IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Southwest Airlines,	:	
Petitioner	:	
	:	No. 447 C.D. 2011
v.	:	
	:	Submitted: June 17, 2011
Workers' Compensation Appeal Board	:	
(Council),	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: December 27, 2011

Southwest Airlines (Employer) petitions for review of the February 23, 2011, order of the Workers' Compensation Appeal Board (Board) upholding the decision of a workers' compensation judge (WCJ) to deny Employer's suspension petition. We affirm.

Gregory Council (Claimant) suffered an umbilical hernia as the result of violent vomiting due to food poisoning in the course of his employment as a ramp operator at Employer's Philadelphia Station. (WCJ's Findings of Fact, No. 1.) Employer issued a Notice of Temporary Compensation Payable, which ultimately converted to a Notice of Compensation Payable, and, Claimant received weekly

indemnity benefits of $315.00 per week.[1] (Id.) On January 23, 2009, Employer filed a Petition to Suspend Compensation Benefits, seeking a suspension of benefits as of January 14, 2009, based on a labor market survey. (WCJ's Findings of Fact, No. 2.) Claimant filed an Answer denying the allegations and requested unreasonable contest attorney's fees. Supersedeas was denied. (Id.)

In support of its suspension petition, Employer presented the deposition testimony of Gabriel Rosales, M.D., who practices occupational medicine and examined Claimant on July 12, 2007, and October 16, 2008. (WCJ's Findings of Fact, No. 4.) Dr. Rosales agreed with the diagnoses of umbilical hernia and unrelated hepatitis C. (Id.) Dr. Rosales testified there was a risk that the hernia could become "incarcerated, strangulated or obstructed," resulting in the need for surgery, which Claimant could not have due to his hepatitis C. (Id.) Dr. Rosales opined that Claimant was not capable of his pre-injury job as a ramp operator but that he was capable of sedentary to light duty work. (Id.)

Employer also presented the deposition testimony of Michael Smychynski, who Employer retained to perform a vocational evaluation of Claimant. According to Smychynski, none of Employer's job descriptions were vocationally appropriate for Claimant. (WCJ's Findings of Fact, No. 5.) After conducting a transferable skills analysis, Smychynski identified a number of alternative employment categories for Claimant, producing five job analyses, at least some of which were recycled from past evaluations. (WCJ's Findings of Fact, No. 5.)

[1] Claimant continued to receive these benefits until his death from non-work-related causes. Employer brings this case for the "purpose of recapturing funds paid into and improperly applied to the Supersedeas Fund . . . ." (Employer's brief at 5.)

Next, Employer presented the deposition testimony of Terri Bellinger, an injury specialist who works for Employer. Bellinger testified that Employer offered twelve different positions at the Philadelphia Station, none of which were within Claimant's restrictions (WCJ's Findings of Fact, No. 6.) Bellinger also stated that company policy requires completion of the 180-day probationary period before a worker is eligible to submit an "internal placement application" for transfer to another department. (Id.) Bellinger further testified that Employer has a "transitional duty program" to modify job duties of injured employees. However, she stated that Clamant was ineligible to participate in that program because Employer does not offer the program to employees who have not completed the 180-day probationary period to which Employer is entitled under the collective bargaining agreement (CBA) with its employees. (Id.)

On cross-examination, Bellinger admitted that all twelve of the Philadelphia Station positions have been modified to accommodate injured workers in the past, (R.R. at 248-54a), and that it was Employer's internal company policy, not the CBA, that prevented probationary employees from participating in this transitional duty program. (R.R. at 255-58a.) Bellinger testified that, although she was familiar with all twelve of the Philadelphia Station positions, none of which Claimant was cleared to perform, she did not know which, if any, of these positions were actually available during the relevant time period. (R.R. at 266-68a.)

Claimant presented the deposition testimony of his treating physician, Edward Stankiewicz, M.D. (WCJ's Findings of Fact, No. 7.) Dr. Stankiewicz testified that Claimant suffered from hepatitis C and resultant liver cirrhosis, and, as a result, was not cleared to have surgery to repair his umbilical hernia. (Id.) Dr. Stankiewicz opined that Claimant was at a high risk of developing incarceration, in

which case Claimant would die. (Id.) Dr. Stankiewicz testified that Claimant was not capable of gainful employment. (Id.) Dr. Stankiewicz reviewed all five of Smychynski's job descriptions and did not approve of any of them. (Id.) In fact, he believed that Claimant was at very high risk of dying if he returned to work at all. (Id.)

Claimant testified about his condition and his efforts to find employment. He testified that he contacted each of the five employers suggested by Smychynski, noting that some of the phone numbers were incorrect. (WCJ's Findings of Fact, No. 8.) Claimant completed one job application online but did not receive a job offer. (Id.) Claimant went to Harrah's casino, one of the suggested employers, but the air was smoky and made him cough, which, according to Dr. Stankiewicz, was dangerous for his hernia. (WCJ's Findings of Fact, No. 7, 8.) Claimant also contacted Lincoln University as suggested but was informed of a hiring freeze. (WCJ's Findings of Fact, No. 7.)

After reviewing the evidence, the WCJ found the evidence of Claimant and his treating physician, Dr. Stankiewicz, to be credible. (WCJ's Findings of Fact, No. 9.) The WCJ rejected Bellinger's testimony because "she testified that she was entirely unaware of what positions were open and available during the relevant time period, yet she signed an affidavit drafted by [Smychynski] stating [Employer had no] jobs available" to Claimant and because she "admitted that Employer could have modified positions to accommodate Claimant, but . . . chose not to do so." (WCJ's Findings of Fact, No. 9.) The WCJ also rejected Smychynsky's testimony, explaining that his "testimony that the identified positions were open and available were [sic] directly rebutted by the credible testimony of [Claimant]; because he made a "flawed attempt to create an elevated earning capacity"; and because he admitted

that he recycles positions for his labor market surveys. (WCJ's Findings of Fact, No. 9.)

Accordingly, the WCJ concluded that Employer did not meet its burden of proving that it was entitled to a suspension of benefits, denied the suspension petition, and awarded attorney's fees for unreasonable contest. The Board affirmed.

On appeal to this court,[2] Employer first argues that the WCJ misapplied section 306(b)(2) of the Workers' Compensation Act (Act),[3] leading the WCJ to err in concluding that Employer failed to establish that it did not have an open, vacant, available position within Claimant's work-related restrictions. Section 306(b)(2) of the Act provides in pertinent part:

> (2) "Earning power" shall be determined by the work the employe is capable of performing and shall be based upon expert opinion evidence which includes job listings with agencies of the department, private job placement agencies and advertisements in the usual employment area. Disability partial in character shall apply if the employe is able to perform his previous work or can, considering the employe's residual productive skill, education, age and work experience, engage in any other kind of substantial gainful employment which exists in the usual employment area in which the employe lives within this Commonwealth . . . <u>If the employer has a specific job vacancy the employe is capable of performing, the employer shall offer such job to the employe</u> . . . .

77 P.S. §512(2) (emphasis added). In other words, as this Court stated in <u>South Hills Health System v. Workers' Compensation Appeal Board (Kiefer)</u>, 806 A.2d 962, 966

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[2] Our scope of review is limited to determining whether findings of fact are supported by substantial evidence, whether an error of law has been committed, or whether constitutional rights have been violated. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

(Pa. Cmwlth. 2002), "in order to prevail in seeking a modification of benefits, an employer must either: (1) offer . . . a claimant a specific job that is available, which the claimant is capable of performing, or (2) establish 'earning power' through expert opinion evidence . . . ."

In addition, 34 Pa. Code §123.301 (emphasis added) provides:

> (a) For claims for injuries suffered on or after June 24, 1996, if a specific job vacancy exists within the usual employment area within this Commonwealth with the liable employer, which the employee is capable of performing, the employer shall offer that job to the employee prior to seeking a modification or suspension of benefits based on earning power.
>
> . . . .
>
> (c) The employer's duty under subsections (a) and (b) may be satisfied if the employer demonstrates facts which may include the following:
>
> > (1) The employee was notified of a job vacancy and failed to respond.
> >
> > (2) A specific job vacancy was offered to the employee, which the employee refused.
> >
> > (3) The employer offered a modified job to the employee, which the employee refused.
> >
> > (4) No job vacancy exists within the usual employment area.
>
> . . . .

(continued…)

[3] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 512(2), added by section 4 of the Act of June 24, 1996, P.L. 350.

> (e) The employer's duty under subsections (a) and (b) does not require the employer to hold a job open for a minimum of 30 days. Job offers shall be made consistent with the employer's usual business practice. If the making of job offers is controlled by the provisions of a collective bargaining agreement, the offer shall be made consistent with those provisions.
>
> . . . .
>
> (g) A job may not be considered vacant if the employee's ability to fill the position was precluded by any applicable collective bargaining agreement.

According to Employer, the WCJ mischaracterized Bellinger's testimony to find that she "was totally unaware of what positions were available with Employer during the relative time period" but nonetheless signed an affidavit that there were no available positions. (WCJ's Findings of Fact, No. 9.) Employer is correct that a more careful reading of Bellinger's testimony[4] shows that Employer did

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[4] Bellinger testified as follows:

> Q. Have you done any research to determine what jobs were available during . . . October 28, 2008 through January 23, 2009?
>
> A. I am aware that we did not have any available with the lifting requirements that he had.
>
> Q. That's not my question. My question is, what jobs were actually available at Southwest Airlines between October 28, 2008 and January 23, 2009?
>
> A. I'm unaware.
>
> Q. You haven't bothered to do any research to determine what jobs were actually available during that period; am I correct?

(Footnote continued on next page…)

not have any jobs available <u>within Claimant's restrictions</u>, but Bellinger did not know specifically which jobs Employer had available that Claimant would <u>not</u> have been capable of performing. (R.R. at 266a-268a.) In other words, it did not matter whether any of the twelve Philadelphia Station positions were open and available because Claimant could not perform any of them.

This is harmless error, however, because the WCJ also found that Employer could have, but chose not to, modify one of its Philadelphia Station positions and offer it to Claimant. Employer argues that it was not obligated to modify a position for Claimant because 34 Pa. Code. §123.301(e) provides that job offers are to be made consistent with the employer's "usual business practices" and the provisions of any applicable CBA subsection, and, further, subsection (g) provides that a job shall not be considered vacant if it is precluded by the CBA. Employer contends that, in this case, providing Claimant with a modified position would somehow be a breach of the CBA. We disagree.

In its entirety, the relevant CBA provision states as follows:

> G. **<u>Probation</u>**. All new Employees shall serve a probation period of one hundred eighty (180) calendar days. During this period, a new Employee has an opportunity to demonstrate his qualifications and ability to adapt to Company policies and procedures. The probation period affords the Company an opportunity to evaluate the Employee's qualifications and ability to perform tasks assigned.

(R.R. at 288a.)

(continued…)

> A. You are incorrect. I am aware [of] the job positions, and what their requirements are. Now, whether there was an opening of a ramp agent or customer service agent at the time period, I am unaware.

(R.R. at 268a.)

The CBA only provides for a 180-day probationary period. There is no evidence anywhere in the record that the CBA prevents probationary employees from receiving modified job offers. Employer refused to modify a position for Claimant pursuant to its own internal company policy, not the CBA. Although 34 Pa. Code §123.301(e) also requires that job offers are made consistent with the employer's "usual business practices," we certainly will not read this provision so broadly as to give employers the latitude to declare "business practices" that allow them to evade their obligations to employees under the Act.

Moreover, Bellinger testified that one of the reasons she could not offer a modified position to Claimant was that, under Employer's "internal placement application" procedure, probationary employees could not be transferred to a different job because, prior to the conclusion of the probation, Employer would not have had a sufficient opportunity to evaluate the employee's qualifications. However, Bellinger testified that all twelve of the positions could be and had been modified in the past, including Claimant's position of ramp operator. (R.R. at 252.) Thus, even the position Claimant held before his injury could have been modified to suit his restrictions, which would not necessitate a transfer at all. Accordingly, we agree that Employer failed to establish that it did not have an open, vacant, available position within Claimant's restrictions.

Employer also argues that: (1) the Board erred in finding it was harmless error for the WCJ to consider Claimant's non-work-related condition to find that Claimant was not capable of performing the five positions suggested by Smychynsky; and (2) the WCJ erred in concluding that the positions identified by Smychynsky were not open and available. We disagree. Employer had the burden of proving both that it did not have a job available to Claimant and that Claimant's earning power had changed. South Hills Health System. Because Employer did not establish it had no job available, we need not address these issues further.

Finally, Employer argues that the Board erred in affirming the WCJs decision because, "due to the multiple errors of fact and law and inconsistencies within the Findings of Fact and Conclusions of Law," the WCJ's opinion was not a reasoned decision. (Employer's brief at 23.) We disagree. All of the WCJ's findings are supported by the record. In addition, the WCJ provided a summary of all relevant testimony, identified the grounds relied upon by the medical witnesses, and clearly explained all necessary credibility determinations. Thus, the WCJ provided a sufficient basis for meaningful appellate review as required by section 422(a) of the Act, 77 P.S. §834.

Accordingly, we affirm.

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PATRICIA A. McCULLOUGH, Judge

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ORDER

AND NOW, this 27th day of December, 2011, the order of the Workers' Compensation Appeal Board dated February 23, 2011, is hereby affirmed.

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PATRICIA A. McCULLOUGH, Judge