



employment. As a result, Claimant received temporary total disability benefits pursuant to an NCP issued by Employer that accepted liability for a “left shoulder strain.” Reproduced Record at 1a (R.R. \_\_\_\_).

On September 18, 2002, Employer filed a termination petition, asserting that Claimant had fully recovered from the work-related injury and was able to return to his pre-injury employment without restrictions. Claimant denied the allegations in the termination petition. Claimant later filed a review petition seeking to modify the NCP’s description of his work-related injury to include “damage to the facet joints” or, as more commonly known, whiplash. R.R. at 3a. Employer timely filed an answer to the review petition denying any knowledge of Claimant’s facet joint injury. Claimant’s review petition and Employer’s termination petition were consolidated.

Hearings were held before WCJ Mark A. Peleak. Claimant testified that following the accident he continued to work for Employer until March 2002, when he discontinued his employment because the pain had become intolerable. Claimant testified that he believed he was unable to return to unrestricted duty. Claimant also stated that he had been approved for retirement in May, but he did not specify what year or whether he had actually retired.

Employer introduced the deposition testimony of Richard Schmidt, M.D., who is board-certified in orthopedic surgery. Dr. Schmidt testified that he examined Claimant on August 16, 2002. Dr. Schmidt reviewed Claimant’s medical history, records, and diagnostic studies in conjunction with the evaluation. Based on his review of Claimant’s MRI taken in January 2002, Dr. Schmidt testified that he “did not see evidence of disc herniation” in Claimant’s neck. R.R. at 138a. Dr. Schmidt stated that his clinical examination revealed that Claimant’s “cervical range of motion was within normal limits.” R.R. at 150a. Dr. Schmidt testified that “based

upon [Claimant's] history, clinical examination, and medical record review, [Claimant] may have had some transient soft tissue strains and sprains to the neck and left shoulder area.” R.R. at 143a. However, Dr. Schmidt opined that Claimant was fully recovered as of the date of the exam and capable of returning to his pre-injury employment without restriction.

Claimant introduced the deposition testimony of his primary treating physician, Dr. Robert Mauthe, M.D., who is board-certified in physical medicine and rehabilitation and electrodiagnostic studies. Dr. Mauthe testified that Claimant had reached maximum medical improvement with “a persistent residual functional impairment of the neck.” R.R. at 55a. Dr. Mauthe testified that “I believe that [Claimant] has a combination of cervical facet syndrome or whip lash.” R.R. at 55a. Dr. Mauthe disagreed with Dr. Schmidt’s interpretation of Claimant’s MRI study. Dr. Mauthe believed the MRI revealed degenerative disc disease and disc protrusions; however, he did not believe these abnormalities arose from Claimant’s work-related accident. Dr. Mauthe stated that his “biggest problem [was with Claimant] maintaining one position for a sustained period of time and concentrating and having to make decisions that affect people’s lives.” R.R. at 65a-66a. Nevertheless, Dr. Mauthe released Claimant to his pre-injury employment on a four hour per-day basis.

On March 16, 2004, WCJ Peleak issued a decision finding that Claimant could return to his pre-injury employment on a full-time basis. Therefore, the WCJ denied Claimant’s review petition and suspended his benefits. Both parties appealed and the Board affirmed.

Claimant appealed the Board’s decision to this Court, and this Court remanded. We directed the WCJ to explain his credibility decisions with respect to the medical experts, as required by *Daniels v. Workers’ Compensation Appeal Board*

(*Tristate Transport*), 574 Pa. 61, 828 A.2d 1043 (2003).<sup>1</sup> We also directed the WCJ, consistent with *Jeanes Hospital v. Workers Compensation Appeal Board (Hass)*, 582 Pa. 405, 872 A.2d 159 (2005), to determine whether the NCP was materially incorrect because it did not show all the work-related injuries sustained by Claimant. Finally, we remanded for findings on whether Claimant had retired.

On remand, Claimant testified before the WCJ that he retired from his employment on June 15, 2002. Claimant objected to the assertion that he removed himself from the labor force, however, because he desired to work as an unemployment compensation advocate for employers. Claimant conceded that he was not qualified for such a position. Claimant also testified that, although he is not totally incapacitated as a result of his work injury, he has not sought employment following his retirement.

After reviewing the evidence on remand, the WCJ made the following pertinent factual finding:

With regard to the Commonwealth Court's concern over the credibility of the physicians, we previously found the physicians to be pretty close in their diagnosis of [Claimant's] condition, although his treating physician, Dr. Mauthe, felt that [Claimant] suffered from some cervical facet syndrome. Nevertheless, he released the Claimant to return to his pre-injury employment on a four (4) hour per day basis, whereas Dr. Schmidt, who examined Claimant for the Employer, found that the Claimant's injuries were basically soft tissue injuries and the Claimant could return to his regular employment in an unrestricted capacity. Dr. Schmidt based this opinion on the fact that the Claimant's findings were normal during his clinical

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<sup>1</sup> This Court noted that the WCJ credited Dr. Schmidt's testimony and rejected the testimony of Dr. Mauthe. However, the WCJ failed to articulate any reason for these credibility determinations, making it impossible to conduct meaningful appellate review.

examination and that there was nothing in the diagnostic studies to indicate that the Claimant suffered from any other significant type of injury. For clarification, we accept Dr. Schmidt's opinion because it is based on his objective findings during his examination and the fact that there are no diagnostic tests that would corroborate any further injury. This is not to say that [Claimant] may not have had some residual discomfort as a result of the left shoulder strain that he suffered on January 10, 2002 only that he is not impaired by it, therefore, we thought he should be able to obtain medication or any other type of treatment that he felt appropriate but he was certainly not restricted from performing his pre-injury job or other types of work if he desired. We further find that [Claimant] knowingly and willingly removed himself from the work force through his retirement and that he was not forced out of his job nor did he continue to actively seek employment following his retirement.

WCJ Decision, dated September 22, 2006, Finding of Fact No. 8; R.R. at 235a. In sum, the WCJ concluded that the most credible medical evidence established that Claimant was capable of returning to full-time employment, and that there was no objective medical evidence to corroborate Claimant's assertion that the accident caused any injury other than his left shoulder strain. As a result, the WCJ dismissed Claimant's review petition and suspended his benefits. Claimant appealed to the Board, which affirmed. Claimant now petitions for review.<sup>2</sup>

Claimant raises two issues for this Court's review.<sup>3</sup> First, Claimant challenges the denial of his review petition and, specifically, the WCJ's finding that the credible medical evidence failed to establish that the NCP should be amended to

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<sup>2</sup> This Court's review of an order of the Board is limited to determining whether the necessary findings of fact were supported by substantial evidence, constitutional rights were violated, or errors of law were committed. *Borough of Heidelberg v. Workers' Compensation Appeal Board (Selva)*, 894 A.2d 861, 863 n.3 (Pa. Cmwlth. 2006).

<sup>3</sup> We have reordered Claimant's issues for purposes of our analysis.

include facet joint damage. Second, Claimant contends that the WCJ erred in suspending his benefits on the basis that he voluntarily left the work force.

We consider, first, Claimant’s argument that the WCJ erred in finding that the evidence failed to establish that Claimant suffered any injury beyond the “left shoulder strain” accepted by Employer in the NCP. Claimant concedes that he is bound by the WCJ’s credibility determinations, and he acknowledges that the WCJ found Employer’s medical witness, Dr. Schmidt, to be more credible than Claimant’s medical witness, Dr. Mauthe.<sup>4</sup> Claimant asserts, however, that Dr. Schmidt opined that Claimant suffered a work-related injury in the nature of soft tissue strains and sprains to the neck and left shoulder. Claimant therefore argues that the NCP should have been modified to include a cervical injury. We disagree.

We begin by reviewing the standards for modification of an NCP. When the description of an injury in an NCP does not accurately reflect the actual injury or enumerate all of the injuries suffered in a work-related incident, Section 413(a) of the Workers’ Compensation Act, Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§771-773 (Act), sets forth the procedure by which the NCP may be modified.<sup>5</sup>

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<sup>4</sup> The WCJ has exclusive province over questions of credibility and evidentiary weight and is free to accept or reject, in whole or in part, the testimony of any witnesses, including medical witnesses. *Jordan v. Workers’ Compensation Appeal Board (Philadelphia Newspapers, Inc.)*, 921 A.2d 27, 37 (Pa. Cmwlth. 2007). This Court will not disturb the finding of a WCJ when it is supported by substantial evidence. *Id.*

<sup>5</sup> Section 413(a) of the Act reads, in pertinent part, as follows:

A workers’ compensation judge may, at any time, review and modify or set aside a notice of compensation payable ... or upon petition filed by either party with the department, or in the course of the proceedings under any petition pending before such workers’ compensation judge, if it be proved that such notice of compensation payable or agreement was in any material respect incorrect. (77 P.S. §771.)

**(Footnote continued on the next page . . .)**

Pursuant to Section 413(a), a “WCJ may amend an NCP if it is materially incorrect or if the disability status of the injured employee has changed.” *Jeanes Hospital*, 582 Pa. at 418-419, 872 A.2d at 167.<sup>6</sup> In order for a claimant to amend or modify a description of an injury contained in an NCP, the claimant must file a petition to review the NCP, which is treated like a claim petition. *Id.* at 421, 872 A.2d at 169.

In a claim petition, the Claimant bears the burden of proving all the elements necessary to support an award. *Inglis House v. Workmen’s Compensation Appeal Board (Reedy)*, 535 Pa. 135, 141, 634 A.2d 592, 595 (1993). In order to meet this burden, the claimant must establish that the injury was sustained in the course of employment. *McCabe v. Workers’ Compensation Appeal Board (Department of Revenue)*, 806 A.2d 512 (Pa. Cmwlth. 2002). When the connection between the injury and the alleged work-related cause is not obvious, the claimant must prove the connection by unequivocal medical evidence. *Hilton Hotel Corp. v. Workmen’s*

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**(continued . . .)**

A workers’ compensation judge designated by the department may, at any time, modify, reinstate, suspend, or terminate a notice of compensation payable ... upon petition filed by either party with the department, upon proof that the disability of an injured employe has increased, decreased, recurred, or has temporarily or finally ceased.... Such modification, reinstatement, suspension, or termination shall be made as of the date upon which it is shown that the disability of the injured employe has increased, decreased, recurred, or has temporarily or finally ceased ... (77 P.S. §772.)

The workers’ compensation judge to whom any such petition has been assigned may subpoena witnesses, hear evidence, make findings of fact, and award or disallow compensation, in the same manner and with the same effect and subject to the same right of appeal, as if such petition were an original claim petition. (77 P.S. §773).

77 P.S. §§771-773.

<sup>6</sup> The Pennsylvania Supreme Court has stated that “[a]n NCP is materially incorrect if the accepted injury (or injuries) does not reflect all of the injuries sustained in the initial work incident.” *Jeanes Hospital*, 582 Pa. at 419, 872 A.2d at 167.

*Compensation Appeal Board (Totin)*, 518 A.2d 1316, 1319 (Pa. Cmwlth. 1986). The Pennsylvania Supreme Court has explained what constitutes unequivocal medical evidence as follows:

Where medical testimony is necessary to establish a causal connection, the medical witness must testify, not that the injury or condition *might have or possibly came from the assigned cause*, but that in his professional opinion the result in question did come from the assigned cause.... Medical evidence which is less than positive or which is based upon possibilities may not constitute legally competent evidence for the purpose of establishing the causal relationship.

*Lewis v. Workmen's Compensation Appeal Board (Pittsburgh Board of Education)*, 508 Pa. 360, 365-366, 498 A.2d 800, 802 (1985) (emphasis added) (citations omitted).

In this case, Claimant filed a review petition to modify the description of the work-related injury in the NCP to include “damage to the facet joints.” R.R. at 3a. In support, Claimant presented the testimony of Dr. Mauthe, who, as explained above, diagnosed Claimant with a combination of cervical facet syndrome or whiplash and an aggravation of his pre-existing degenerative disc disease as a result of his work injury. Dr. Mauthe did not believe that the disc disease arose from the work-related accident. Although Dr. Mauthe believed Claimant’s condition to be permanent, he opined that Claimant could return to work at his pre-injury job for up to four hours a day.

In opposition, Employer presented the testimony of Dr. Schmidt. Dr. Schmidt opined that Claimant “*may have had* some transient soft tissue strains and sprains to the neck and left shoulder area.” R.R. at 143a (emphasis added). However, based upon his clinical examination and review of the relevant diagnostic studies, Dr. Schmidt opined that Claimant was fully recovered from his work injury and able to return to his pre-injury job without restriction.



The WCJ accepted as credible the testimony of Dr. Schmidt because he found Claimant to be normal at his clinical examination and because the diagnostic studies did not show a whiplash injury. The WCJ accepted Employer's medical evidence as more credible than Claimant's medical evidence; stated otherwise, the WCJ rejected Dr. Mauthe's opinion. Thus, the WCJ held that Claimant failed to meet his burden of proving that the NCP should be amended to add facet joint damage.

Nonetheless, Claimant argues that, Employer's expert, Dr. Schmidt, established that the NCP should be amended to include a cervical injury. We disagree. Dr. Schmidt merely stated that Claimant "may have had" some soft tissue strains or sprains to the neck. It is well established that a physician's statement that a work incident "could have" caused an injury, which in this case is alleged to be a neck sprain, is insufficient to prove the connection. *Lewis*, 508 Pa. at 367, 498 A.2d at 803. More importantly, Dr. Schmidt testified that Claimant was fully recovered and capable of returning to his pre-injury employment without restrictions. Thus, Dr. Schmidt's testimony did not prove that the NCP was materially incorrect.

We next consider Claimant's argument that the WCJ erred in suspending his benefits for the reason that Claimant voluntarily left the work force. Claimant argues that his testimony demonstrated that he desired work in the unemployment compensation field. Claimant further asserts that there was no evidence that his pre-injury position was made available to him, even though the medical evidence indicated he could return to his pre-injury position without restrictions. For these reasons, Claimant asserts that the WCJ erred in suspending his disability benefits. We disagree.

Generally, to obtain a suspension of workers' compensation disability benefits, the employer must demonstrate suitable employment was made available to

the claimant. *Kachinski v. Workmen's Compensation Appeal Board (Veeco Construction Co.)*, 516 Pa. 240, 250, 532 A.2d 374, 379 (1987). However, it is well established that this rule does not apply in cases where the claimant retires. *Southeastern Pennsylvania Transportation Authority v. Workmen's Compensation Appeal Board (Henderson)*, 543 Pa. 74, 669 A.2d 911 (1995). In *Henderson*, the Pennsylvania Supreme Court stated:

It is clear that disability benefits must be suspended when a claimant voluntarily leaves the labor market upon retirement. The mere possibility that a retired worker may, at some future time, seek employment does not transform a voluntary retirement from the labor market into a continuing compensable disability. An employer should not be required to show that a claimant has no intention of continuing to work; such a burden of proof would be prohibitive. For disability compensation to continue following retirement, a claimant must show that he is seeking employment after retirement or that he was forced into retirement because of his work-related injury.

*Henderson*, 543 Pa. at 79, 669 A.2d at 913. Thus, for disability benefits to continue following retirement, the employer does not need to demonstrate that suitable employment was made available to the claimant.<sup>7</sup> Rather, the burden is on the voluntarily retired claimant to establish that he sought employment after retirement or that he was forced into retirement because of the work-related injury.<sup>8</sup>

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<sup>7</sup> See, e.g., *Kasper v. Workers' Compensation Appeal Board (Perloff Brothers, Inc. and Sedgwick James & Co.)*, 769 A.2d 1243 (Pa. Cmwlth. 2001) (employer did not have to demonstrate that suitable employment was made available where claimant retired to Florida and had not looked for employment or contacted any personnel companies to try to find employment).

<sup>8</sup> See, e.g., *Maroski v. Workers' Compensation Appeal Board (Bethlehem Steel Corp.)*, 725 A.2d 1260 (Pa. Cmwlth. 1999) (claimant failed to meet his burden of proof because he did not present evidence that he sought employment after retiring or that he was forced to retire due to his injury).

Claimant testified that he intended to seek employment as an unemployment compensation advocate, but he was not qualified for such a position. Claimant also testified that he had not taken any additional steps to find employment. The mere possibility that a retired worker may seek employment does not transform a voluntary retirement into a continuing compensable disability. *Id.* Additionally, in order to show that he was “forced into retirement,” Claimant was “required to demonstrate that he was forced out of the *entire labor market, not just his pre-injury job.*” *Pries v. Workers’ Compensation Appeal Board (Verizon Pennsylvania)*, 903 A.2d 136, 143 (Pa. Cmwlth. 2006) (emphasis added). This he failed to do. Thus, because Claimant failed to establish that he was forced out of the entire labor market as a result of his work-related injury or that he continued to seek employment,<sup>9</sup> the WCJ properly suspended Claimant’s benefits.

For these reasons, we affirm the Board.

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MARY HANNAH LEAVITT, Judge

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<sup>9</sup> Even assuming, *arguendo*, that Claimant was seeking additional employment, Claimant ignores that the WCJ found, as fact, that he was capable of returning to full-time employment. Claimant has not challenged this finding and, therefore, it is binding on this Court.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert J. Dougherty,	:	
Petitioner	:	
	:	
v.	:	No. 1881 C.D. 2007
	:	
Workers' Compensation Appeal	:	
Board (Department of Labor and	:	
Industry),	:	
Respondent	:	

**ORDER**

AND NOW, this 12<sup>th</sup> day of February, 2008, the order of the Workers' Compensation Appeal Board dated September 17, 2007, in the above-captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge