IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Thomas Cook, | : | |
| Petitioner | : | |
| | : | |
| v. | : | No. 359 C.D. 2011 |
| | : | Submitted: June 10, 2011 |
| Workers' Compensation Appeal Board (Bologna Construction and State Farm Insurance), | : | |
| Respondents | : | |

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: September 14, 2011

Thomas Cook (Cook) petitions for review of a February 14, 2011, order of the Workers' Compensation Appeal Board (WCAB), which affirmed the decision of a workers' compensation judge (WCJ) granting the combined petition to review medical treatment/review compensation benefits/suspend compensation benefits filed by Bologna Construction (Employer) and suspending Cook's benefits effective February 28, 2008. We affirm as modified.

On February 12, 2004, Cook twisted his left foot while working as an electrician for Employer. (Findings of Fact, No. 4.)[1] He filed a workers' compensation claim in April 2004, and a WCJ awarded benefits. (*Id.*) The WCAB affirmed the WCJ's decision in January 2007, and no further appeals were filed. (Findings of Fact, No. 5.)

In the meantime, in October 2006, Employer hired Christopher J. Marchionda, a rehabilitation counselor, to conduct a vocational interview with Cook and provide services, including an earning power assessment, by which Marchionda could opine as to Cook's earning power and employability. (Findings of Fact, No. 6.) Marchionda then determined that he needed a medical opinion of Cook's capabilities, and, in July 2007, pursuant to Employer's request, Cook underwent an independent medical evaluation with Dr. Michael Bowman, an orthopedic surgeon sub-specializing in hand and foot surgery. (Findings of Fact, Nos. 6 and 13(a).) Thereafter, Cook was served with a Notice of Ability to Return to Work. (Findings of Fact, No. 6.)

Despite numerous attempts to schedule an interview between Marchionda and Cook in 2007-08, no interview took place due to Cook's unwillingness to cooperate with the process. (Findings of Fact, No. 7). Of particular note, on February 28, 2008, Cook failed to participate in a scheduled telephone conference with Marchionda, to which Cook's counsel had previously agreed.

[1] Cook asserts that he "stepped onto a piece of sprinkler pipe left by another constructor [sic], twisting his left ankle and aggravating a previous significant crush injury to his left foot." (Cook's Br. at 3.)

(Findings of Fact, No. 12(jj-ll).) On April 24, 2008, Employer filed its combined petition to review medical treatment/review compensation benefits/suspend compensation benefits. At the hearings before the WCJ, respective counsel acknowledged their agreement that Cook should attend a vocational interview, but he did not do so. (Findings of Fact, No. 7.) Cook's refusal was based on the "false pretense" that State Farm Insurance Company had refused to pay for some orthotics that Cook had received from De La Torre Orthotics and Prosthetics (De La Torre). (Findings of Fact, No. 29.) Employer, however, presented the deposition testimony of De La Torre's prosthetic billing manager that Cook's account had been paid in full by Gateway Insurance, the only insurance company that De La Torre had ever billed for Cook's orthotics. (Findings of Fact, No. 15(a-j).)

Employer also presented the deposition testimony of Dr. Bowman, who opined within a reasonable degree of medical certainty that Cook could return to work in a sedentary job as long as he did not stand or walk for more than two hours per day. (Findings of Fact, No. 13(hh).) Employer further presented Marchionda's deposition testimony.[2] Marchionda testified regarding his numerous futile attempts to schedule an interview with Cook, as well as to his October 29, 2008, preliminary opinion report, which evaluated Cook's employability and earning power based on the information Marchionda had available. (*See generally* Findings of Fact, No. 12.) Marchionda stated that, in evaluating Cook's employability and earning power, he considered Cook's previous skilled work as an electrician and he also considered that,

[2] Marchionda's deposition transcript was entered into evidence without objection. (N.T., 2/3/09, at 5-6.)

at one point, Cook had been self-employed. (Findings of Fact, No. 12(ww).) Marchionda explained that the skills typically demonstrated by an electrician include the capacity for critical thinking, complex problem solving, active listening, decision making, troubleshooting, quality control analysis and reading comprehension. (Findings of Fact, No. 12(xx).)

Marchionda opined, within a reasonable degree of occupational rehabilitation certainty, that work Cook would be vocationally able to perform would be available to him within his abilities as explained by Dr. Bowman, thereby rendering Cook possibly and likely to return to the workforce earning an amount of money comparable to his pre-injury average weekly wage. (Findings of Fact, No. 12(bbb).) Cook had previously earned $12.00 per hour with Employer. (Findings of Fact, No. 12(ooo).) Marchionda identified five actual job openings suitable for Cook and testified that there would be other types of work outside of these openings that Cook could perform. (Findings of Fact, No. 12(eee), (ggg-lll).)[3] All of the actual job openings were sedentary positions and fit within Dr. Bowman's restrictions. (Findings of Fact, No. 12(ggg-lll).) Marchionda testified that he was confident in his vocational opinions, but they were limited by the fact that he has never met with

[3] The actual job openings consisted of a dispatcher position with UPMC Mercy Hospital for forty hours per week at a wage ranging from $10.58 to $16.19 per hour; a telephone operator job with Hyatt Regency Pittsburgh International Airport for forty hours per week with wages beginning at $8.50 per hour; a security officer position with Cauley Detective Agency for forty hours per week at $8.00 per hour; an inbound customer service representative position with Dial America for forty hours per week at $8.00 per hour base pay, plus incentives, typically amounting to $10.00 per hour, with bonuses and incentives; and a security officer job with Wackenhut Corporation for forty hours per week at $8.00 per hour. (Findings of Fact, No. 12(ggg-lll).)

Cook and Cook's treating physician information was never provided to him. (Findings of Fact, No. 12(qqq).)

Cook presented the deposition testimony of Dr. Gerald P. Falkenstein, a family medicine practitioner and Cook's treating physician, who acknowledged on cross-examination that Cook could perform a sedentary job in which he walks or stands no more than two hours a day. (Findings of Fact, No. 19(a-c, h-i, l).) Dr. Falkenstein testified that Cook could perform a dispatcher job with these restrictions and also that he could perform a security job with the same limitations, as long as he did not have to run or react. (Findings of Fact No. 19(j-k).) Moreover, Cook testified regarding his assertion that State Farm Insurance Company would not pay for his orthotics, but his memory was unclear on the issue. (Findings of Fact, Nos. 17(b) and 32.)

The WCJ credited Employer's witnesses' testimony over the testimony of Cook's witnesses where their testimony was inconsistent. (Findings of Fact, Nos. 43-44; Conclusions of Law, Nos. 3-5.) The WCJ also found that Cook "demonstrated his lack of good faith by refusing to even meet with Employer's Vocational Rehabilitation Counselor . . . for over a year" based on "the false pretense that State Farm Insurance was refusing to pay for orthotics from De La Torre," (Findings of Fact, No. 29), and that "all the medical evidence in the record unequivocally supports a finding that employee was capable of performing [the five specific job openings]," (Findings of Fact, No. 41.) The WCJ further determined:

> [E]mployer has met its burden of proof that it is entitled to a suspension of employee's benefits as a result of employee's lack of good faith participation in vocational rehabilitation

> efforts. This Judge finds that the testimony of Certified Rehabilitation Counselor Christopher Marchionda was competent, credible and worthy of belief in that he found work available to employee within employee's abilities as defined by Michael Bowman, M.D., that he would be vocationally capable of performing and that work would enable employee to return to the workforce earning an amount of money comparable to his pre-injury average weekly wage.

(Findings of Fact, No. 42.) Consequently, the WCJ suspended Cook's benefits, effective February 28, 2008. On appeal, the WCAB affirmed.[4] Cook's petition for review to this court followed.[5]

Cook asserts that the workers' compensation authorities erred in deciding his benefits should be suspended because Employer did not prove that Cook has been vocationally and medically cleared for employment.[6] In particular, Cook

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[4] Relying on *State Workmen's Insurance Fund v. Workmen's Compensation Appeal Board (Hoover)*, 680 A.2d 40, 43 (Pa. Cmwlth. 1996), the WCAB noted: "The willful sabotage by a claimant of an available employment opportunity constitutes a bad faith effort." (WCAB Op. at 3.)

[5] Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

[6] We explained in *Edwards v. Workers' Compensation Appeal Board (MPW Industrial Services, Inc.)*, 858 A.2d 648, 650-51 (Pa. Cmwlth. 2004), that:

> [i]n order for an employer to prevail in seeking a suspension of benefits, under Act 57 [the 1996 amendments to the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*], an employer must either: "(1) offer to a claimant a specific job that it has available, which the claimant is capable of performing, or (2) establish 'earning power' through expert opinion evidence including

**(Footnote continued on next page…)**

contends that, absent a vocational interview, Marchionda's report lacks an adequate basis for concluding that Cook could perform any of the five open positions that Marchionda located for him. However, Cook has waived the issue.

Here, Marchionda testified in great detail to the fundamentals of his report assessing Cook's earning power. Cook's counsel did not object to Marchionda's testimony based on the lack of a vocational interview either during Marchionda's deposition or during the hearing at which Marchionda's testimony was entered into evidence.[7] We explained in *John F. Davis Company v. Workmen's Compensation Appeal Board (Lucas)*, 407 A.2d 931, 933 (Pa. Cmwlth. 1979), that the failure to object to a vocational expert's competency at the hearing before the referee (now WCJ) constitutes a waiver of that objection. *See also Wheeler v. Workers' Compensation Appeal Board (Reading Hospital and Medical Center)*, 829 A.2d 730, 735 (Pa. Cmwlth. 2003) ("It is well established that objections to a witness' competency to testify at the deposition are waived if they are not raised before or during the deposition where the ground[s] for the objections are known to the objecting party."). Hence, Cook has waived his objection to the competency of Marchionda's report on this basis.

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> job listings with employment agencies, agencies of the Department of Labor and Industry and advertisements in a claimant's usual area of employment." *South Hills Health Sys. v. Workers' Comp. Appeal Bd. (Kiefer)*, 806 A.2d 962, 966 (Pa. Cmwlth. 2002).

[7] Moreover, the WCJ specifically found that "neither party filed a document of record to preserve any objections in the depositions for this Judge to rule upon." (Findings of Fact, No. 44.)

Moreover, even had Cook not waived this argument, we also explained in *Wheeler* that Section 306(b)(2) of the Act, 77 P.S. §512(2) provides merely

> that the insurer "may" require the employee to submit to an interview by a vocational expert approved by the Department "in order to accurately assess the earning power of the employe." Under the plain language in Section 306(b)(2), a vocational interview by an expert approved by the Department is optional, not mandatory, to assess the claimant's earning power.

*Wheeler*, 829 A.2d at 735. Therefore, by the terms of the Act itself, a vocational interview is not required for a competent earning power assessment.[8]

We next address Cook's argument that the workers' compensation authorities erred in deciding his benefits should be suspended based on his bad faith refusal to submit to an interview with Marchionda. Cook asserts that, because Employer did not file a petition for expert interview and did not obtain an order compelling him to participate in a vocational interview pursuant to Section 314 of the Act, 77 P.S. §651,[9] his failure to talk to Marchionda should not have led to a

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[8] Cook further argues that the WCAB and the WCJ erred in determining that the five job openings that Marchionda found were actually available to him because there was no evidence that Marchionda told the prospective employers about Cook's work-related injury. However, because Cook did not raise this issue in either his petition for review or his statement of questions involved, we will not consider it. *South Hills Health System v. Workers' Compensation Appeal Board (Kiefer)*, 806 A.2d 962, 969 n.8 (Pa. Cmwlth. 2002).

[9] Section 314 of the Act, 77 P.S. §651 (emphasis added), provides in relevant part:

> (a) At any time after an injury the employe, if so requested by his employer, must submit himself at some reasonable time and place

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suspension of his benefits, for reasons of bad faith or otherwise. We agree with Cook that his benefits should not have been suspended on the basis of bad faith.

In *Bradley v. Workers' Compensation Appeal Board (County of Delaware)*, 919 A.2d 293, 295 (Pa. Cmwlth. 2006) (emphasis added), we stated:

> Section 314 of the Act permits an employer to petition the WCJ to order a claimant to submit to an expert interview. 77 P.S. §651(a). If the claimant refuses to attend the interview "without reasonable cause or excuse" *once the WCJ grants the petition*, the WCJ is mandated to forfeit the claimant's benefits during the period of refusal. *Id.*

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> for a physical examination or expert interview by an appropriate health care provider or other expert, who shall be selected and paid for by the employer. If the employe shall refuse upon the request of the employer, to submit to the examination or expert interview by the health care provider or other expert selected by the employer, a workers' compensation judge assigned by the department may, upon petition of the employer, order the employe to submit to such examination or expert interview at a time and place set by the workers' compensation judge and by the health care provider or other expert selected and paid for by the employer or by a health care provider or other expert designated by the workers' compensation judge and paid for by the employer. . . . The refusal or neglect, without reasonable cause or excuse, of the employe to submit to such examination or expert interview *ordered by the workers' compensation judge*, either before or after an agreement or award, *shall deprive him of the right to compensation, under this article, during the continuance of such refusal or neglect*, and the period of such neglect or refusal shall be deducted from the period during which compensation would otherwise be payable.

Further, in *Rauch v. Workers' Compensation Appeal Board (Kids Wear Services, Inc.*), 808 A.2d 291, 295-96 (Pa. Cmwlth. 2002) (citation omitted; emphasis added), we explained:

> [T]he Section 314 amendment [which affords a means for requiring expert vocational interviews and penalties for refusing to attend] provides a means by which an employer may secure pertinent information. . . . By providing for an expert vocational interview, the amendment modifies this return-to-work procedure in a manner that permits an employer to better identify suitable jobs. That is, it provides a mechanism for an employer to enforce its rights. . . . *This procedural modification, however, has no effect on a claimant's substantive right to receive workers' compensation benefits or the substantive right of an employer to secure modification or suspension.* Further, the fact that suspension of benefits may be imposed *as a means of securing compliance with an order to compel an interview* is simply an enforcement mechanism. *It has no effect upon the underlying substantive right of the claimant to workers' compensation benefits.*

Here, Employer did not obtain an order requiring Cook to interview with Marchionda. Even had Employer done so, Cook's refusal still could not have served as a basis for denying his underlying, substantive benefits claim. *Id.* Instead, any unreasonable refusal by Cook to submit to such an interview could have resulted in the forfeiture of his benefits for the period of refusal only. *Bradley*, 919 A.2d at 295. Thus, the WCJ and the WCAB clearly erred in suspending Cook's benefits for an indefinite period based on his refusal to participate in a vocational interview he was never ordered to submit to.

However, the matter does not end here. As previously stated, under Act 57, "earning power may be proven by expert witness testimony. . . ." *Edwards*, 858 A.2d at 652. In this case, Employer met its burden of proof for a suspension of Cook's benefits, where the WCJ found, based on Marchionda's credible testimony, that work was available to Cook that he was capable of performing. (Findings of Fact, No. 42.)[10] Accordingly, we affirm the suspension of Cook's benefits on other grounds. Nevertheless, we modify the effective date of the suspension from February 28, 2008, the date of the missed interview, to October 29, 2008, the date of Marchionda's report detailing the available work that Cook was able to perform.[11]

ROCHELLE S. FRIEDMAN, Senior Judge

[10] Credibility determinations are for the WCJ, not this Court. *Phoenixville Hospital v. Workers' Compensation Appeal Board (Shoap)*, 2 A.3d 689, 698 (Pa. Cmwlth. 2010), *appeal granted*, ___ Pa. ___, 18 A.3d 1093 (2011).

[11] We may affirm the order of a lower tribunal based on other grounds where other grounds to affirm exist. *Chrzan v. Workers' Compensation Appeal Board (Allied Corporation)*, 805 A.2d 42, 47 n.10 (Pa. Cmwlth. 2002).

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O R D E R

AND NOW, this 14th day of September, 2011, the order of the Workers' Compensation Appeal Board, dated February 14, 2011, is hereby affirmed, with the modification that the suspension of Thomas Cook's benefits is effective as of October 29, 2008.

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ROCHELLE S. FRIEDMAN, Senior Judge