

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John McCarraher, :
 :
 Petitioner :
 :
 v. : No. 1566 C.D. 2009
 :
 Workers' Compensation Appeal : Submitted: January 15, 2010
 Board (Rivercrest Golf Club and :
 Sunnybrook Golf Club, Inc.), :
 Respondents :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: April 26, 2010

John McCarraher (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) which affirmed an order of a Worker's Compensation Judge (WCJ). Pursuant to the Pennsylvania Workers' Compensation Act (Act),¹ the WCJ's order denied Claimant's Claim and Reinstatement Petitions, denied two Review Petitions and a Termination Petition filed by Rivercrest Golf Club (Rivercrest), and dismissed as moot Rivercrest's Joinder Petition. We affirm.

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

Claimant was injured during the course and scope of his seasonal work as a caddy master for Rivercrest on September 30, 2005, while walking through a doorway. Pursuant to a Notice of Compensation Payable, Rivercrest accepted liability for the injury, and Claimant thereafter began receiving total disability benefits under the Act for an injury described as a left knee strain. Claimant missed work for two subsequent weeks, and left his employment with Rivercrest at the end of October, 2005. Claimant did not thereafter return to work for Rivercrest. On July 6, 2006, Claimant and Rivercrest executed a Supplemental Agreement suspending Claimant's benefits. On February 1, 2007, Claimant underwent knee replacement surgery.

On February 5, 2007, Claimant filed a Reinstatement Petition against Rivercrest, alleging partial disability from May 18, 2006, through July 26, 2006, and total disability thereafter. Rivercrest filed an Answer, denying the material allegations therein.

On February 13, 2007, Claimant filed a Claim Petition against Sunnybrook Golf Club, Inc. (Sunnybrook), the employer Claimant had worked for as an assistant professional beginning on May 18, 2006. Claimant alleged a work-related injury suffered on July 26, 2006, in the form of a repetitive trauma suffered from walking up and down steps. Claimant ceased working for Sunnybrook on or about July 28, 2006. Sunnybrook filed an Answer to the Claim Petition, denying the material allegations therein.

On May 7, 2007, Rivercrest filed a Joinder Petition against Sunnybrook, alleging that if Claimant suffered any further disability, it was caused

by his duties in his work for Sunnybrook. Sunnybrook filed an Answer, denying the material allegations therein.

On August 20, 2007, Rivercrest filed a Review Petition alleging that Claimant's injury description should be amended to include a subluxation of the left knee patella. On the same date, Rivercrest also filed a Termination Petition alleging that Claimant was fully recovered from his September 30, 2005, injury as of either September 6, 2006, or June 6, 2007.

The various Petitions at issue were consolidated, and hearings ensued before the WCJ. Claimant presented his own testimony, and that of his orthopedic surgeon, Dr. Karl Rosenfeld. Rivercrest presented the testimony of orthopedic surgeon Dr. Ronald Krasnick, who had examined Claimant on two occasions, and further presented the testimony of Claimant's supervisor, James Komancheck. Sunnybrook presented the testimony of orthopedic surgeon Dr. Alexander Sapega, who had examined Claimant on one occasion. Sunnybrook also offered the testimony of John Allen, Sunnybrook's head professional.

In his credibility determinations, the WCJ found Claimant's medical expert, Dr. Rosenfeld, credible to the extent that it supported a finding that an aggravation of Claimant's underlying arthritic condition, and subsequent resulting knee replacement surgery, were causally related to Claimant's September 30, 2005, work injury. The WCJ rejected Dr. Krasnick's expert opinion that Claimant has fully recovered, and is suffering only from a natural progression of his arthritic condition, as not credible.

The WCJ accepted as credible the opinion of Dr. Sapega, presented by Sunnybrook, to the extent that it supported a finding that Claimant's left knee condition was not caused, aggravated, or accelerated by his employment with Sunnybrook. On this point, the WCJ rejected as not credible the opinion of Dr. Rosenfeld that Claimant's duties at Sunnybrook aggravated his condition. The WCJ further accepted Dr. Sapega's opinion that Claimant was unable to perform his pre-injury job from the date of his knee replacement surgery, on February 1, 2007, through the date of his examination on August 7, 2007. Additionally, the WCJ accepted as credible the testimony of James Komancheck and John Allen that Claimant did not leave his employment for both employers as a result of any work-related physical disability.² The WCJ rejected all testimony indicating a disability period prior to February 1, 2007.

The WCJ concluded, in part relevant to the matter *sub judice*, that Claimant had failed to meet his burden under the Reinstatement Petition of establishing that his work-related disability recurred on or after May 18, 2006. By order dated November 18, 2008, the WCJ denied Claimant's Claim and Reinstatement Petitions, denied Rivercrest's two Review Petitions and Termination Petition, and dismissed as moot Rivercrest's Joinder Petition. Claimant appealed to the Board, which affirmed. Claimant now petitions this Court for review of the Board's July 8, 2009, order.

² The WCJ accepted as credible testimony that Claimant had left his position at Rivercrest due to the end of the season, and due to Claimant's rejection of a reassignment to another position. The WCJ accepted as credible testimony that Claimant left his position at

(Continued....)

This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of Board procedures, and whether necessary findings of fact are supported by substantial evidence. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

Claimant presents one issue for review: whether the Board erred in affirming the WCJ, due to the WCJ's application of the wrong burden of proof in relation to Claimant's Reinstatement Petition against Rivercrest. Claimant argues that the WCJ credited the testimony of Dr. Sapega, which testimony established that Claimant's previously recognized work-related knee injury worsened and necessitated surgical repair, and that this resulting surgery took Claimant out of the work force completely. Building on that assertion, Claimant argues that the burden under the Reinstatement Petition then shifted to Rivercrest, which is charged with proving that Claimant's work-related condition had resolved or changed, and that a job or jobs were available to Claimant.³

A claimant seeking reinstatement following a suspension of benefits must prove that: (1) through no fault of his or her own, the claimant's disability, *i.e.*, earning power, is again adversely affected by the work-related injury, and (2) the disability which gave rise to the original claim continues. McKay v. Workmen's Compensation Appeal Board (Osmolinski), 688 A.2d 259 (Pa.

Sunnybrook due to a layoff related to the conditions of the golf course.

³ See generally Kachinski v. Workmen's Compensation Appeal Board (Veeco Constr. Co.), 516 Pa. 240, 532 A.2d 374 (1987).

Cmwlth. 1997) (citing Pieper v. Ametek-Thermox Instruments, 526 Pa. 25, 584 A.2d 301 (1990)). Further:

'Given the nature of suspension status, which actually *acknowledges* a continuing medical injury, and suspends benefits only because the claimant's earning power is currently not affected by the injury, the testimony of a claimant, alone, . . . satis[fies] his burden of establishing that his work-related injury continues.'

McKay at 261 (quoting Latta v. Workmen's Compensation Appeal Board (Latrobe Die Casting Co.), 537 Pa. 223, 227, 642 A.2d 1083, 1085 (1994) (emphasis in original)). Once a claimant testifies that his or her prior work-related injury continues, the burden shifts to the employer to prove the contrary. Latta.

In the instant matter both Rivercrest and Sunnybrook presented evidence, found credible by the WCJ, that Claimant did not leave his work with either Riverside or Sunnybrook as a result of any work-related disability, and that Claimant did not complain of any disability while working for either employer during the period at issue. The WCJ stated:

14. Regarding disability, I have carefully reviewed the medical evidence and accept the testimony of Dr. Sapega that Claimant was not able to perform his pre-injury job from the date of his left knee replacement surgery on February 1, 2007 through his date of examination on August 7, 2007. While Dr. Rosenfeld testified to a prior disability date of July 26, 2006, he based his opinion solely on Claimant's rehabilitation from his knee replacement surgery. In addition, **the credible testimony of James Komancheck and John Allen establish that Claimant did not leave his employment at Rivercrest or Sunnybrook because of any physical disability.** Accordingly, the testimony indicating a

disability period prior to February 1, 2007 is rejected as not credible.

15. I have carefully reviewed the factual testimony presented in this matter and find that it does not establish that Claimant left his employment at Rivercrest or Sunnybrook as a result of any work-related disability. I accept the testimony of James Komancheck that claimant left employment at Rivercrest because it was the end of the caddy season and he did not want to be reassigned to a ranger position. In addition, I accept the testimony of John Allen that Claimant left employment at Sunnybrook because of a layoff due to the conditions of the greens. Both witnesses credibly testified that Claimant did not complain of any disability while working for them. While Claimant did testify that he could not return to either job, he did not testify that he reported any disability while he was working. Instead he acknowledged that he stopped work at Rivercrest because they hired someone else, and that he would have continued to work at Sunnybrook if he hadn't been told to take time off. In addition, Claimant acknowledged that he continued to play golf during this period, and in July, 2006 did so with minimal discomfort. Accordingly, Claimant's testimony on this issue is less persuasive and is rejected to the extent that it conflicts with the testimony of Mr. Komancheck and Mr. Allen.

WCJ Opinion at 9 (emphasis added). Claimant argues that the above-cited Findings support an award of benefits for, at a minimum, the period from February 1, 2007, to August 7, 2007, under Dr. Sapega's credible testimony. We disagree.

Given the unchallenged credible testimony of record, Claimant's argument is without merit. Claimant has failed to satisfy the first prong of his burden for reinstatement. It is well established under McKay and Pieper that a claimant seeking reinstatement of previously suspended benefits under the Act

must first prove that his disability, in the form of his earning power, is again adversely affected by the work-related injury. Under the facts before us, Claimant failed to prove any loss of earning power attributable to his work-related disability, notwithstanding the medical testimony that some medical disability may still have existed.

Mr. Komancheck and Mr. Allen both credibly testified that Claimant did not leave the employ of either Rivercrest or Sunnybrook, respectively, due to any physical disability, but instead left for reasons not related to any injury or concomitant disability. That testimony was found credible by the WCJ. Additionally, no credible testimony of record exists from Claimant himself that he suffered a work-related disability that caused a loss in earnings. Relying upon his Findings⁴ noting the testimony of Mr. Komancheck and Mr. Allen, the WCJ did not err in concluding that Claimant had failed to satisfy his burden for reinstatement.⁵ McKay.

⁴ Claimant has not challenged any of the WCJ's Findings in his appeal to this Court.

⁵ Notwithstanding our foregoing disposition, we note that Claimant additionally cites to Latta for the proposition that following a suspension, the causal connection between an original work-related injury and compensable disability is presumed and that therefore a claimant's testimony alone is sufficient to satisfy a reinstatement burden even without medical evidence. Assuming *arguendo* that Claimant had fulfilled his initial burden for reinstatement, however, his argument on this point is without merit. Latta's full holding on this point establishes a claimant's entitlement to the presumption relied upon by Claimant only in the absence of any credible employer evidence to the contrary. The testimony presented by both Riverside and Sunnybrook herein, that Claimant left their respective employ for reasons not related to any physical disability, would serve to defeat the Latta presumption relied upon by Claimant in his argument. Latta, 537 Pa. at 227, 642 A.2d at 1085 (“[O]nce a claimant testifies that his prior work-related injury continues, the burden shifts to his employer to prove the contrary. **Where an employer fails to present evidence to the contrary, the claimant's testimony, if believed by the referee,**

(Continued....)

Accordingly, we affirm.

JAMES R. KELLEY, Senior Judge

is sufficient to support reinstatement of the suspended benefits.”) (emphasis added).

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ORDER

AND NOW, this 26th day of April, 2010, the order of the Workers' Compensation Appeal Board dated July 8, 2009, at A08-2256, is affirmed.

JAMES R. KELLEY, Senior Judge