IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Upper Darby Township, Petitioner	:	
v.	:	No. 2063 C.D. 2010
	:	Submitted: April 29, 2011
Workers' Compensation Appeal Board (Dunn), Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: August 10, 2011

Upper Darby Township (Employer) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) that denied Employer's petition to terminate or, in the alternative, suspend Michael Dunn's (Claimant) workers' compensation benefits. In doing so, the Board affirmed the Workers' Compensation Judge's (WCJ) determination that Employer failed to prove that Claimant was fully recovered or that it had offered him an available job within his restrictions. Finding no error, we affirm.

Claimant was last employed as a police officer by Employer. On December 5, 2004, Claimant fell to the ground while attempting to restrain a burglary suspect. Claimant filed an incident report with Employer. WCJ Decision, March 31, 2009, at 6 (WCJ Decision ____); Finding of Fact 9b. Claimant was referred by Employer's workers' compensation administrator to Dr. Eugene Elia, a

board certified orthopedic surgeon, for treatment of his shoulder and left knee injuries. Dr. Elia surgically repaired Claimant's right shoulder on November 3, 2005, and the left shoulder on June 29, 2006. Employer issued a Notice of Temporary Compensation Payable (NTCP) identifying the work injury as a right shoulder strain and sprain and rotator cuff tear. The NTCP later converted to a Notice of Compensation Payable (NCP). Following a one-year period of rehabilitation, Dr. Elia authored a report on November 19, 2007, stating that Claimant continued to complain of upper extremity weakness and had reached maximum medical improvement. WCJ Decision at 5; Finding of Fact 8l. Dr. Elia opined that Claimant could not return to work as a police officer.[1]

Employer sent Claimant to Dr. William Spellman, a board certified orthopedic surgeon, for a second opinion on December 13, 2007. Dr. Spellman disagreed with Dr. Elia and felt that Claimant could return to his normal work duties. Relying on Dr. Spellman's opinion, on January 4, 2008, Employer filed a termination petition alleging Claimant's work injury was fully resolved. Employer also sent Claimant a notice to return to work. When Claimant failed to comply, Employer filed a suspension petition on January 14, 2008, alleging that Claimant was offered a specific job within his medical capabilities but he refused to return to work. The WCJ consolidated Employer's petitions, denied supersedeas, and conducted a hearing on August 20, 2008.

Claimant, through oral and deposition testimony, testified regarding his job duties, how he sustained the work injury, and his ongoing symptoms. Claimant testified that, after his right shoulder surgery on November 3, 2005, he

[1] Dr. Elia's observations were reiterated in a second report he authored on January 28, 2008, which stated that Claimant could not return to *any* police employment duties.

returned to light-duty work for Employer for approximately six weeks. During this time he experienced continued weakness and pain in his left shoulder, which was surgically repaired on June 29, 2006. After his left shoulder surgery, Claimant underwent physical therapy until February 2007. Then, upon Dr. Elia's recommendation, he began a rehabilitation program, called a "work hardening" program, designed to improve his ability to perform the physical tasks specifically required of a police officer. The program ended in November 2007. At that point Dr. Elia again evaluated Claimant, but did not release him to return to work.

Claimant testified that he continues to experience weakness in his right shoulder and spasms and pain in his left shoulder. Claimant testified that he could not safely perform the duties of a full-time police officer, which include heavy lifting, subduing suspects and using a firearm.

Dr. Elia, who first examined Claimant on December 8, 2004, testified on behalf of Claimant. His examination report described Claimant's knee and right shoulder injuries but did not mention a left shoulder injury. However, Dr. Elia recalled that he evaluated Claimant's left shoulder at his first examination because Claimant complained of pain there. Dr. Elia explained that he did not mention the left shoulder in his report because it was minor in comparison to the right shoulder injury. *See* Reproduced Record at 169a-170a (R.R. ___).

Dr. Elia examined Claimant again on January 21, 2005, at which time Claimant complained of "cracking" and pain in his right shoulder. He gave Claimant a Cortisone shot and directed him to start physical therapy.

Dr. Elia next evaluated Claimant in September of 2005. Claimant continued to complain of right shoulder pain and mild left shoulder discomfort. Dr. Elia ordered an MRI, which showed a full thickness rotator cuff tear in

Claimant's right shoulder and a less severe rotator cuff tear in Claimant's left shoulder. Dr. Elia stated that both tears were the result of Claimant's work injury.

After the second surgery on June 29, 2006, Claimant underwent several physical therapy programs. Dr. Elia opined that Claimant had reached maximum medical improvement but was not able to return to his former duties as a police officer. Dr. Elia confirmed this opinion in two reports dated November 19, 2007, and January 28, 2008, as well at his most recent evaluation of Claimant, which took place several weeks prior to his July 28, 2008, deposition.

Employer offered the deposition testimony of Dr. Spellman. Dr. Spellman testified that he examined Claimant once, on December 21, 2007, at which time Claimant continued to complain of the very same shoulder problems that he reported to Dr. Elia on December 4, 2004. Dr. Spellman testified that Claimant admitted to him that he believed he could return to light-duty work. Dr. Spellman then stated that his physical examination of Claimant showed that both shoulders were in good condition. He only noticed pain at the extreme range of motions, which he stated was consistent with a low-grade impingement.

Dr. Spellman testified that he reviewed Claimant's MRI. He determined that the MRI showed a large post-traumatic tear in the right shoulder and a small tear in the left shoulder tendon that was secondary to impingement tendonitis. He explained that in individuals of Claimant's age, the type of tear in the left shoulder is not uncommon, and it results from normal wear of the rotator cuff. Noting that Dr. Elia did not mention Claimant's left shoulder in his original examination report, Dr. Spellman opined that Claimant's left shoulder injury was not work-related. Dr. Spellman opined that Claimant could return to work as a police officer and issued an affidavit of full recovery.

Captain Anthony Paparo of the Upper Darby Police Department testified for Employer. Captain Paparo testified that, based upon Dr. Spellman's report releasing Claimant to normal-duty, he sent Claimant a letter on January 8, 2008, directing him to return to duty on January 13, 2008, at his former platoon. The letter did not state whether Claimant would be assigned normal-duty or light-duty work. However, Captain Paparo testified that were Claimant to return on light-duty, the Department could accommodate him. Captain Paparo stated that he always tries to accommodate officers by making assignments "completely in the officer's favor." R.R. 212a.

The WCJ denied Employer's termination and suspension petitions, concluding that Employer failed to prove (1) that Claimant fully recovered from his work injury or (2) that Employer had work available that Claimant could perform. WCJ Decision at 10; Conclusion of Law 1. Employer appealed to the Board, arguing the WCJ erred in not granting the petitions and failed to issue a reasoned decision.

In affirming the WCJ, the Board found that the WCJ credited Dr. Elia's testimony over Dr. Spellman's and explained his reasons for doing so. Accordingly, the Board found that Claimant had neither fully recovered from his work injury nor could he return to work without restrictions. The Board also noted that Employer did not specifically offer Claimant a light-duty job. Based upon these findings, the Board held that Employer did not meet its burden of proof on either the termination or suspension petition. Employer now petitions for this Court's review.[2]

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[2] Our scope of review is limited to determining whether there has been a violation of constitutional rights, whether errors of law were committed, or whether necessary findings of

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Employer's issues on appeal may be summarized as follows. First, Employer argues that the WCJ failed to issue a reasoned decision with respect to his finding that Claimant's left shoulder injury was work-related. Second, Employer contends the WCJ erred in not finding that Claimant could return to work a modified job that was offered to him.

Employer's first issue relates to its termination petition. Employer argues that the WCJ did not issue a reasoned decision because he did not make specific credibility findings, explain them or relate his credibility determinations to the objective evidence. As a result, Employer contends that the WCJ erred in finding Claimant's work injury had not resolved and that his left shoulder injury was work-related. We disagree.

The WCJ is the "ultimate finder of fact and exclusive arbiter of credibility." *Daniels v. Workers' Compensation Appeal Board (Tristate Transport)*, 574 Pa. 61, 76, 828 A.2d 1043, 1052 (2003) (quoting *Thompson v. Workers' Compensation Appeal Board (USF&G Co. and Craig Welding & Equipment Rental)*, 566 Pa. 420, 426-427, 781 A.2d 1146, 1150 (2001)). *See also Marincov v. Workmen's Compensation Appeal Board (City of Washington)*, 454 A.2d 670, 673 (Pa. Cmwlth. 1983) (noting questions of evidentiary weight and credibility and the resolution of conflicts in medical testimony are for the WCJ not this Court). However, the WCJ's power in this regard is limited by Section 422(a) of the Workers' Compensation Act (Act),[3] which provides, in relevant part, that

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fact are supported by substantial evidence. *City of Philadelphia v. Workers' Compensation Appeal Board (Smith)*, 860 A.2d 215, 220 n.8 (Pa. Cmwlth. 2004). Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

[3] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §834.

> [a]ll parties to an adjudicatory proceeding are entitled to a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions…. The workers' compensation judge shall specify the evidence upon which the workers' compensation judge relies and state the reasons for accepting it…. When faced with conflicting evidence, the workers' compensation judge must adequately explain the reasons for rejecting or discrediting competent evidence. . . .

77 P.S. §834.[4]

Section 422(a) mandates that the WCJ provide reasons for accepting or rejecting evidence, which our Supreme Court has construed to mean that a WCJ need not explain his decision according to "some formulaic rubric or detailed to the 'nth degree.'" *Daniels*, 574 Pa. at 77, 828 A.2d at 1053. However, the WCJ must provide some guidance as to why one witness was found credible over another. This is especially true where medical experts testify by deposition, not in person. In those instances, the WCJ cannot simply assert that he deems one witness more credible and persuasive than another. *Daniels*, 574 Pa. at 78, 828 A.2d at 1053. The WCJ must provide at least one objective factor to support his decision. For example, the WCJ might observe that *one expert had more or less interaction with a claimant than another expert;* a witness testified based on erroneous facts; a witness exhibited a bias or interest in the matter; or an expert did not have a timely interaction with the claimant. *Id.* (emphasis added).

[4] A decision is "reasoned" for purposes of Section 422(a) if it "allows for adequate review by the [Board] without further elucidation and if it allows for adequate review by the appellate courts under applicable review standards. A reasoned decision is no more, and no less." *Daniels*, 574 Pa. at 76, 828 A.2d at 1052.

Here, the WCJ made specific credibility determinations and supported those determinations with detailed explanations. *See* WCJ Decision at 9; Findings of Fact 12-14. For example, the WCJ found Claimant to be credible based upon his demeanor at the hearing and because his testimony was corroborated by the December 5, 2004, incident report Claimant filed with Employer. WCJ Decision at 9; Finding of Fact 12. Similarly, the WCJ found Dr. Elia credible because, *inter alia*, he treated Claimant on multiple occasions; was his treating physician; and performed the surgeries on his shoulders. WCJ Decision at 9; Finding of Fact 13. Conversely, the WCJ found Dr. Spellman not credible because he examined Claimant once and did not participate in the treatment of his work injuries. WCJ Decision at 9; Finding of Fact 14.

Employer argues, however, that Claimant's work injury did not include the left shoulder tear because it was not listed in the NTCP. This is true but not dispositive. Claimant reported problems with both shoulders and his left knee in his December 5, 2004, incident report. Dr. Elia testified that Claimant complained of left shoulder pain at his first examination, but he did not address it in his report because at the time he was more concerned with Claimant's right shoulder. The MRI revealed both a right shoulder tear and a left shoulder tear, and this confirmed, in Dr. Elia's opinion, that the left shoulder tear was work-related. The MRI and Dr. Elia's opinion, which was credited by the WCJ, constitute substantial evidence to support the WCJ's finding that Claimant's left shoulder tear was work-related. *See* Section 413(a) of the Act, 77 P.S. §771 (authorizing a WCJ to amend an NCP at anytime if it is incorrect).[5]

[5] In relevant part, it states:

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In sum, there is no merit to Employer's argument that the WCJ did not issue a reasoned decision.

Next, Employer contends that the WCJ erred in denying its suspension petition. Employer asserts that it offered Claimant a job, which Claimant could do, and that Claimant refused to attempt the job. Employer acknowledges that its return to work letter to Claimant stated only that he was to "return to duty." However, Employer points out that Captain Paparo testified that he could accommodate light-duty restrictions; that Claimant had worked light-duty before; and that Claimant believed he could do so again. Therefore, Employer argues, Claimant was required to return to work.

In *Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Company)*, 516 Pa. 240, 532 A.2d 374 (1987), our Supreme Court set forth the standard for determining whether a claimant's benefits should be suspended or modified because he refused suitable alternative employment.[6] The *Kachinski* test places two burdens on an employer seeking to modify benefits. First, the employer is required to produce medical evidence of a change in condition, and second, the employer must produce evidence of a referral to a then open job which fits the claimant's qualifications. *Id.* at 252, 532 A.2d at 380. An

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> A workers' compensation judge may, at any time, review and modify or set aside a notice of compensation payable . . . 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.

[6] *Kachinski* applies in this case, even though Claimant's injury occurred after 1996, because Employer offered Claimant a specific job. *Darrall v. Workers' Compensation Appeal Board (H.J. Heinz Company)*, 792 A.2d 706, 714 (Pa. Cmwlth. 2002).

employer's evidence of a job referral need not specify every aspect of the job it offers to a claimant. *Darrall v. Workers' Compensation Appeal Board (H.J. Heinz Company)*, 792 A.2d 706, 714 (Pa. Cmwlth. 2002). However, an employer must at least provide a basic description of the job and explain how the job is classified, *i.e.*, light-duty, full-duty, sedentary, etc. *Id*. The claimant must be given sufficient information to determine whether the job is within his physical restrictions. If the claimant has previously worked in a particular job, however, the employer is not required to provide a specific description of the job duties. *Id*. Employer failed to satisfy either of its burdens under *Kachinski.*

First, Employer did not prove a change in Claimant's condition. Employer offered Dr. Spellman's testimony on this issue, but the WCJ rejected Dr. Spellman's testimony as not credible. Instead, the WCJ credited Dr. Elia's testimony that Claimant could not do his pre-injury job.[7]

At any rate, assuming that Employer proved a change in Claimant's medical condition, it did not provide an adequate job referral. First, the WCJ rejected as not credible Captain Paparo's testimony that he had light-duty work for Claimant. Second, Employer's job referral letter simply directed Claimant to "report for duty" to his former platoon on January 13, 2008. R.R. at 218a. The letter did not provide a basic description of Claimant's job duties or state whether he was assigned to normal-duty or light-duty.[8] Because Claimant had worked both normal-duty and light-duty for Employer in the past, a generic letter of this type

[7] There was no testimony by Dr. Elia indicating what Claimant's physical restrictions were in January 2008, aside from his statement that Claimant could not return to his police officer duties.

[8] Because Claimant had worked both light-duty and normal-duty, an explanation as to the specific job duties Claimant would be required to engage in was not required. However, Employer did need to specify whether the job being offered was light-duty or normal-duty.

was insufficient. Captain Paparo's testimony that he always accommodated light-duty restrictions and could do so for Claimant, even if credible, could not carry the day. Claimant could not make an informed decision regarding whether the job he was being offered was within his physical restrictions.

For all of the foregoing reasons, we affirm the Board's adjudication.

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MARY HANNAH LEAVITT, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Upper Darby Township, Petitioner	:	
v.	:	No. 2063 C.D. 2010
Workers' Compensation Appeal Board (Dunn), Respondent	:	

ORDER

AND NOW, this 10th day of August, 2011, the order of the Workers' Compensation Appeal Board, dated September 3, 2010, in the above-captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge