

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Frederick Roseberry,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2049 C.D. 2007
	:	
Workers' Compensation Appeal Board	:	Submitted: March 7, 2008
(Unifirst Corporation),	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: June 5, 2008

Frederick Roseberry (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) that affirmed the Workers' Compensation Judge's (WCJ) Decision and Order granting Unifirst Corporation's (Employer) Petition to Modify or Suspend Compensation Benefits (Modification Petition). On appeal, Claimant argues that the Board erred in modifying his benefits because Employer's modified job offer was outside Claimant's physical restrictions of not operating or riding in large delivery trucks.

The relevant facts of this case are as follows. On January 14, 2003, Claimant sustained a low back and left knee injury while working in the scope and course of his employment. On March 19, 2003 a Notice of Compensation Payable was issued. On November 16, 2005, Employer filed a Petition for Suspension, later amended to alternatively include modification, stating that a specific job had been offered to Claimant. Claimant timely answered the Modification Petition denying that a specific job within his physical restrictions had been offered.

During several hearings before a WCJ, Employer and Claimant submitted testimony and depositions regarding the Modification Petition. In support of its Modification Petition, Employer submitted the testimony of Paul Leslie, an employee and former branch manager for Employer, and submitted the deposition testimony of Richard Todd Kozakiewicz, M.D., who specializes in physical medicine and rehabilitation. In opposition to the Modification Petition, Claimant testified twice before the WCJ and submitted the deposition testimony of James R. Macielak, M.D.

The WCJ summarized the testimony of Leslie as follows. Leslie testified that Employer was a supplier of industrial uniforms and other products. Leslie stated that Employer offered Claimant a modified duty position in accordance with the physical restrictions imposed by Dr. Kozakiewicz, beginning October 31, 2005. Leslie testified that Claimant did not return to work in a modified duty capacity, nor did he contact Employer after Employer offered Claimant the modified position. He also gave a detailed description of the duties and physical requirements for the modified duty position. (WCJ Decision, Findings of Fact (FOF) ¶ 4.)

The WCJ summarized the testimony of Dr. Kozakiewicz as follows. Dr. Kozakiewicz, a board-certified physiatrist, testified that he examined Claimant on

behalf of Employer on October 4, 2005. Dr. Kozakiewicz explained that he took a medical history, reviewed Claimant's medical records, and performed a physical examination. Dr. Kozakiewicz testified that his conclusion was that Claimant had ongoing residual disability from his work-related injury. Dr. Kozakiewicz also testified that Claimant would be capable of full-time, light-duty work, including: lifting a maximum of twenty pounds occasionally; sitting for three to four hours per day; standing for three to four hours per day; walking for two to three hours per day; and, bending, climbing, kneeling, and squatting occasionally. (FOF ¶ 8.) Additionally, Dr. Kozakiewicz testified that he had reviewed the modified duties of the offered position and concluded that Claimant would be able to perform the modified work. (FOF ¶ 8.)

The WCJ summarized the testimony of Claimant as follows. Claimant testified that he continues to have low back pain, which gets worse with twisting, and that he continues to be treated by Dr. Macielak about every six months. Claimant did not recall Dr. Macielak releasing him back to work. Claimant also testified that he "did not think he was capable of performing the modified duty" position offered by Employer. (FOF ¶ 5.) However, Claimant testified that he worked for a correctional institution for approximately three months after his work injury, and that he applied for a position as a truck driver after his work injury. Furthermore, Claimant testified that he is a deer hunter and had successfully harvested a deer in 2005. (FOF ¶ 5.)

The WCJ summarized the testimony of Dr. Macielak as follows. Dr. Macielak, a board-certified orthopedic surgeon, testified on behalf of Claimant. He stated that he reviewed a Functional Capacity Evaluation (FCE) of Claimant and from this concluded that Claimant was capable of "light duty work for less than eight hours per day." (FOF ¶ 9.) However, Dr. Macielak also testified that the FCE evaluated the

Claimant's *entire* physical condition and was not limited to findings of the work-related injury alone. (FOF ¶ 9.) Dr. Macielak acknowledged that he was aware of Claimant's position as a prison guard and that Claimant had sought work as a truck driver after his work-related injury occurred. Dr. Macielak testified that, in his opinion, Claimant was able to work at either or both of those jobs at the time and, thus, he did not restrict Claimant from working either position. However, Dr. Macielak testified that he was unaware that Claimant had also been deer hunting in the fall of 2005.

After considering all of the evidence, the WCJ found that Employer had met its burden to show that Claimant's benefits should be modified in accordance with the modified duty job offer as of October 31, 2005. The WCJ found Leslie's testimony credible regarding the modified job offer being within Claimant's restrictions, the availability of additional modifications if necessary, and that Claimant did not perform the modified position. The WCJ found the testimony of Dr. Kozakiewicz to be more credible than the testimony of Dr. Macielak. The WCJ found credible Dr. Kozakiewicz's opinion that Claimant could perform the modified, light-duty job on a full-time basis, which was based on his evaluation and review of the light-duty job offer. The WCJ found the opinion of Dr. Macielak to be less credible because he did not express his own opinion as to Claimant's physical restrictions. Instead, Dr. Macielak based his opinion on the FCE, which contained an evaluation of Claimant's entire physical status and not just the restrictions due to his work-related injury. Further, the WCJ noted that Dr. Macielak was unaware of Claimant's activities of deer hunting, which admittedly were outside of Claimant's stated restrictions. The WCJ found the testimony of Claimant not credible that he could not perform the modified job because Claimant, himself, testified that he worked as a

prison guard and applied for a truck driver position immediately following his work-related injury. Accordingly, Employer's Modification Petition was granted.

Claimant then appealed to the Board, which affirmed the decision and order of the WCJ. The Board determined that the WCJ's decision was supported by substantial and competent evidence and that Employer met its burden to prove that Claimant rejected an available, modified, light-duty position, which fit within the occupational category for which he had been given medical clearance. The Board specifically found that the modified position was not outside of Claimant's physical restrictions because Dr. Kozakiewicz permitted occasional riding and driving of small delivery trucks and Dr. Macielak testified that, although Claimant may have trouble riding or operating a delivery truck, he did not restrict Claimant from driving. Additionally, the Board found that, even if Claimant had been restricted from driving or riding in a delivery truck, Leslie credibly testified that the modified, light-duty job could be further modified to meet the physical restrictions of Claimant. Claimant now petitions this Court for review.¹

On appeal, Claimant argues that the WCJ erred in modifying Claimant's benefits because the record does not contain substantial evidence to show that a modified position was actually available for Claimant. Specifically, Claimant contends that the modified position offered to him included riding and driving a delivery truck, which Claimant contends was outside his medical restrictions.

¹ When considering a petition for review of an order of the Board, our review is limited to determining "whether there has been a violation of constitutional rights, whether an error of law has been committed, or whether all necessary findings of fact are supported by substantial evidence." Gregory v. Workers' Compensation Appeal Board (Narvon Builders), 926 A.2d 564, 566 n.5 (Pa. Cmwlth. 2007).

In seeking a modification of compensation benefits, “[t]he employer has the burden of showing that the disability has ended or has been reduced and that work is available to the claimant and claimant is capable of doing such work.” Celio v. Workmen’s Compensation Appeal Board (Canonsburg General Hosp.), 531 A.2d 552, 553 (Pa. Cmwlth. 1987). In Kachinski v. Workmen’s Compensation Appeal Board (Veeco Construction Co.), 516 Pa. 240, 252, 532 A.2d 374, 380 (1987), our Supreme Court set forth the following test for determining when modification of a claimant’s benefits is appropriate on account of a job offer:

1. The employer who seeks to modify a claimant's benefits on the basis that he has recovered some or all of his ability must first produce medical evidence of a change in condition.
2. The employer must then produce evidence of a referral (or referrals) to a then open job (or jobs), which fits in the occupational category for which the claimant has been given medical clearance, e.g., light work, sedentary work, etc.
3. The claimant must then demonstrate that he has in good faith followed through on the job referral(s).
4. If the referral fails to result in a job then claimant's benefits should continue.

Id. at 252, 532 A.2d at 380.

In workers’ compensation proceedings, the WCJ is the ultimate finder of fact and arbiter of credibility. Westmoreland County v. Workers’ Compensation Appeal Board (Fuller), 942 A.2d 213, 216 n.6 (Pa. Cmwlth. 2008). As the fact finder, the WCJ has exclusive province over weighing the evidence. Id. As such, “[t]he WCJ is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part.” Id. As long as the WCJ’s factual findings are supported by

substantial evidence, those findings are binding on appeal. Id. Substantial evidence is defined as “relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Gibson v. Workers’ Compensation Appeal Board (Armco Stainless & Alloy Prods.), 580 Pa. 470, 479, 861 A.2d 938, 943 (2004). “It is irrelevant whether there is evidence to support contrary findings; the relevant inquiry is whether substantial evidence supports the WCJ’s necessary findings.” Westmoreland County, 942 A.2d at 216 n.6.

Here, the sole issue revolves around the second prong of the Kachinski test. And, upon review, we conclude that there is substantial evidence to support the WCJ’s conclusion that Employer offered Claimant a modified position, which was within Claimant’s medical restrictions and was actually available.

On October 24, 2005, Leslie sent a letter to Claimant offering him a modified position which fit within the modified restrictions by Dr. Kozakiewicz. The letter stated that the modified position:

[W]ill allow you to sit, stand, walk and change positions as needed. You will not have to perform any lifting in excess of 20 pounds. Your job duties will include the following: handling accounts receivable: filing paperwork: making and distributing copies: emptying [sic] and distributing contents of shuttle box: performing data entry work: running special deliveries within light duty restriction: doing black outs: going to the bank: cleaning the office: and riding on trucks.

(Letter from Leslie to Claimant (October 24, 2005).) At a hearing before the WCJ, Leslie clarified the modified-duty position. Leslie credibly testified that Claimant would be “working *primarily* in the office . . . maintaining and cleaning the office . . . [and] *at times possibly* making deliveries as long as they fell within the weight

guidelines and the operating of the motor vehicle guideline restrictions.” (WCJ Hr’g Tr. at 12, December 14, 2005 (emphasis added).) Upon questioning about running special deliveries as part of Claimant’s modified position, Leslie testified that Claimant would “absolutely” be able to change positions as needed in performing the modified duty assignment, and that Employer would be “absolutely” willing to make further modification to the job if necessary for Claimant to come back to work. (WCJ Hr’g Tr. at 13-15, December 14, 2005.) Leslie further explained that, in performing special deliveries, Claimant would be riding in a sales vehicle that looked like a “UPS truck”, and could be gone for most of the day if a big service area was being serviced that day. (WCJ Hr’g Tr. at 19-20, December 14, 2005.) However, again, Leslie clarified that “if he went [and] were to ride on the truck and if it’s something that he was not able to do based on his restrictions, of course we would not have him do that” (WCJ Hr’g Tr. at 20, December 14, 2005.)

Dr. Kozakiewicz reviewed Claimant’s medical records, took a medical history from Claimant, and physically examined him. Based on this, Dr. Kozakiewicz credibly opined that Claimant “was medically capable of full-time light-duty work.” (Kozakiewicz Dep. at 11.) In addition to the specific restrictions of sitting, standing, bending, lifting, reaching, and twisting, as explained on page 3 of this opinion, Dr. Kozakiewicz opined “that occasional driving of a car as appropriate relative to the job requirements would be indicated.” (Kozakiewicz Dep. at 12.) Dr. Kozakiewicz credibly testified that he reviewed the October 24, 2005 Letter from Leslie to Claimant and opined that Claimant would be able to perform the work described. (Kozakiewicz Dep. at 13.) He also testified that he reviewed Leslie’s testimony from the December 2005 hearing transcript, in which Leslie explained in more detail the

modified position, and opined that Leslie's description of the modified position "was consistent with those duties being within the objectively medically appropriate recommendations that I made." (Kozakiewicz Dep. at 14.) Dr. Kozakiewicz also opined that Claimant's work injury would not prevent Claimant from performing the light-duty position. (Kozakiewicz Dep. at 14.) With regard to Claimant's ability to operate a truck or ride along in a truck, described as a UPS truck, Dr. Kozakiewicz testified on cross-examination that the same general restrictions of driving or riding in a car would also apply. (Kozakiewicz Dep. at 25.) Dr. Kozakiewicz testified that he would recommend that Claimant not be in a seated position for more than one hour at a time and be given a chance every hour or every 70 miles to get out of the vehicle and walk in order to take pressure off the disc in his lower back. (Kozakiewicz Dep. at 25.) Dr. Kozakiewicz explained on re-direct examination that making deliveries and riding in trucks "would be objectively medically appropriate if they . . . fell within my medical recommendations, and . . . if the seat in the truck . . . would be user-friendly" (Kozakiewicz Dep. at 29.)

Based on the credible testimony of Leslie and Dr. Kozakiewicz, and the letter to Claimant offering him the full-time, light-duty position, we agree with the Board that there is substantial evidence that Employer offered Claimant an available position, which fit into the occupational category for which Claimant had been given medical clearance. Dr. Kozakiewicz did not restrict Claimant from driving or riding in a truck but, rather, restricted Claimant to the amount of time he could sit in a truck without changing positions to relieve pressure in his lower back. Likewise, Leslie credibly testified that Claimant would *primarily* be working in the office, and only occasionally making deliveries so long as it fit within Claimant's medical restrictions. Furthermore, Leslie made it perfectly clear in answering several different questions

that Claimant would be able to change positions, as needed, to perform his light-duty job; he would not have to ride in a truck if he was not able to do so; and, Employer would make further modifications to the position if necessary in order for Claimant to return to work. Accordingly, we disagree with Claimant that the proffered modified position, which included riding in trucks, was outside his medical restrictions.

Based on the foregoing opinion, we affirm the Board's order granting Employer's Modification Petition.

RENÉE COHN JUBELIRER, Judge

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Workers' Compensation Appeal Board	:	
(Unifirst Corporation),	:	
	:	
Respondent	:	

ORDER

NOW, June 5, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge