IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Franklin Looks, Petitioner	:	
v.	:	No. 436 C.D. 2008
	:	Submitted: June 27, 2008
Workers' Compensation Appeal Board (SLP Roofing), Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: September 5, 2008

Franklin Looks (Claimant) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) granting the modification petition of SLP Roofing (Employer). In affirming the decision of the Workers' Compensation Judge (WCJ), the Board concluded that Employer provided prompt written notice of Claimant's ability to return to work as required by Section 306(b)(3) of the Workers' Compensation Act (Act).[1] Additionally, the Board modified the WCJ's finding with respect to Claimant's earning capacity, concluding that the WCJ made an arithmetic error in his calculation. Finding no error in the Board's holdings, we will affirm.

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §512(3). The full text of Section 306(b)(3) is set forth in the opinion, *infra*.

Claimant was employed as a roofer with an average weekly wage of $720. On September 17, 2004, Claimant sustained an injury to his left wrist and shoulder when he fell from a roof. Employer issued a Notice of Compensation Payable accepting liability for Claimant's "left wrist/shoulder fracture." Reproduced Record at 5a (R.R. __).

On June 20, 2005, Michael Mitrick, D.O., a board-certified orthopedic surgeon, examined Claimant. In conjunction with the exam, Dr. Mitrick reviewed Claimant's medical history, records, and diagnostic studies. Dr. Mitrick concluded that Claimant could work so long as he did not lift anything weighing over 35 pounds and did not do overhead work.

On August 26, 2005, Claimant met with Brian Bierley, a certified rehabilitation counselor and vocational expert. Based on his interview with Claimant and Dr. Mitrick's report, Bierley prepared a labor market survey targeting unskilled, light-duty occupations that fell within the work restrictions prescribed by Dr. Mitrick. Bierley also prepared an earning power assessment report, which indicated that Claimant was capable of performing light-duty, unskilled work as a housekeeper and could earn approximately $293 per week.[2]

On November 7, 2005, Employer sent Claimant a notice of ability to return to work on the LIBC-757 form, which stated that Dr. Mitrick concluded Claimant was able to return to work with certain restrictions. On December 6, 2005, Employer filed a modification petition alleging, *inter alia*, that a labor market survey determined Claimant had an earning capacity of $293 per week as

[2] Included in the earning power assessment report was a job analysis for three housekeeping positions that were open and available in the relevant geographical area.

of November 1, 2005. Claimant denied the allegations in the modification petition, and the matter proceeded to hearing.

At the hearing before the WCJ, Employer introduced the deposition testimony of Dr. Mitrick, who opined that Claimant can "absolutely" be gainfully employed, as long as the job does not require lifting 35 pounds or doing overhead work. R.R. at 40a-41a. Dr. Mitrick reviewed the labor market survey and opined that Claimant was physically capable of performing the housekeeper job as long as he did not do a lot of repetitive and overhead lifting.

Employer also introduced the deposition testimony of Bierley, along with the market survey and earning power assessment report. Bierley testified that he relied on Dr. Mitrick's report and his interview with Claimant and targeted housekeeping positions because they fit within Claimant's profile and work restrictions. Based on his research of such positions, Bierley opined that Claimant could earn approximately $293 per week.

In opposition to Employer's case, Claimant testified that he was only able to lift about 10 pounds above his shoulder. Claimant stated that he did not think he could work full-time as a housekeeper because using his left arm causes pain. Claimant conceded that there was nothing wrong with his right arm.

Claimant also introduced the deposition testimony of Niles Hall, a certified rehabilitation counselor, who testified that he interviewed and tested Claimant. Hall also reviewed the labor market survey prepared by Bierley and opined that the housekeeping jobs were not appropriate for Claimant. Hall felt that they were too physically demanding and required too much overhead work. Hall also opined that Claimant's earnings in a housekeeping position would be

approximately $232 per week. Hall admitted that he did not review Dr. Mitrick's testimony.

The WCJ granted Employer's modification petition as of September 30, 2005. The WCJ accepted as competent and credible the testimony of Employer's witnesses. The WCJ rejected the testimony of Claimant's expert, Hall, because Hall had failed to review Dr. Mitrick's testimony regarding Claimant's restrictions. The WCJ rejected Claimant's testimony as not credible. Based on the labor market survey, the WCJ concluded that Claimant had a weekly earning capacity of $276 and, therefore, modified Claimant's weekly indemnity benefits to $289.

Claimant appealed to the Board, asserting that the WCJ's decision was not supported by substantial evidence and that Employer's notice of ability to return to work was not timely. The Board affirmed the modification, holding that the WCJ's fact finding was supported by substantial evidence. It declined to determine whether Employer's notice was timely. However, the Board modified the WCJ's order to reflect an earning capacity of $293 per week, rather than the $276 found by the WCJ, noting that it has authority to correct clerical or mechanical errors. Claimant now petitions for review.[3]

Claimant raises two issues for this Court's review. First, Claimant contends that the Board erred in finding that Employer's five-month delay in

[3] This Court's review of an order of the Board is limited to determining whether the necessary findings of fact were supported by substantial evidence, constitutional rights were violated, or errors of law were committed. *Borough of Heidelberg v. Workers' Compensation Appeal Board (Selva)*, 894 A.2d 861, 863 n.3 (Pa. Cmwlth. 2006). The WCJ's determinations as to credibility and evidentiary weight are binding on appeal unless made arbitrarily and capriciously. *PEC Contracting Engineers v. Workers' Compensation Appeal Board (Hutchison)*, 717 A.2d 1086, 1089 (Pa. Cmwlth. 1998).

issuing the notice of ability to return to work was timely. Claimant next asserts that the Board erred in unilaterally increasing Claimant's weekly earning capacity from $276, the figure reached by the WCJ, to $293, thereby reducing his weekly indemnity benefits.

We begin with Claimant's argument that Employer did not give him "prompt written notice" of his ability as required by Section 306(b)(3) of the Act. It states:

> 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.

77 P.S. §512(3) (emphasis added). Claimant argues that the passage of five months between the date of Dr. Mitrick's examination and the date of Employer's notice was not "prompt."

This Court has recently addressed the issue of what constitutes "prompt written notice" for purposes of Section 306(b)(3). In *Melmark Home v. Workers' Compensation Appeal Board (Rosenberg)*, 946 A.2d 159 (Pa. Cmwlth.

2008), this court noted that the purpose of the statutory "prompt written notice" requirement is

> to provide notice to a claimant that there is medical evidence that the claimant can perform some work; that benefits could be affected; and that the claimant has an obligation to look for work. A claimant must have notice that her benefits could be affected *before* the employer attempts to modify benefits. Otherwise, a modification petition would be a claimant's first notice that a doctor has found the claimant capable of work.

Id. at 163 (emphasis original). This Court then went on to hold that

> "prompt written notice" requires an employer to give a claimant notice of the medical evidence it has received a reasonable time *after* its receipt lest the report itself becomes stale. It also requires an employer to give notice to the claimant a reasonable time *before* the employer acts upon the information. This necessarily requires an examination of the facts and timeline in each case to determine if the claimant has been prejudiced by the timing of the notice.

Id. (emphasis original) (footnotes omitted). In short, whether a notice of ability to return to work is promptly issued depends upon its impact upon the claimant.

Here, the WCJ made no findings of fact on the reasonableness of Employer's notice and whether Claimant was prejudiced. The WCJ's only finding regarding the notice was that "[Employer] provided written notice to Claimant of the ability to return to work on the prescribed Bureau form." WCJ Decision at 23. The absence of findings by the WCJ on the promptness of Employer's notice resulted from Claimant's failure to raise this issue before the WCJ.

An issue not raised before the WCJ is waived. *See Dobransky v. Workers' Compensation Appeal Board (Continental Baking Company)*, 701 A.2d 597, 600 (Pa. Cmwlth. 1997) ("[T]he strict doctrine of waiver is applicable in workers' compensation proceedings."); *Mearion v. Workers' Compensation*

Appeal Board (Franklin Smelting & Refining Co.), 703 A.2d 1080, 1081 (Pa. Cmwlth. 1997) (issues not raised before the WCJ are waived). This Court has explained waiver in the context of workers' compensation proceedings as follows:

> The [WCJ] not only functions as the factfinder in the workmen's compensation adjudicatory system, he or she is also charged with making a record of hearing, and such findings of fact and conclusions of law "as the petition and answers and the evidence produced before him and the provisions of this act shall, in his judgment, require." 77 P.S. § 883. Appeals are taken on the basis of the record produced before the [WCJ] and that record is necessarily limited to the … petition, the answers, and the evidence. Legal issues and facts not presented to the [WCJ] cannot be asserted on appeal without sacrificing the integrity, efficiency and orderly administration of the [workers'] compensation scheme of redress for work-related injury and occupational disease.

Dobransky, 701 A.2d at 599 (*quoting DeMarco v. Jones & Laughlin Steel Corp.*, 513 Pa. 526, 531-532, 522 A.2d 26, 29 (1987) (opinion announcing judgment of court)).

Claimant asserts that "this issue was raised during the course of the litigation and in the Claimant's Brief [before the WCJ]." Certified Record, Claimant's Appeal to the Board (C.R. ___). However, the record does not support this assertion.

First, Employer's modification petition asserted that Claimant's indemnity benefits should be modified based on the labor market survey. Claimant's answer did not challenge the timeliness of Employer's notice of ability to return to work; instead, that answer challenged the merits of Employer's petition. Second, the hearing transcripts do not show that Claimant made any argument or offered any evidence to challenge the timeliness of Employer's notice. Finally, whether Claimant raised this issue in his brief before the WCJ is of no

moment because that brief is not part of the certified record. *See, e.g.*, *Steglik v. Workers' Compensation Appeal Board (Delta Gulf Corp.),* 755 A.2d 69, 74 n.3 (Pa. Cmwlth. 2000).[4] Claimant could have requested that his brief be included as part of the certified record, but he failed to do so.

In short, there is no basis for this Court to find that Claimant raised to the WCJ the issue of timeliness of Employer's notice of ability to return to work. Accordingly, that issue has been waived.

Claimant next argues that the Board erred in modifying Claimant's weekly earning capacity to $293. Claimant contends that the WCJ found Claimant's earning capacity to be $276 by taking the average of the three housekeeping positions identified in the earning power assessment. Claimant asserts that there is no evidence of any clerical, typographical or mechanical error in the WCJ's determination. Accordingly, the Board erred in unilaterally modifying Claimant's weekly earning capacity.

There is no question that the Board has authority, on its own motion, to correct typographical and mechanical errors, provided proper notice and explanation is given. *Cohen v. Workmen's Compensation Appeal Board*, 381 A.2d 1330, 1332 (Pa. Cmwlth. 1978). Because the WCJ expressly credited the testimony of Employer's vocational expert, Bierley, who testified that Claimant's

---

[4] In *Steglik*, this Court concluded that an appellate court "cannot … rel[y] upon" a brief submitted to the Board that, although included in the reproduced record, is not included in the certified record because "it is beyond cavil" that appellate courts may only consider "those facts which have been duly certified in the record on appeal." *Steglik*, 755 A.2d at 74 n.3 (*quoting Spink v. Spink*, 619 A.2d 277, 280 n.1 (Pa. Super. 1992)). We also noted that "[i]f Claimant wished to rely on that brief, she '[c]ould have requested that the Board certify and transmit a supplemental record containing [her] brief to this Court pursuant to PA. R.A.P. 1926.'" *Id.* (citations omitted).

earning capacity was $293 per week, the Board held that the WCJ made a mistake in setting Claimant's earning capacity at $276 per week.

The WCJ stated that he calculated Claimant's weekly earning capacity to $276 by taking the "average of the three housekeeping positions" identified in the earning power assessment report. WCJ Decision at 25. However, the WCJ made a factual or mathematical error. The earning power assessment prepared by Bierley identified three housekeeping jobs with hourly salaries of $7.00, $7.50, and $7.50 respectively. C.R., Employer's Ex. No. 3, Tab 3. At 40 hours per week, each position would result in a weekly wage of $280, $300, and $300, yielding an average weekly wage of $293.[5] The WCJ's description of his calculation yields a result of $293, not $276. The Board correctly modified the WCJ's order to reflect a weekly earning capacity of $293.

Based on the foregoing, the adjudication of the Board is affirmed.

MARY HANNAH LEAVITT, Judge

Judge Smith-Ribner concurs in the result only.

[5] Average weekly wage = ($280 + $300 + $300) ÷ 3 = 293.34

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Franklin Looks, Petitioner	:	
v.	:	No. 436 C.D. 2008
Workers' Compensation Appeal Board (SLP Roofing), Respondent	:	

ORDER

AND NOW, this 5th day of September, 2008, the order of the Workers' Compensation Appeal Board dated February 26, 2008, in the above-captioned matter is hereby AFFIRMED.

_____

MARY HANNAH LEAVITT, Judge