



petition and amended the NCP to include extrusions of the cervical discs at C5-6 and C6-7.

On January 2, 2009, Employer filed a petition to modify Claimant's benefits based on a December 5, 2008, labor market survey prepared by John Dieckman. Dieckman had reviewed Claimant's physical restrictions as set forth by Dr. William Murphy, who diagnosed Claimant with various conditions "referable" to the May 14, 2004, work incident, including "cervical strain and sprain, aggravation of the cervical degenerative and joint disease and cervical disc extrusions at C5-6 and C6-7, left shoulder sprain and strain with rotator cuff tendonitis and subacromial bursitis," (Findings of Fact, No. 28), but released Claimant to return to light duty work as of May 15, 2008. (Findings of Fact, No. 29.)<sup>1</sup> Thereafter, Dr. Murphy reviewed eight job analyses prepared by Dieckman and determined that all of these jobs were within Claimant's capabilities. (*Id.*)

WCJ Paul E. Baker held hearings on Employer's modification petition, and both Dieckman and Dr. Murphy testified for Employer. After the hearings, the WCJ credited Dr. Murphy's testimony that Claimant "is fully capable of working in a restricted duty capacity," (Findings of Fact, No. 43), as well as Dieckman's testimony that Claimant "had work generally available to her." (Findings of Fact, No. 44.) Also determining, based on Dieckman's testimony, that Claimant had an earning power of \$390.00 per week, WCJ Baker modified Claimant's benefits to partial

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<sup>1</sup> Accordingly, Employer issued Claimant a notice of ability to return to work, which was received by both Claimant and her counsel. (Findings of Fact, No. 30.)

disability, effective December 5, 2008, the date of Dieckman's vocational assessment, and ongoing. As an aside, the WCJ further noted:

Dr. Murphy's testimony indicates that he reached the opinion that the Claimant's May 14, 2004, work injury had resulted in various medical conditions other than those originally acknowledged and determined to have been sustained by Judge Stapleton. *The issue of whether the Claimant is experiencing additional medical conditions arising out of, or related to, the original work injury, is not an issue in these proceedings.*

(Findings of Fact, No. 28) (emphasis added). Consequently, WCJ Baker did not amend the NCP to include any of the additional medical conditions that Dr. Murphy attributed to Claimant's work incident.

Both parties appealed portions of the WCJ's decision, and the WCAB affirmed. On appeal here,<sup>2</sup> Claimant argues that WCJ Baker committed an error of law in failing to make a corrective amendment to the description of her work injury because Dr. Murphy's testimony supports an expansion of Claimant's work injuries under the Workers' Compensation Act (Act).<sup>3</sup> However, Claimant's argument is devoid of merit. The discrete issue before WCJ Baker was whether Employer was entitled to a modification of Claimant's benefits based on Dieckman's labor market

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<sup>2</sup> 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.

<sup>3</sup> Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§1-1041.4, 2501-2708.

survey, which relied in part on Dr. Murphy’s physical restrictions of Claimant.<sup>4</sup> The precise issue before us—whether the original NCP should be amended to include other medical conditions cited by Dr. Murphy—is thus irrelevant in the face of Dr. Murphy’s credited testimony that Claimant can return to light duty work, despite the entirety of his diagnoses. Stated another way, even accepting Claimant’s argument that Dr. Murphy’s opinion supports an expansion of her accepted work injuries, the record nonetheless supports a modification of Claimant’s benefits based on her earning power, where Dr. Murphy cleared Claimant for light duty work; Dieckman relied on Dr. Murphy’s physical restrictions in crafting his labor market survey; and the WCJ credited both this medical and vocational evidence.

Accordingly, we affirm.<sup>5</sup>

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ROCHELLE S. FRIEDMAN, Senior Judge

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<sup>4</sup> “An employer who files a modification petition to change a claimant’s benefits from total to partial may succeed if the employer establishes that the disabled claimant has ‘earning power.’” *Rebeor v. Workers’ Compensation Appeal Board (Eckerd)*, 976 A.2d 655, 658 (Pa. Cmwlth.) (citation omitted), *appeal denied*, 604 Pa. 700, 986 A.2d 152 (2009).

<sup>5</sup> We note that Claimant made no argument in her brief that changing the description of the NCP would have affected the result in this case. Again, Claimant queried only whether the WCJ’s failure to make a corrective amendment to the description of her work injury amounted to an error of law. “[A]n issue is waived unless it is preserved at every stage of the proceeding.” *Wheeler v. Workers’ Compensation Appeal Board (Reading Hospital and Medical Center)*, 829 A.2d 730, 735 (Pa. Cmwlth. 2003).

