for violations of the Act.

[2] The petition for penalties arose from the filing of Claimant's own utilization review request in September 2003. The review was for an IDET procedure that had been performed by Claimant's doctor. In December 2003, the IDET procedure was deemed reasonable and necessary. Employer approved the bill, but it was not paid until October 2004. The IDET is performed with a local anesthetic and mild intravenous sedation. A hollow introducer needle is inserted into the painful lumbar disc space using a portable x-ray machine for proper placement allowing the introduction of an electrothermal catheter (heating wire) which is then passed through the needle and positioned along the back inner wall of the disc (the annulus), the site believed to be responsible for the chronic pain. The catheter tip is then slowly heated up to 90 degrees Celsius for 15-17 minutes. The heat contracts and thickens the collagen fibers making up the disc wall, thereby promoting closure of the tears and cracks. Tiny nerve endings within these tears are cauterized, making them less sensitive. The catheter is removed along with the needle and after a short period of observation, the patient is discharged from the medical facility. Lumbar support is worn for six to eight weeks followed by an appropriate course of physical therapy. Lifting and bending precautions are necessary during this time to allow for adequate healing of the disc.

[3] In May 2005, Employer filed a utilization review request to review some of the treatments Claimant was receiving, specifically, physical and aquatic therapy and chiropractic treatment. A determination found the physical and aquatic therapy to be neither reasonable nor necessary. Claimant appealed that determination to the WCJ, which affirmed that determination, and that issue is not before us on appeal as Claimant did not contest that portion of the WCJ's decision.

go home and lie down. Despite treatment, she testified that she still experienced pain in her right side and buttock and down her right leg into her knee, as well as extreme pressure in the center of her back. She further testified that her right hip "locked up" and she sometimes felt as if her right leg would give out. Because sitting too long in one position, standing up for too long and walking moderate distances were difficult for her, she testified that she believed she was unable to return to a full-time position, but that she would not have difficulty performing the part-time clerical work she had been performing before August 2004 when her hours increased and her symptoms recurred. She stated that her treating physician, Mark LoDico, M.D. (Dr. LoDico), had released her to part-time work as of October 21, 2004.

Dr. LoDico, board certified in anesthesiology with a certificate in pain management, testified that due to the increase in her hours in August 2004, Claimant experienced increasing right side hip and buttock pain, and that she walked with an "antalgic gait," meaning she would drag her right leg around as opposed to moving forward normally. He explained that the severity of the recurrence of Claimant's symptoms was proportional to the amount of time she worked, and that working eight hours daily would irritate her condition. Dr. LoDico stated that in September 2004, he removed Claimant from work because he found her condition to be worse in September 2004 than it had been in the past because the increase in hours intensified her ongoing pain. He went on to detail the treatments Claimant had received over the past three years, including the relief she experienced from the IDET procedure. Based on his examinations of Claimant, Dr. LoDico opined that Claimant was unable to return to work in a full-time, light-duty position due to her reports of increasing pain with sustained activities, her continued presentation of the antalgic gait, and the

continued presence of annular tears in her disks. His final diagnosis of Claimant was lumbar diskogenic syndrome with intermittent radiculopathy, and he was of the opinion that she was unable to perform the job that was offered to her as of February 14, 2005.

Claimant also offered into evidence the February 9, 2005 job offer letter sent to her by Nicole Edwards (Edwards), the Human Resources Director for Employer, offering her a position as "General Clerk/Evening Receptionist." The letter indicated that Employer was in receipt of the Independent Medical Evaluation (IME) supplied by Vincent Morgan, M.D. (Dr. Morgan), which released Claimant to work full-time in a light-duty capacity. It described the proffered position as one that required occasional bending, frequent sitting and occasional standing and walking as well as occasionally lifting objects *in excess* of 20 pounds.

In opposition to Claimant's petition for penalties, Ann Walczak (Walczak), Employer's workers' compensation specialist, testified that the payment of the medical bill for the IDET procedure had originally taken place in September 2003, and that she had approved payment in December 2004. The bill had not been paid until February 2004 because a claims administrator had delayed payment as the ASU Group (the company Employer used for processing claims and re-pricing) believed the procedure was not clearly identified and it needed to be re-priced. After the re-pricing finally occurred, the re-priced amount totaled $4,972. Payment of this amount did not occur until October 2004.

In opposition, Employer offered the testimony of Dr. Morgan, who was board certified in physical medicine and rehabilitation. Dr. Morgan testified that he examined Claimant three times – once in May 2003, again in March 2004, and finally in January 2005. After these examinations, Dr. Morgan diagnosed Claimant as suffering from chronic low back pain of a musculoskeletal origin with right lower extremity radiculitis and degenerative disc disease of the lower spine. He testified that he believed her radiculitis was resolved after the second examination because of improved subjective complaints and intermittent complaints at his final examination. Dr. Morgan testified that he had found significant evidence of symptom magnification because the antalgic gait described by Dr. LoDico was present during her first and third examinations, but not at her second, and he stated that based on his examinations, that gait was not physiologic. Based on his examinations, Dr. Morgan opined that based on his understanding of the job, which arose from conversations with Claimant as well as with Employer, Claimant was able to perform the duties of the full-time clerical job with certain restrictions. According to the return-to-work form Dr. Morgan filled out, Claimant could return to a light-work status, lifting *no more* than 20 pounds, with a frequent lifting and/or carrying of objects weighing 10 pounds. She could stand and walk intermittently for no more than three hours, and walk a distance of no more than 100 feet at a time. However, she could sit for up to periods of seven hours with intermittent changes. According to Dr. Morgan, Claimant could rarely bend, squat or climb, and could occasionally twist her body. She was unable to push or pull any weight. On cross-examination, however, Dr. Morgan admitted that he was never presented with an actual job description setting forth the work to be performed or for how long Claimant would be required to undertake certain activities.

Employer also offered the testimony of Edwards, who testified that she notified Claimant of the job offer through the February 9, 2005 letter, and that the job was essentially the same clerical job she had been performing when she stopped working in September 2004. Edwards testified that the duties would be within the restrictions set by Dr. Morgan. As for the utilization review petition, Employee offered the testimony of Jay D. Kaufman (Kaufman), MBA, P.T. Kaufman reviewed the records of Claimant's physical and aquatic therapy and testified that those treatments were not reasonable nor necessary from April 18, 2005, through May 23, 2005, and ongoing because Claimant showed no improvement.

In his decision and order, the WCJ granted Claimant's reinstatement petition for the period between September 2, 2004, and February 13, 2005, because Dr. LoDico's testimony and Claimant's testimony that Claimant remained disabled was the only evidence regarding her condition for that timeframe. The WCJ, however, suspended Claimant's benefits effective February 14, 2005, finding that Employer had met its burden of proving the availability of work to Claimant which was within her physical capabilities at wages equal to or exceeding her time-of-injury wages. In making this finding, the WCJ accepted Dr. Morgan's testimony that Claimant was able to perform the General Clerk/Evening Receptionist position in February 2005.[4]

[4] Claimant also offered into evidence the March 9, 2004 ProCare Ergonomic study. This study was to serve as a basis for evaluating the physical and functional requirements of the position offered to Claimant in February 2005. Claimant maintained that the ProCare Ergonomic study indicated that the requirements of the job would exceed the physical limitations placed on her by Dr. Morgan. Because the WCJ made no mention of the study in his opinion, Claimant argues that the WCJ arbitrarily and capriciously disregarded relevant evidence and issued an unreasoned
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As to Claimant's penalty petition, the WCJ found that Employer did not present a credible explanation for the nine-month delay in paying Claimant's IDET bill and imposed a penalty of 50% of the $4,972.00 re-priced bill against Employer, but concluded that the other treatments were neither reasonable nor necessary.

Claimant appealed the WCJ's decision granting Employer's suspension petition. Employer cross-appealed, contending that the WCJ erred in reinstating benefits between September 2, 2004, and February 13, 2005, and awarding any penalties at all. Both parties appealed to the Board, which denied both appeals. These appeals followed.[5]

In her appeal, Claimant contends that the WCJ erred in finding that Employer satisfied its burden of offering an available, modified-duty job that was within her physical capabilities as of February 14, 2005. She claims that the position was not available because Dr. Morgan testified that she was restricted to lifting *no more* than 20 pounds on occasion, yet Employer's February 9, 2005 job description letter in which Claimant was offered the position in question states that Claimant

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decision within the meaning of Section 422(a) of the Act, 77 P.S. §834. Based on the way we have decided this appeal, we need not address this issue.

[5] Our scope of review in workers' compensation cases is to determine whether constitutional rights have been violated, whether an error of law has been committed, or whether any findings of fact necessary to support the adjudication are not supported by substantial evidence. *Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Board (Skirpan)*, 531 Pa. 287, 612 A.2d 434 (1992).

would be required to lift *over* 20 pounds on occasion. When an employer seeks to modify benefits based on the availability of suitable work, the employer must prove, among other things, that employment has been made available that is within the claimant's physical capabilities. *See Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Company)*, 516 Pa. 240, 532 A.2d 374 (1987); *Finley v. Workers' Compensation Appeal Board (USX Corporation)*, 811 A.2d 1081 (Pa. Cmwlth. 2002). Because the night receptionist position Employer offered was not in accord with the restrictions placed on Claimant by Dr. Morgan, its own medical expert, Employer did not offer suitable, available employment. We reverse the Board's order to grant Employer's suspension petition.

In its appeal, Employer contends that the WCJ erred in reinstating Claimant's full benefits for the period between September 2, 2004, and February 13, 2005, because he found that the only evidence during that time period was Claimant's and Dr. LoDico's testimony.[6] That finding was incorrect, Employer contends, because Dr. Morgan testified that when he examined Claimant in March 2004 and January 2005, he could not find any objective reason to support Claimant's professed disability that would preclude her from accepting the position proffered in the February 9, 2005 job offer letter. Employer maintains that the WCJ erred when he failed to consider that testimony with regard to reinstating Claimant's benefits.

[6] In order to have benefits reinstated, a claimant must prove that: (1) through no fault of her own, her earning power is once again adversely affected by the work-related injury; and (2) the disability which gave rise to the original claim does, in fact, continue. *Wood v. Workers' Compensation Appeal Board (Country Care Private Nursing)*, 915 A.2d 181 (Pa. Cmwlth. 2007).

Dr. Morgan, however, also found that Claimant was unable to perform her pre-injury job so that Employer was required to establish that suitable work was available or total benefits were to be reinstated. Under the July 15, 2004 supplemental agreement, it was established that Claimant had a continuing disability, and that she was entitled to partial disability payments because she was only capable of working part-time. Due to the increased work hours and duties, Claimant testified that she left work on September 2, 2004, because of the recurrence of severe back pain. On October 21, 2004, Dr. LoDico released Claimant to part-time sedentary work, but Employer refused to make any part-time work available. It was only on February 14, 2005, that Employer made the night receptionist position available. Total disability benefits must be reinstated unless there is proof of work availability, and the WCJ determined that the only testimony regarding the issue of work availability from September 2, 2004, to February 13, 2005, was that of Claimant and Dr. LoDico. Even if we ignore for the moment that we have determined that the position offered in the February 9, 2005 job offer letter was not a suitable position within the meaning of *Kachinski*, for the period between September 2, 2004, and February 13, 2005, Employer failed to make *any* work available to Claimant. Therefore, the WCJ did not err in reinstating benefits for that period based on the findings that he made.

The final issue on appeal is the assessment of the 50% penalty, which both parties contend is in error. Claimant maintains that the WCJ erred in limiting penalties to 50% of the re-priced IDET bill of $4,972. Claimant contends that Employer also failed to pay several other bills relating to the IDET procedure, including a $13,000 hospital bill. However, we agree with Employer that that claim

is waived because Claimant failed to present any evidence regarding the alleged outstanding bills, and there is no indication that Claimant raised that issue before the WCJ or the Board. In its cross-appeal, Employer contends that the WCJ abused his discretion by awarding the maximum penalty of 50% of the unpaid IDET bill because it had established that its actions in delaying payment on the bill were not malicious or intentional. The WCJ found, however, that Employer's explanation for a nine-month delay was not credible and that the delay was excessive and unreasonable. Given those findings, there was no abuse of discretion in awarding the full amount of the penalty authorized by Section 435(d)(i) of the Act, 77 P.S. §991.[7]

Accordingly, those portions of the Board's Order affirming the WCJ's decision to reinstate benefits between September 2, 2004, and February 13, 2005, and to order a 50% penalty on $4,972 of an unpaid medical bill are affirmed, and the portion of the Board's Order affirming the WCJ's decision to suspend benefits after February 13, 2005 is reversed.

DAN PELLEGRINI, JUDGE

President Judge Leadbetter dissents.

[7] Section 435(d)(i) of the Act, 77 P.S. §991, provides, in pertinent part, that: "Employers and insurers may be penalized a sum not exceeding ten per centum of the amount awarded and interest accrued and payable: Provided, however, that such penalty may be increased to fifty per centum in cases of unreasonable or excessive delays. Such penalty shall be payable to the same persons to whom the compensation is payable."

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O R D E R

AND NOW, this 12th day of February, 2008, those portions of the Worker's Compensation Appeal Board's order affirming the reinstatement of benefits between September 2, 2004, and February 13, 2005, and affirming the order of a 50% penalty on $4,972 of an unpaid medical bill is affirmed. That portion of the Worker's Compensation Appeal Board's order affirming the suspension of benefits after February 13, 2005, is reversed.

DAN PELLEGRINI, JUDGE