

Elvington, a board-certified orthopedic surgeon, who performed arthroscopic surgery on Claimant's right knee on August 11, 2008.

On August 7, 2008, Employer filed a petition to modify and/or suspend benefits, asserting that Claimant had been released to work in a modified-duty capacity and that although work was no longer available with Employer, work was generally available for Claimant within her restrictions and limitations.

At hearings held before the WCJ, Employer presented the deposition testimony of its medical expert, Dr. Alfred Dawson, also a board-certified orthopedic surgeon, and the deposition testimony of its vocational expert, Ronald Kushner.¹ Claimant testified and also submitted her deposition testimony, as well as the deposition testimony of her treating physician, Dr. Elvington, and a vocational expert, Christopher Marchionda.

Mr. Kushner testified that he interviewed Claimant by telephone and reviewed the medical report of Dr. Dawson. Mr. Kushner testified that he used various resources to find a list of employment opportunities which might be available and that he called each employer and spoke with a representative to find out if they were currently hiring and to review the physical requirements of the available position in order to determine if Claimant would be capable of performing the job duties of that position. Mr. Kushner testified that he then performed a labor market survey (LMS) and created a list of six jobs in Claimant's geographic area that he asserted were within her restrictions: 1) a school bus driver for Krise School Bus Service, Inc.; 2) a school bus driver for Clepper Bus Service;

¹ Employer also presented the deposition testimony of Kyle Blain, Director of Driver Relations for Employer, who testified that no work was available for Claimant as a driver for JWA, the service provider who supplied drivers to Employer, since the contract with JWA ended in June 2007. Deposition of Kyle Blain, Reproduced Record (R.R.) at 123.

3) a telecommunicator position with TRG Customer Solutions; 4) a school van/bus driver position with Tri-County Transportation, Inc.; 5) a delivery driver for Dominos Pizza; and, 6) a delivery driver for Pizza Hut. Mr. Kushner classified the three bus driver positions and the telecommunicator positions as sedentary, which he defined as frequent sitting, lifting no greater than ten pounds, with limited standing and walking. On cross-examination, Mr. Kushner testified that while he “requested medical information from . . . Dr. [E]lvington” and “did receive some limited office notes,” the actual LMS “was conducted based on the [IME] completed by Dr. Dawson.” Deposition of Ronald Kushner, Notes of Testimony (N.T.) at 18. Finally, Mr. Kushner testified that Claimant told him that she was not renewing her CDL (Commercial Driver’s License) due to expire in July 2008, and he was aware that the positions with Krise and Clepper required a valid CDL.

Dr. Dawson testified that he is board-certified in orthopedics and mainly specializes in knee, shoulder, and carpal tunnel surgeries. Dr. Dawson performed an independent medical examination of Claimant on May 12, 2008. Dr. Dawson testified that he obtained a history from Claimant that she fell off a truck and injured her right knee on September 14, 2005 while working for Employer. On physical examination, Claimant had some range of motion limitation in her right knee, which was “slightly decreased.” Dr. Dawson’s Deposition, at 7. Dr. Dawson testified that Claimant’s x-rays showed arthritis of the right knee. He diagnosed her with right knee pain or synovitis. Dr. Dawson testified that Claimant had minimal residual disability of the right knee which would impair her ability to handle freight. With respect to Claimant’s capabilities, Dr. Dawson opined that Claimant would be able to get in and out of a truck no more than fifty times per day; that she was unable to squat more than twenty-five times per day;

and that she would have difficulty climbing more than 20 flights of stairs per day. Dr. Dawson further opined that Claimant could work an eight-hour work day and that in an eight hour day, she could stand, sit and walk three to five hours and drive five to eight hours. Dr. Dawson restricted Claimant from climbing a ladder. He opined that Claimant was capable of lifting up to thirty pounds maximum infrequently, and up to fifteen pounds frequently. As for the LMS, Dr. Dawson approved each of the jobs except for the job with Pizza Hut, because the job had a heavier weight requirement than the other positions. On cross-examination, Dr. Dawson testified that he has performed physical examinations required for the CDL and that he is familiar with patients with more serious orthopedic conditions than Claimant's and still maintaining their CDL. Dr. Dawson also testified that because repetitive activities can cause pain for someone like Claimant with patellar arthritis, he "put a limit on [Claimant] squatting, climbing, number of times she could get in and out of a truck." *Id.* at 24. He did not approve her to be "like a local UPS guy, you know, that has to get out of the truck 100 times a day, that type of situation." *Id.*

Claimant testified that her position as a truck driver required her to both drive and load/unload the truck. Claimant has not worked for any employer since her last day of work for Employer. Claimant stated that she did not have a valid CDL, and that she was told by a physician that she did not possess the physical requirements to pass the Department of Transportation physical needed for a CDL. Claimant testified that she is still treating with Dr. Elvington and that her current complaints include constant pain, stiffness and difficulty bending her knee, difficulty walking without a limp, and swelling. Claimant testified that she did not feel that she would be able to perform work as a bus driver because she

could not pass the physical required to renew her CDL and did not feel that she could perform the pre-trip inspections of the bus required of the position. Claimant also testified she would not be able to perform the telecommunicator job because she could not sit for long periods of time and could not perform the pizza delivery jobs because it is hard for her to get in and out of her vehicle. Claimant testified that she was taking an internet course in medical billing, which she hoped to complete soon. Finally, Claimant testified that she went to several temporary agencies looking for employment and also submitted her resume to several hospitals. Claimant testified she saw Dr. Elvington on an as-needed basis and that Dr. Elvington had released her to light work, such as desk work.

Dr. Elvington testified that he initially treated Claimant's knee injury with anti-inflammatory medication, a knee brace and cortisone injections. When her knee continued to be painful and swollen, he performed a chondroplasty, which smooths off the damaged cartilage, and a lateral retinacular release, in which he "cut the retinacular that releases some of the tension of the patella on the femur." Deposition of Dr. Elvington, December 11, 2008, at 16. Dr. Elvington opined that Claimant had chondromalacia, which is "simply a breakdown of the cartilage or the lining of the knee joint over the bone" and arthritis. *Id.* at 18-19. Dr. Elvington testified that while Claimant has been compliant with following his recommendations and physical therapy, she would possibly need more injections, physical therapy and anti-inflammatory medication in the future. Dr. Elvington also testified that if her knee pain continues to worsen, Claimant may need a knee replacement. Dr. Elvington released Claimant to sedentary work, which he described as "[d]esk work where she's seated most of the time and able to stand if

she needs to for the knee . . . [with] no heavy lifting, no climbing, stooping, squatting.” *Id.* at 21-22.

As for the jobs in the labor market survey prepared by Employer’s vocational expert Kushner, Dr. Elvington testified that he would not release Claimant to any of the three school bus driver positions that were available, because he did not think she could drive for long periods of time and because she would have to go up and down the steps of the vehicle. Dr. Elvington also rejected as not suitable the two pizza delivery positions for the same reasons. Dr. Elvington agreed that only the telecommunicator position with TRG Solutions would be suitable for Claimant because it was described as a sedentary position.

Mr. Marchionda, a rehabilitation counselor, who was certified in disability management, testified that he reviewed the LMS prepared by Employer’s expert, Kushner, and noted that the report only took into account the recommendations by Dr. Dawson regarding Claimant’s restrictions. Mr. Marchionda testified that he disagreed with Mr. Kushner’s methods, because he believes that the treating physician should be contacted in order to obtain a claimant’s medical restrictions, although he admitted on cross-examination that he at times does not do so. Mr. Marchionda rejected both of the pizza delivery jobs as unsuitable because the lifting requirements were more than Claimant was allowed to lift and also because there were activities required of the positions that did not meet her restrictions. Mr. Marchionda also rejected the bus driver positions with Clepper and Tri-County because they required Claimant to have a valid CDL and because the hours were not guaranteed. He rejected the bus driver position at Krise because Claimant had previously been terminated from employment with this company and had subsequently filed a wrongful termination suit against the

company. Finally, Mr. Marchionda rejected the telecommunicator position because the telephone number listed for the company in the LMS was disconnected.

The WCJ determined that Employer had met its burden and found that Claimant had an earning power of \$255 per week based upon evidence submitted by Employer. The WCJ found Employer's vocational expert, Mr. Kushner, more credible as a whole than the testimony of Claimant's expert, Mr. Marchionda. The WCJ found that "Mr. Kushner's opinions are based upon a survey of available positions within claimant's physical capabilities." WCJ's Decision, Finding of Fact No. 18, at 8. The WCJ also made the following pertinent finding:

I accept that claimant has some limitation of motion of her right knee but reject her testimony that she is unable to drive an automobile or a truck due to the restrictions which exist as a result of her work injury. I accept the medical opinions of A. Dawson, M.D., as more persuasive than Dr. Elvington on this issue. Dr. Dawson's opinions are consistent with the medical evidence and the nature of claimant's work injury which is in essence mild arthritis of the kneecap.

Id. at No. 15. The WCJ accordingly granted Employer's petition and Claimant's benefits were reduced from total to partial disability.

Claimant appealed and the Board reversed. The Board concluded that the WCJ erred in finding that Employer met its burden of proving that work was generally available to Claimant within her physical restrictions. The Board opined:

First, Mr. Kushner admitted that he based the LMS solely on the report provided by Dr. Dawson, which occurred prior to Claimant's surgery. Without considering the opinions provided by Dr. Elvington, Mr. Kushner was unaware of Claimant's current limitations. Second, Mr. Kushner clearly ignored the fact that Claimant no longer

has a CDL, nor was she able to obtain a release to renew her CDL. We do not believe that the jobs in Defendant's LMS were actually available as of the date of the survey due to Mr. Kushner's inaccurate view of Claimant's condition, and his ignorance of Claimant's CDL situation.

Board's Opinion at 7.

On appeal, Employer presents a single issue for our review, that is, whether in reversing the WCJ's decision, the Board substituted its own credibility determinations in place of the WCJ's.

An employer seeking modification of a claimant's benefits under Section 306(b)(2) of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 512(2), must either offer claimant a specific job that it has available that claimant is capable of performing or establish the claimant's earning power through expert opinion. *Kleinhagen v. Workers' Comp. Appeal Bd. (KNIF Flexpak Corp.)*, 993 A.2d 1269 (Pa. Cmwlth. 2010). Here, because Employer does not have any available positions for Claimant, it was required to establish her "earning power." As this court explained in *South Hills Health System v. Workers' Compensation Appeal Board (Kiefer)*, 806 A.2d 962, 969 (Pa. Cmwlth. 2002), "earning power is to be determined by: (1) the work an employee is capable of performing . . . and (2) expert opinion evidence including job listings, with agencies of the department, private job placement agencies, and advertisements in the usual employment area." Furthermore, while it is not necessary that the treating physician pre-approve each possible alternate position, "some qualified witness must persuade the fact-finder that an injured worker can perform the work." *Allied Prods. & Servs., Inc. v. Workers' Comp. Appeal Bd. (Click)*, 823 A.2d 284, 287 (Pa. Cmwlth. 2003).

Here, Employer submitted vocational and medical evidence that persuaded the WCJ that there were positions available within Claimant's limitations and restrictions. The WCJ, in assessing the witnesses' testimony and documentary evidence, attached greater weight to Employer's vocational expert and his report, as well as the testimony of Employer's medical witness, Dr. Dawson. The WCJ found that, "[a]fter a review of all the testimony offered in this matter, I find that claimant has an earning power of \$255.00 per week. I make this finding after considering the medical and vocational testimony offered in this matter as well as claimant's testimony." WCJ's Decision, Finding of Fact No. 15.

The Board, however, concluded that the LMS created by Employer's vocational expert "did not meet the requirements required" because Mr. Kushner testified he did not consider Claimant's medical expert's opinion when completing the LMS, and because Mr. Kushner "clearly ignored the fact that Claimant no longer has a CDL, nor was she able to obtain a release to renew her CDL." Board's Opinion at 7. We disagree, as it is the role of the WCJ as fact-finder to "assess these duties and restrictions and determine if Claimant could perform the jobs." *Farkaly v. Workmen's Comp. Appeal Bd. (Baltimore Life Ins. Co.)*, 516 Pa. 256, 259-60, 532 A.2d 382, 383 (1987) [quoting with approval *Farkaly v. Workmen's Comp. Appeal Bd. (Baltimore Life Ins. Co.)*, 498 A.2d 34, 36 (Pa. Cmwlth. 1985) (Doyle J., Dissenting)]. In addition, the law does not require that a claimant's treating physician approve each and every job position in a labor market survey. *Allied Prods.* What is required is that the fact-finder assess the duties set forth in the LMS for the positions listed and the restrictions placed on the Claimant and then determine if Claimant could perform those jobs. *Farkaly*. In this case, Mr. Kushner credibly testified that he reviewed Dr. Dawson's opinion with respect

to Claimant's physical limitations and capabilities and that he researched the particular duties required for each of the six positions before including them in the labor market survey.

Moreover, the WCJ's assessment of these factors was based on her review of all the testimony, including the testimony of Dr. Elvington with respect to Claimant's ability to drive a truck or automobile as well as Claimant's own testimony in that regard, which she rejected as not credible on that issue. The WCJ instead accepted Employer's medical and vocational experts' testimony as more credible in this regard.² We decline to disturb the WCJ's credibility determinations.

Accordingly, for these reasons, we reverse the order of the Board.

BONNIE BRIGANCE LEADBETTER,
Judge

Judge Brobson did not participate in the decision in this case.

² A WCJ is free to credit the testimony of any witness in whole or in part. *Campbell v. Workers' Comp. Appeal Bd. (Pittsburgh Post Gazette)*, 954 A.2d 726 (Pa. Cmwlth. 2008).

