IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Deborah A. Birkhimer, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Lower Yoder Township), Respondent	:	No. 2048 C.D. 2007
	:	Submitted: January 25, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: April 15, 2008

Deborah A. Birkhimer (Claimant) petitions for review of the order of the Workers' Compensation Appeal Board (Board) which affirmed the order of the Workers' Compensation Judge (WCJ) who granted the modification petition of Lower Yoder Township (Employer).

Claimant worked as a police officer for Employer. On January 27, 1992, Claimant suffered an injury during the course and scope of her employment when she slipped on the ice after exiting the Township building. Claimant fell and hit her tailbone and both wrists and hands in an attempt to break the fall. Employer issued a notice of compensation payable and Claimant received weekly compensation benefits of $445.35 based on an average weekly wage of $668.03.

On or about August 11, 1998, Employer petitioned to modify/suspend benefits. Employer alleged that, as of February 23, 1998, Claimant failed to

exercise good faith by applying for jobs referred to her within her physical capacity to perform and within her geographic area.

Employer presented the deposition testimony of William Hennessey, M.D. (Dr. Hennessey), board-certified in physical medicine and rehabilitation. Dr. Hennessey examined Claimant on October 6, 1997, took a history, and reviewed medical records. Dr. Hennessey testified that Claimant recovered from the work-related "low back strain or contusion or soft tissue injury as well as some wrist sprains . . . ." Deposition of William Hennessey, M.D., December 2, 1998, (Dr. Hennessey Deposition) at 17. He also noted that she had a discectomy of part of the L5-S1 disc and had an accompanying S1 radiculopathy to the right side but had no active radicular process at the time of examination. Dr. Hennessey Deposition at 17. Dr. Hennessey testified within a reasonable degree of medical certainty that Claimant could return to work at a sedentary or "light" position on a full time basis. Dr. Hennessey Deposition at 18. Dr. Hennessey approved Claimant for jobs at Comfort Inn, Hoss' Steak & Sea House, Laurel Bank, and the Tribune-Democrat. Dr. Hennessey Deposition at 18-21.

Employer also presented the deposition testimony of Georgette Gerben (Gerben), a rehabilitation consultant to Occupational Resource Specialists and certified rehabilitation counselor. Gerben interviewed Claimant on February 19, 1998, to obtain information about her education and work experience. Dr. Hennessey released Claimant to sedentary to light duty with maximum lifting of up to twenty-five pounds. Gerben located six jobs for Claimant that were within a reasonable geographic distance from Claimant's residence and that fit within her

physical restrictions as well as her educational and work experience. Deposition of Georgette Gerben, March 12, 1999, (Gerben Deposition) at 15. She located a position of front desk clerk at a Comfort Inn which was available on February 23, 1998, and notified Claimant of the position by certified and regular mail. In the letter, Gerben directed Claimant to apply for the Comfort Inn position on March 3, 1998, at 11 a.m. Claimant did not appear at that time. Gerben Deposition at 16-17. The position paid $5.15 per hour for sixteen to thirty-two hours a week. Gerben Deposition at 19; Reproduced Record (R.R.) at 72a.

Gerben also located a hostess position at Hoss's Steak and Sea House on March 6, 1998. Gerben notified Claimant of the available position and instructed her to apply in person on March 11, 1998, at 2 p.m. Claimant did not appear. Gerben Deposition at 20-21; R.R. at 73a-74a. The position at Hoss's paid $5.15 an hour for sixteen to twenty-five hours per week. Gerben Deposition at 22; R.R. at 75a.

Gerben referred Claimant to a part-time teller position at Laurel Bank. Gerben instructed Claimant to contact the human resources department and arrange to have an application mailed to her. Gerben Deposition at 24. Laurel Bank had no record that Claimant ever applied for a job. Gerben Deposition at 25. The job paid $7.19 per hour for twenty to thirty hours per week. Gerben Deposition at 26. Gerben also referred Claimant to a telephone customer service position at the Tribune-Democrat. Claimant did not apply. Gerben Deposition at 27-28. Gerben referred Claimant to a night auditor position at Hampton Inn. Claimant did not appear to apply at Hampton Inn on May 26, 1998 as Gerben requested. Gerben

Deposition at 29-30. This position paid $5.15 per hour and was for sixteen to twenty-four hours per week. Gerben Deposition at 31. Finally, Gerben referred Claimant to a salesperson position at Boscov's. Claimant did not apply for the position which was for $5.15 per hour for fifteen to twenty hours per week. Gerben Deposition at 32-33, and 35; R.R. at 77a.

Claimant testified that she suffered from headaches, blurred vision, ringing in her ears, stiffness and pain in her neck, pain in her arms, hands, and wrist, numbness and tingling in her hands and fingers, muscle spasms down the upper part of her chest, low back pain, and pain into the right groin. Claimant further testified that she had urinary and bowel problems. Notes of Testimony, September 17, 1998, (N.T.) at 10-11. She also complained of pain that radiated from her right buttock into her right leg down into her foot. She also said that her right leg gave out at times while walking. N.T. at 11. Claimant had disc herniations at C4-5, C6-7, and L5-S1 and a fusion at C5-6. N.T. at 12. Claimant had trouble sleeping and had limited concentration. Claimant was prescribed Oxycontin which she took three times a day in twenty milligram doses. N.T. at 13-14. Claimant testified that she went to the Comfort Inn on March 3, 1998, but the assistant manager with whom she was supposed to meet was not there. Notes of Testimony, July 6, 1999, (N.T. 7/6/99) at 21, and 23; R.R. at 89a and 91a. At Hoss's, she was told that "we're always accepting applications, we're not necessarily hiring at this time, we may review applications at a later date." N.T. 7/6/99 at 24; R.R. at 92a. Claimant testified that she called Laurel Bank several times but the person who handled the applications was not there and did not return her call. N.T. 7/6/99 at 25; R.R. at 93a. She testified that she applied for the

position at the Tribune-Democrat but never heard anymore about it. Claimant said that the manager at the Hampton Inn informed her that the position had been filled. N.T. 7/6/99 at 26; R.R. at 94a. When she spoke with someone at Boscov's, she was told there were no immediate openings. N.T. 7/6/99 at 27; R.R. at 95a.

Claimant presented the deposition testimony of William R. Acosta, M.D. (Dr. Acosta), her treating physician and board-certified in pain management. Dr. Acosta initially treated Claimant on March 24, 1998. Dr. Acosta testified that Claimant was unable to work. Deposition of William R. Acosta, M.D., April 23, 1999, at 49.

By order dated August 4, 1999, the WCJ granted Employer's modification petition and modified compensation benefits to reflect an earning capacity of $82.40 per week and reduced Claimant's rate of compensation to $390.42 per week effective March 11, 1998. The WCJ made the following relevant finding of fact:

> 18. Based upon the foregoing and review of the record in its entirety, it is found as follows:
> . . . .
> (b) Each of the six job referrals identified in the testimony of Ms. Gerben are within the occupational category of physical level of employment approved by Dr. Hennessey, and the Claimant was physically capable of performing each of these positions. Four of these positions were subsequently, specifically, approved by Dr. Hennessey as being physically appropriate for performance by the Claimant. The Claimant, and her counsel, were specifically notified of Dr. Hennessey's release of the Claimant to perform light duty/sedentary employment;

> (c) The Claimant failed to act in good faith in following through on the job referrals;
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> (d) It is found that, effective March 11, 1998, the date that the Claimant was instructed to apply for the job at Hoss's Steak and Sea House, the Claimant is deemed to have inputed [sic] earnings of $5.15 per hour for 16 hours per week for a total of $82.40 per week;
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> (e) In reaching these findings, the testimony of Dr. Hennessey as to the Claimant's ability to work is found more credible than the testimony of Dr. Acosta because Dr. Acosta's opinion was generally based on inadmissible hearsay and lacked significant objective findings.
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> (f) In reaching these findings, the testimony of Ms. Gerben is found to be consistent, logical, probative and persuasive and is accepted as fact.

WCJ's Decision, August 6, 1999, Finding of Fact No. 18 at 7-8.

The parties stipulated that neither party received a copy of the WCJ's decision. On February 26, 2003, Claimant appealed nunc pro tunc to the Board. The Board declared the WCJ's decision a nullity because it was never circulated. The Board remanded for the case to proceed on its merits. Because of the length of time since the original decision, the Board permitted the parties to present evidence regarding Claimant's current earning capacity.

On remand, the WCJ held a hearing to determine the parties' positions on the remand order. In a decision dated January 21, 2004, the WCJ adopted the 1999 WCJ's decision in full.

Claimant appealed to the Board and alleged that the WCJ's decision was not supported by substantial, competent evidence and that the WCJ violated the remand order because he refused to take any evidence concerning Claimant's current earning capacity. The Board affirmed in part and reversed in part. The Board affirmed the modification of benefits but reversed regarding Claimant's earning capacity because the earlier remand order directed the WCJ to allow the parties to present evidence concerning Claimant's earning capacity.

On remand, Claimant testified that numbness and problems with her right arm have increased dramatically such that she dropped plates and dishes and had difficulty holding onto anything. She also had difficulty sleeping for more than one or two hours at a time, pain in her lower back, headaches, limited movement in her neck, pain in her tailbone when she sits, pain in her lower back that radiates to her right groin and down her right leg, difficulty walking, and her right leg "a lot of times . . . will give out." Notes of Testimony, March 29, 2005, (N.T. 3/29/05) at 15-16. Her ability to concentrate declined to the point where she was afraid to put things on the stove because twice she had fires. N.T. 3/29/05 at 17. Claimant had a disc surgically removed from her back at L5-S1. N.T. 3/29/05 at 25.

Employer presented two medical reports from Vincent F. Morgan, M.D. (Dr. Morgan) who examined Claimant on May 25, 2004, and on July 13, 2005. Dr. Morgan diagnosed Claimant as status post work-related fall with chronic cervical and lumbar pain, L5-S1 disc herniation secondary to the work-related fall with subsequent discectomy with chronic low back pain and bilateral

lower extremities radiculitis without evidence of radiculopathy on examination, chronic cervical pain and bilateral upper extremity radiculitis with C4-5 and C6-7 disc protrusions without evidence of radiculopathy on examination, and continued evidence of nonorganicity/symptom magnification on evaluation. Report of Vincent F. Morgan, M.D, July 13, 2005, (Dr. Morgan Report) at 2. Dr. Morgan opined that Claimant was capable of full time sedentary work with the opportunity to alternate positions. Dr. Morgan Report at 3.

Claimant presented three medical reports from Dr. Acosta. Dr. Acosta opined that Claimant was incapable of performing any gainful activity including light or sedentary jobs. He believed that Claimant was totally disabled. Report of William R. Acosta, M.D., March 2, 2006, at 1.

The WCJ again granted the modification petition and ordered that Claimant's compensation rate be modified to a partial compensation rate of $390.42 effective March 11, 1998, and ongoing for a period not to exceed 500 weeks.[1] Claimant appealed to the Board which affirmed.

Claimant contends that the WCJ and the Board committed an error of law and violated Claimant's Fifth and Fourteenth Amendment due process rights guaranteed by the United States Constitution to notice and an opportunity to be heard in a meaningful time and manner and Sections 418 and 423(a) of the

[1] The WCJ also denied Claimant's utilization review and affirmed a utilization review determination that concluded it was only reasonable and necessary for Claimant to treat with Dr. Acosta twice in one year. This determination is not before this Court.

Workers' Compensation Act (Act)[2] by allowing the WCJ's initial decision to be rendered five years after the hearing was held, that the Board and WCJ committed an error of law when they excused Employer's failure to send Claimant a Notice of Availability to Return to Work form as mandated by the Act until six years after the job referral letters were mailed and it was a necessary finding of fact not supported by substantial evidence on the record to modify Claimant's benefits that could not be waived, and that the WCJ and the Board committed an error of law when they relied upon hearsay vocational expert opinions to find bad faith on

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[2] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§833 and 853. Section 418 of the Act, 77 P.S. §833, provides:

> The referee to whom a petition is assigned for hearing, may subpoena witnesses, order the production of books and other writings, and hear evidence, shall make a record of hearings, and shall make, in writing and as soon as may be after the conclusion of the hearing, such findings of fact, conclusions of law, and award or disallowance of compensation or other order, as the petition and answers and the evidence produced before him and the provisions of this act shall, in his judgment, require. The findings of fact made by a referee to whom a petition has been assigned or any question of fact has been referred under the provisions of section four hundred and nineteen shall be final, unless an appeal is taken as provided in this act.

This Section was added by the Act of June 26, 1919, P.L. 642.

> Section 423(a) of the Act, 77 P.S. §853, provides:
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> Any party in interest may, within twenty days after notice of a workers' compensation judge's adjudication shall have been served upon him, take an appeal to the board on the ground: (1) that the adjudication is not in conformity with the terms of this act, or that the workers' compensation judge committed an error of law; (2) that the findings of fact and adjudication was unwarranted by sufficient, competent evidence or was procured by fraud, coercion, or other improper conduct of any party in interest. The board may, upon cause shown, extend the time provided in this article for taking such appeal or for the filing of an answer or other pleading.

behalf of Claimant who suffered pre Act 57 work-related injuries without any proof of actual job availability from a prospective employer.[3]

Initially, Claimant contends that the WCJ and the Board erred and violated Claimant's rights to due process guaranteed by the Fifth and the Fourteenth Amendments to the United States Constitution because Claimant was not provided with notice and an opportunity to be heard and also in violation of the Act. Claimant makes this claim because she had neither notice nor an opportunity to be heard before the WCJ entered his order dated January 20, 2004, following the Board's remand order of April 28, 2003.

The Board reversed in part the WCJ's order of January 20, 2004, and remanded the case for the WCJ to hear testimony. Claimant testified before the WCJ on remand and submitted medical reports. Claimant also testified and presented evidence in the original proceedings before the WCJ. This Court agrees with the Board that "any perceived violation [of Claimant's rights to due process] was remedied with Claimant's presentation of evidence to the WCJ before his 2006 Decision was rendered." Board Opinion, October 19, 2007, at 8 n.2; R.R. at 11a. Indeed, Claimant does not address this conclusion by the Board.

Claimant next contends that the WCJ and the Board committed errors of law when each excused Employer's failure to send a Notice of Availability to

[3] This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

Return to Work form to Claimant as required by Section 306(b)(3) of the Act, 77 P.S. §512(3)[4], until years after the job referral letters were mailed. The parties stipulated that the form was not sent to Claimant until July 27, 2004, six years after the job referral letters upon which the WCJ relied in making his decision. Claimant argues that Employer's failure to timely issue the Notice of Ability to Return to Work form prevented consideration of the job referral letters.

Claimant did not raise this issue in the original proceedings before the WCJ, in the first appeal to the Board, in the second appeal to the Board, or at any time before the WCJ on remand. Claimant first raised the issue of the failure to timely issue the Notice of Availability to Return to Work in its appeal to the Board of the WCJ's December 28, 2006, decision. The doctrine of waiver applies in workers' compensation proceedings. Dobransky v. Workmen's Compensation

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[4] Section 306(b)(3) of the Act, 77 P.S. §512(3), provides:

> 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, 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.

Appeal Board (Continental Baking Co.), 701 A.2d 597 (Pa. Cmwlth. 1997). The waiver doctrine requires that issues be raised at the earliest opportunity. Rox Coal Co. v. Workers' Compensation Appeal Board (Snizaski), 570 Pa. 60, 807 A.2d 906 (2002). Here, Claimant clearly did not raise this issue at the earliest possible opportunity. This Court agrees with the Board that Claimant waived this issue.

Claimant next contends that the WCJ and the Board committed errors of law when they relied upon the hearsay opinions of Gerben to find bad faith on the part of Claimant. Claimant argues that without proof of actual job availability from a prospective employer, Employer could not meet its burden of proving that it was entitled to a modification of benefits.

Once again, Claimant did not preserve this issue. A review of Claimant's appeal to the Board from the WCJ's December 28, 2006, decision reveals that Claimant did not raise this issue before the Board. Accordingly, this issue is waived.[5]

This Court affirms.

BERNARD L. McGINLEY, Judge

[5] Claimant also asks that this Court award her attorney fees under Section 440 of the Act, 77 P.S. §996. Because Claimant did not prevail, she is not entitled to attorney fees. See Phillips v. Workmen's Compensation Appeal Board (Century Steel), 554 Pa. 504, 721 A.2d 1091 (1999).

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Workers' Compensation Appeal Board (Lower Yoder Township), Respondent	:	No. 2048 C.D. 2007

O R D E R

AND NOW, this 15th day of April, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge