IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kraft Foods, Inc., and ESIS- Wilmington WC, Petitioners	:	
v.	:	No. 1644 C.D. 2009
Workers' Compensation Appeal Board (Anterola), Respondent	:	Submitted: November 25, 2009

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: January 29, 2010

Kraft Foods, Inc. and ESIS-Wilmington WC (collectively, Employer) petition for review of an order of the Workers' Compensation Appeal Board (Board) which reversed an order of a Workers' Compensation Judge (WCJ). The WCJ's order, in part relevant hereto, granted Employer's Petition to Modify Compensation Benefits pursuant to the Pennsylvania Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1 - 1041.4; 2501 - 2708. We affirm.

On February 13, 2004, Leonard Anterola (Claimant) suffered a right knee medial meniscus tear in the course and scope of his job as a utility worker for Employer. Thereafter, Claimant began receiving benefits pursuant to a Notice of Compensation Payable.

On February 2, 2007, Employer filed a Petition to Modify Compensation Benefits (Modification Petition) alleging that work was generally available to Claimant as of January 16, 2007. On February 5, 2007, Employer filed a Suspension Petition alleging that Claimant's modified earning power entitled Employer to a complete suspension of Claimant's ongoing temporary total disability benefits. The Petitions were consolidated, and hearings ensued before the WCJ.

Employer presented the testimony of David R. Cooper, M.D., who testified, most generally summarized, that Claimant was capable of full time sedentary work. Dr. Cooper additionally approved positions with three potential employers, each involving dispatcher positions, as within Claimant's abilities and restrictions.

Employer also presented the testimony of Cheryl Duncan, a certified rehabilitation counselor. Duncan testified, in relevant part, that she met with and performed an analysis of Claimant, and testified that he could perform a job such as, *inter alia*, dispatcher. Duncan further testified that she had performed a labor market survey, and had narrowed down three available jobs as appropriate for Claimant, namely, the three dispatcher positions noted above as approved by Dr.

Cooper. Duncan further testified that Claimant had left high school prior to graduating, and had never worked as a dispatcher.[1]

Additionally, Employer presented the testimony of Clifford Lucido, Employer's Safety, Security and Environmental Manager. Lucido is responsible for all of Employer's work injury cases, and testified that there is no permanent sedentary work for Claimant with Employer.

Claimant presented the testimony of William C. Ford, a certified rehabilitation counselor who had met and interviewed Claimant, and who had reviewed Duncan's vocational assessment. Ford had also performed his own assessment as to the availability of the three dispatcher positions identified by Duncan, but did not conduct his own labor market survey. Ford further testified that two of the three dispatcher positions required a high school diploma or GED, which Ford confirmed that Claimant did not have, and that thusly he would not be a qualified candidate for those positions. Ford testified that one of those two positions permitted a substitution of dispatcher experience, and knowledge of that field, for the high school diploma or GED; Ford confirmed that Claimant had no such dispatcher experience or knowledge. In regards to the third offered dispatcher position, Ford testified that he could not locate that position or the employer identified by Duncan, and concluded that if that employer did exist, it had moved or changed names.

[1] Claimant's own testimony corroborated Duncan's testimony regarding Claimant's education and experience.

Ford further testified that Claimant's education and experience level, and his sedentary restrictions, would potentially result in an earning capacity between $7.00 and $10.00 per hour at an entry-level position. While Ford testified that entry-level jobs are available in the job market in general, he had not performed a labor market survey or identified any specific actual available jobs appropriate for Claimant.

The WCJ accepted Dr. Cooper's testimony as credible, noting that it was unrefuted. The WCJ also accepted Lucido's testimony that no suitable position existed for Claimant with Employer. The WCJ rejected Duncan's testimony, notably finding that two of the three positions identified as suitable by Duncan were not open and available due to the positions' education and experience requirements, and that the third position could not be contacted or verified.

The WCJ accepted as credible the testimony and evidence of Ford. Based thereon, the WCJ concluded that Claimant had an earning power of $8.50 per hour, which figure represented the median of Ford's stated $7.00 - $10.00 theoretical earning power range.

Based upon those credibility determinations, the WCJ concluded that, in the absence of a requirement that an expert witness identify specific job listings in forming an earning power assessment, Employer had met its burden under its Modification Petition based upon Ford's testimony.[2] By Order and Decision dated

[2] The evidence required to satisfy a party's burden in a proceeding under the Act need not be presented by that party; a party's burden may be met where the necessary proof is introduced by his adversary. In other words, a WCJ can rely on evidence in the record regardless of which

(Continued....)

June 27, 2008, the WCJ granted Employer's Modification Petition and concomitantly reduced Claimant's ongoing partial disability rate in light of his newly established earning power.[3] Claimant appealed to the Board.

The Board examined Ford's testimony to determine its sufficiency as support for Employer's Modification Petition.[4] Concluding that expert opinion evidence establishing earning power must consist of both consideration of a claimant's capabilities, and evidence of actual job listings, the Board concluded that Ford's testimony was insufficient as support for Employer's Modification Petition. Accordingly, the Board reversed the WCJ's order by order dated July 30, 2009. Employer now petitions for review.

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

party presented the evidence or which party is benefitted by the evidence. See Costa v. Workers' Compensation Appeal Board (Carlisle Corp.), 958 A.2d 596 (Pa. Cmwlth. 2008); SKF USA, Inc. v. Workers' Compensation Appeal Board (Smalls), 728 A.2d 385 (Pa. Cmwlth.), petition for allowance of appeal denied, 561 Pa. 663, 747 A.2d 903 (1999).

[3] The WCJ also denied Employer's Suspension Petition, which denial is not at issue herein.

[4] To support a modification of compensation benefits, an employer must show that a claimant's disability has ended, or has been reduced and that work is available to the claimant and the claimant is capable of doing such work. To prevail, an employer may establish "earning power" through expert opinion evidence including job listings with employment agencies, agencies of the Department of Labor and Industry, and advertisements in the claimant's usual area of employment. Burrell v. Workers' Compensation Appeal Board (Philadelphia Gas Works and Compservices, Inc.), 849 A.2d 1282 (Pa. Cmwlth. 2004) (citations omitted).

substantial evidence. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

Employer asserts one issue for review: whether the WCJ was correct in modifying Claimant's benefits based upon Ford's credible testimony. The crux of Employer's argument on this issue is that while the Act provides that it is the employer's obligation to provide evidence of jobs that are actually available when it seeks to modify benefits, the Act does not require an expert witness to identify specific job listings in order to establish earning power. Therefore, Employer argues that its obligation can be met when a claimant's own expert offers his or her opinion of earning capacity. We disagree.

We have previously disposed of this issue in South Hills Health System v. Workers' Compensation Appeal Board (Kiefer), 806 A.2d 962 (Pa. Cmwlth. 2002), wherein the employer sought to modify the claimant's benefits by establishing earning power through expert opinion evidence centered on the claimant's abilities, skills, education, age, and work experience. The expert testified as to generally existing, but not vacant, jobs in the claimant's area that claimant would potentially qualify for, but failed to address, rely upon, or introduce any evidence establishing that any specific actual job or jobs were open and available to the claimant. We held that such a lack of specific actual jobs available to the claimant was insufficient to establish earning power. In so holding, we also addressed the Act's applicability to this issue:

> Section 306(b)(2) of the Act now provides, in part, as follows:

> **Schedule of compensation for disability partial in character**
>
> ....
>
> **(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.**

77 P.S. § 512(2) (emphasis added). Additionally, regulations promulgated by the Department of Labor and Industry pursuant to Section 306(b)(2) provide the following:

> (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.
>
> (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) [FN6] [Form LIBC-757] of the act ... and shall continue for 30 days or until the filing of a Petition for Modification or Suspension, whichever is longer.

> FN6. Section 306(b)(3) of the Act, 77 P.S. § 512(3), provides as follows:
>
> If the insurer receives medical evidence that the claimant is able to return to work **in any capacity,** then the insurer must provide prompt written notice, on a form prescribed by the department [Form LIBC-757], to the claimant, which states all of the following:
>
> > (i) The nature of the employe's physical condition or change of condition.
> >
> > (ii) That the employe has an obligation to look for available employment.
> >
> > (iii) **That proof of *available* employment opportunities may jeopardize the employe's right to receipt of ongoing benefits.**
> >
> > (iv) That the employe has the right to consult with an attorney in order to obtain evidence to challenge the insurer's contentions.
>
> (Emphasis added).
>
> 34 Pa. Code § 123.301 (footnote added).
>
> 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 including job listings with employment agencies, agencies of the Department of Labor and Industry, and advertisements in a claimant's usual area of employment.

South Hills Health System, 806 A.2d at 965-966 (emphasis in original).

Thusly, the Act's express provision requires Employer to establish the earning power of Claimant by, *inter alia*, showing existing actual jobs that were

open and available to Claimant. Id. We note that this burden does not change when an employer relies upon a claimant's own evidence in satisfaction of its burden. Accord Costa; SKF USA, Inc.. As correctly determined by the Board, although the WCJ found Ford credible, his testimony was insufficient to meet Employer's burden as he did not identify any existing jobs that were actually available to Claimant.

Accordingly, Employer's argument on its sole issue is without merit. We affirm.

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JAMES R. KELLEY, Senior Judge

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O R D E R

AND NOW, this 29th day of January, 2010, the order of the Workers' Compensation Appeal Board dated July 30, 2009, at A08-1324, is affirmed.

JAMES R. KELLEY, Senior Judge