IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Danella Companies, Inc. and NovaPro Risk Solutions, LLC, Petitioners	:	
v.	:	
Workers' Compensation Appeal Board (Kostek), Respondent	:	No. 382 C.D. 2008
	:	Submitted: October 10, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: November 19, 2008

Danella Companies (Employer) petitions for review of the order of the Workers' Compensation Appeal Board (Board) which affirmed the Workers' Compensation Judge's (WCJ) denial of Employer's two suspension petitions.[1]

Claimant was employed as a heavy equipment operator with Employer. He sustained a work-related injury to his left wrist on May 25, 2002, and received weekly total disability benefits of $662.00 based on an average weekly wage of $1,054.80.

[1] The Board also affirmed the WCJ's grant of the penalty petition of Jerome Kostek (Claimant). Employer does not contest the award of $198.60 in penalties for failure to pay compensation benefits for three weeks.

On January 9, 2006, Employer petitioned to suspend benefits and alleged that as of January 5, 2006, work was generally available to Claimant. On March 6, 2006, Employer again petitioned to suspend benefits and alleged that Claimant voluntarily withdrew from the workforce as of February 23, 2006. On June 22, 2006, Claimant petitioned for penalties and alleged that Employer violated the Workers' Compensation Act (Act)[2] for failure to pay benefits when due. The WCJ consolidated all three petitions.

Employer presented the deposition testimony of Stephen L. Cash, M.D. (Dr. Cash), board-certified in orthopedics and hand surgery. Dr. Cash examined Claimant on May 17, 2005, reviewed his medical records, and took a history. From his review, Dr. Cash ascertained that Claimant underwent surgery on his left wrist on July 18, 2002, for scaphoid excision and a four corner fusion "using a spider plate and distal radius bone graft." Deposition of Stephen L. Cash, M.D., April 18, 2006, (Dr. Cash Deposition) at 8; Reproduced Record (R.R.) at 189a. Claimant underwent a total left wrist fusion and carpal tunnel release on December 2, 2004. Dr. Cash Deposition at 9; R.R. at 189a. Dr. Cash diagnosed Claimant with

> SLAC wrist deformity. And what that means is an acronym for chronic schapholunate advanced collapse. . . . In plain English that means that the ligament that held two of the wrist bones together the scaphoid and lunate bone, stretched out or ruptured. And as a result over time the bones started moving apart from each other and then started causing arthritis to develop in the wrist.

[2] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§1-1041.4; 2501-2708.

Dr. Cash Deposition at 18-19; R.R. at 192a. Dr. Cash opined that Claimant could work "in a relatively lighter sedentary capacity, . . . with a maximum lifting/carrying of 10 to 20 pounds. He'd have to avoid activities requiring flexible wrist or firm repetitive gripping or twisting maneuvers, repetitive forearm motion on the left side. The right side would be fine." Dr. Cash Deposition at 20; R.R. at 192a. Dr. Cash approved Claimant for the following jobs: guest services representative, telemarketer, security officer, lot attendant, and service writer. Dr. Cash Deposition at 22-27; R.R. at 193a-194a.

Gail Hrobuchak (Hrobuchak), vocational specialist consultant for Vocational Rehabilitation Services, testified on behalf of Employer. After Hrobuchak conducted a vocational interview of Claimant and received physical restrictions from Dr. Cash, Hrobuchak identified suitable jobs she believed Claimant could perform. Hrobuchak identified a security officer position with Securitas, a part-time guest services representative position, a semi-skilled position, at the front desk of Quality Inn Suites, a telemarketing position, and a lot attendant at a Chevrolet dealership which involved washing and vacuuming cars on the lot, inspecting vehicles for damage and scratches, and driving vehicles within the lot. Hrobuchak sent the information for these positions to Claimant via certified and regular mail. Hrobuchak reported that Claimant left two phone messages and called one more time to inform Hrobuchak that job referrals had to go through his union. To her knowledge, Claimant did not apply for these jobs. Notes of Testimony, August 15, 2006, (N.T.) at 20-27; R.R. at 116a-123a.

Claimant testified that he did not receive benefits from May 18, 2006, to June 21, 2006, until he called the number on the check stub. N.T. at 67-70; R.R. at 163a-166a. On cross-examination, Claimant testified that he remained a dues paying member of Local 542 of the operating engineers union. However, Claimant did not receive hospitalization, pension, and annuity benefits from his union because he was not working. Deposition of Jerome Kostek, September 1, 2006, (Claimant Deposition) at 6. Claimant denied that he informed Hrobuchak that he could not apply for the jobs referred to him because of his union status. Claimant Deposition at 8-9.

Glenn David Trayer (Trayer), business agent of the International Union of Operating Engineers, testified that a member of the union could be fined, suspended, or expelled from the union if he accepted non-union employment. Notes of Testimony, April 11, 2006, (N.T. 4/11/06) at 7-8; R.R. at 53a-54a. Trayer read portions of the union constitution which indicated the penalties for accepting a position outside of the union. These provisions would apply to Claimant if he accepted a position outside of the union. N.T. 4/11/06 at 13; R.R. at 59a. On cross-examination, Trayer admitted that only one member was expelled in the three years he had been business agent for working with a non-union contractor. N.T. 4/11/06 at 20; R.R. at 66a. Trayer admitted that he would have no problem with Claimant accepting work referred to him by a vocational rehabilitation company, but it was possible that another union member might. N.T. 4/11/06 at 26-27; R.R. at 72a-73a.[3]

[3] James Edward Reilley, District Business Representative for District 2 of the International Union of Operating Engineers, testified that Claimant would lose his health and
(Footnote continued on next page…)

Claimant presented the deposition testimony of John Dieckman (Dieckman), vocational director at Proto-Worx and a certified rehabilitation counselor and disability management specialist. After meeting with Claimant and reviewing medical records, Dieckman performed a vocational assessment and critique of earning power assessment report. Dieckman could not determine whether Claimant could perform the security position because specific details of what the job entailed were unavailable. With respect to the guest services representative at Quality Inn Suites, Dieckman determined after a conversation with the manager that Claimant was a poor candidate for the position because his math and language skills were less than required, he had no experience with customer service, the hotel was located one hour from his home, and the job involved some night audit duty which was a more skilled position than hotel clerk. Dieckman also believed that the telemarketing position required math and language skills beyond Claimant's aptitude. With respect to the lot attendant position, Dieckman interviewed the service manager at the dealership and determined that there was heavier lifting required than Claimant could handle. Dieckman did not believe Claimant could perform any of the four positions. Deposition of John Dieckman, September 1, 2006, at 17-25.

(continued…)

welfare benefits, "rule of his pension," and annuity benefits if he accepted work outside the union. N.T. 4/11/06 at 39; R.R. at 85a.

The WCJ denied the two suspension petitions and granted the penalty petition. The WCJ also ordered Employer to pay Claimant's counsel fees in the amount of $2,981.47 because Employer did not engage in a reasonable contest. The WCJ made the following relevant findings of fact:

> 18. This Workers' Compensation Judge has carefully reviewed the testimony and evidence presented in this matter. Based upon such review, this Judge hereby accepts the uncontradicted testimony and medical opinions of Dr. Cash as competent, credible, and worthy of belief, for the reasons articulated by him at the time of his deposition. Accordingly, then based hereon, this Judge hereby finds as a fact that as of May 17, 2005, the claimant was capable of returning to work on a full-time basis and with the physical restrictions established by Dr. Cash based upon his independent medical examination of him on that date.
>
> 19. This Workers' Compensation Judge has also carefully reviewed the non-medical testimony and evidence presented in this matter. Based upon such review, this Judge hereby accepts the testimony and opinions of Mr. Dieckman as competent, credible, and worthy of belief, for the reasons articulated by him at the time of his deposition, and this Judge hereby also accepts the testimony and opinions of Ms. Hrobuchak, but only to the extent that they were consistent with the competent and credible testimony and opinions of Mr. Dieckman. Further, this Judge hereby also accepts the claimant's testimony as competent, credible, and worthy of belief, with the exception of his testimony relating to his poor recollection of his conversation with Ms. Hrobuchak following his receipt of her referral letters. His testimony in that regard is hereby rejected as lacking credibility. Finally, this Judge hereby also accepts the testimony of Mr. Trayer . . . as competent, credible, and worthy of belief.
>
> Accordingly, then, based upon his careful review of all of the non-medical testimony and evidence presented in this

> matter, this Judge hereby observes and finds that the employer has presented no testimony or evidence whatsoever that following Dr. Cash's independent medical examination of the claimant on May 17, 2005, it or its insurance administrator provided the claimant with prompt written Notice of Ability to Return to Work on the form prescribed by the Department of Labor & Industry in accordance with the requirements of Section 306(b)(3) of the Workers' Compensation Act. Therefore, based upon this finding, this Judge hereby further finds and concludes that the employer cannot be entitled to a suspension or modification of the claimant's workers' compensation wage loss benefits based upon the referral of the four jobs or positions to him in this matter. . . .
>
> Moreover, this Judge hereby also observes and finds that the employer has presented no testimony or evidence that the claimant has retired from his employment with the employer. Furthermore, although the employer did present testimony that the claimant has effectively removed himself from the work force by his response to the vocational rehabilitation performed by the employer in this matter, the employer has not cited any case in which the courts of Pennsylvania have extended the doctrine of voluntary withdrawal from the work force to a situation similar to the present case. Therefore, this Judge will not extend it to the present case either. For all of the foregoing reasons, then, this Judge hereby finds and concludes that the employer is not entitled to a suspension or modification of the claimant's workers' compensation wage loss benefits in this matter. (Citations omitted).

WCJ's Decision, March 29, 2007, Findings of Fact Nos. 18-19 at 5-6; R.R. at 12a-13a.

Employer appealed to the Board which affirmed.

Employer contends that Claimant's behavior amounted to a voluntary removal from the workforce and benefits should have been suspended. Employer also contends that the Board erred when it failed to find that Claimant behaved in such a manner that the need for a Notice of Ability to Return to Work form to be issued was eliminated, and that the Board erred when it affirmed the WCJ's determination that Employer engaged in an unreasonable contest.[4]

Initially, Employer contends that Claimant voluntarily removed himself from the workforce so Employer is entitled to a suspension of benefits.

Disability benefits must be suspended when a claimant voluntarily leaves the labor market upon retirement. For disability compensation to continue after retirement, a claimant must establish that he is seeking employment after retirement or that he was forced into retirement because of his work-related injury. Southeastern Pennsylvania Transportation Authority v. Workmen's Compensation Appeal Board (Henderson), 543 Pa. 74, 669 A.2d 911 (1995).

Employer asserts that Claimant retired from the workforce because he no longer paid dues to his union and would not lose any benefits if he accepted non-union work, he did not place himself on the A-1 list the union maintained for older workers which would potentially be less strenuous, Claimant refused to cooperate with any job offers, and failed to look for work on his own.

[4] 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).

First, Employer mischaracterizes Claimant's testimony. Claimant testified that he continued to pay dues to his union. Claimant Deposition at 6. While he did not receive benefits from the union, he continued to be eligible for them because he was an active member provided he worked through the union. Further, Trayer testified that Claimant could be expelled from the union if he accepted a non-union position. N.T. 4/11/06 at 7-8; R.R. at 53a-54a. Trayer also credibly testified that he did not know of any jobs which Claimant could have performed if he had been on the A-1 list. N.T. 4/11/06 at 30-31; R.R. at 76a-77a. The WCJ found Claimant credible on this issue and also found Trayer wholly credible. The WCJ, as the ultimate finder of fact in workers' compensation cases, has exclusive province over questions of credibility and evidentiary weight, and is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part. General Electric Co. v. Workmen's Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 529 Pa. 626, 600 A.2d 541 (1991). This Court will not disturb a WCJ's findings when those findings are supported by substantial evidence. Nevin Trucking v. Workmen's Compensation Appeal Board (Murdock), 667 A.2d 262 (Pa. Cmwlth. 1995).

In addition, Employer's argument that because he did not apply for the jobs referred to him by Hrobuchak he retired is without merit. First, Dieckman credibly testified that none of the positions were within Claimant's physical limitations. Secondly, as the WCJ and the Board pointed out, Employer fails to cite to any case law or statute which would support a determination that a failure to apply for a job meant that a claimant retired.

With respect to whether Claimant's failure to seek work on his own indicated that Claimant retired, the Board stated:

> [W]e noted that since Claimant's entitlement to disability benefits was already established, his disability was presumed to continue. Weigard [Giant Eagle v. Workers' Compensation Appeal Board (Weigard), 764 A.2d 663 (Pa. Cmwlth. 2000)]. Because Claimant had no burden to seek employment aside from referrals made to him in the context of a standard modification petition, any alleged failure on Claimant's part to pursue those referrals in good faith, if established, could lead only to a modification petition context, and would not warrant a conclusion that Claimant had withdrawn from the entire workforce.

Board Opinion, January 29, 2008, at 7; R.R. at 28a. This Court agrees. There is nothing in the record to indicate that Claimant retired.

Employer next contends that Employer's failure to supply Claimant with a Notice of Ability to Return to Work Form did not preclude a modification of benefits.

Section 306(b)(3) of the Workers' Compensation Act (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.

Employer concedes that compliance with this Section of the Act is a threshold burden that must be met when modification or suspension is based on availability of work. Summit Trailer Sales v. Workers' Compensation Appeal Board (Weikel), 795 A.2d 1082 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 569 Pa. 727, 806 A.2d 865 (2002). However, Employer argues that this Court has held that the Notice of Ability to Return to Work form is not needed when the employer's modification or suspension is based on expert vocational testimony and surveillance evidence. Burrell v. Workers' Compensation Appeal Board (Philadelphia Gas Works), 849 A.2d 1282 (Pa. Cmwlth. 2004). A review of the record indicates that Burrell is inapplicable because there was no surveillance evidence here.

Employer also argues that because Claimant voluntarily left the work force there was no need to issue the Notice of Ability to Return to Work. This Court has already determined that Claimant did not voluntarily leave the workforce. Therefore, this issue has no merit.

Employer also argues that because there was no change in Claimant's medical condition that Employer did not need to issue the form. Employer argues that Claimant's medical condition was stable and at maximum medical improvement. This argument makes no sense. Claimant was totally disabled and

received total disability benefits. Dr. Cash credibly testified that Claimant was capable of performing light duty work within certain restrictions. That certainly is a change from being totally disabled.

Employer next contends that the Board erred when it affirmed the WCJ's award of counsel fess for unreasonable contest.

Section 440(a) of the Act, 77 P.S. §996(a)[5], provides:

> In any contested case where the insurer has contested liability in whole or in part, including contested cases involving petitions to terminate, reinstate, increase, reduce or otherwise modify compensation awards, agreements or other payment arrangements or to set aside final receipts, the employe . . . in whose favor the matter at issue has been finally determined in whole or in part shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred for attorney's fee, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend the proceedings: Provided, that cost for attorney fees may be excluded when a reasonable basis for the contest has been established by the employer or the insurer.

An employer's contest is reasonable if the contest was brought to resolve a genuinely disputed issue, not merely to harass the claimant. Dworek v. Workmen's Compensation Appeal Board (Ragnar Benson, Inc.), 646 A.2d 713 (Pa. Cmwlth. 1994). The imposition of attorney fees is a question of law

[5] This Section was added by the Act of February 8, 1972, P.L. 25.

reviewable by the Board and this Court. McGoldrick v. Workmen's Compensation Appeal Board (Acme Markets, Inc.), 597 A.2d 1254 (Pa. Cmwlth. 1991).

This Court finds no error in the determination that Employer's contest was unreasonable. The WCJ found that Employer did not issue the required form for the suspension petition based on work generally available and argued a theory regarding retirement in the workforce but presented no evidence that Claimant retired and cited no case law to support the proposition.

Accordingly, this Court affirms.

BERNARD L. McGINLEY, Judge

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v.	:	
Workers' Compensation Appeal Board (Kostek), Respondent	:	No. 382 C.D. 2008

O R D E R

AND NOW, this 19th day of November, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge