IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stacey Redclift, Petitioner	:	
v.	:	No. 517 C.D. 2010
	:	SUBMITTED: September 24, 2010
Workers' Compensation Appeal Board (Secure Health, LP.), Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

<u>OPINION NOT REPORTED</u>

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED: December 21, 2010**

Stacey Redclift petitions for review of the order of the Workers' Compensation Appeal Board (Board) that affirmed the order of the Workers' Compensation Judge (WCJ) granting the suspension petition of Secure Health, LP (Employer). For the reasons that follow, we affirm.

The facts of this case, as found by the WCJ, are as follows. Redclift worked for Employer as a certified nursing assistant for four years. In February 2006, she suffered a work-related injury to her lower back. Employer accepted responsibility for the injury, which was initially described as a lower back strain, and began paying compensation. By agreement, the injury description was eventually expanded to an annular tear at L5-S1 with exacerbation of an

underlying degenerative disc disease. In August 2006, Redclift underwent surgery to attempt to alleviate her condition, and had an anterior discectomy and fusion at L5-S1. This surgery led to further complications, including a staph infection.

In May 2007, nine months after the surgery, Employer had Redclift undergo an independent medical examination with John Williams, M.D. Dr. Williams, in a report dated July 5, 2007, confirmed the above history and concluded that although Redclift still suffered some pain, she could return to sedentary work with restrictions. Based on this report, Employer sent Redclift a Notice of Ability to Return to Work on August 7, 2007. Reproduced Record (R.R.) at 109. Employer followed that notice with job offer letters in August, September and November of 2007. The final job offer letter, dated November 2, 2007, offered Redclift a "transitional CNA" position, and stated that "a Notice of Ability to Return to Work has previously been sent to you in this regard."[1] R.R. at 265. Attached to this letter was a description of the offered job's duties, which had been signed and approved by Dr. Williams on October 30, 2007. R.R. at 266-67.

Shortly after receiving the November job offer letter, Redclift met with Sharon Malenovitch, an administrator for Employer. At this meeting, Redclift informed Malenovitch that there were certain duties included in the job description which she did not feel that she could perform. Malenovitch told Redclift that she would have to perform all of the listed job duties, and upon hearing this, Redclift declined to take the position. WCJ Opinion, Finding of Fact 58.

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[1] The suspension petition in this case was based solely on the November job offer. For this reason, we do not address the contents of the August and September letters.

After Redclift declined the offered position, Employer filed the suspension petition at issue in this case. The WCJ heard medical testimony from Dr. Williams on behalf of Employer and from Robert Mauthe, M.D. on behalf of Redclift. Both doctors testified that Redclift was capable of light-duty work with restrictions, but differed on whether the offered job was appropriate. The WCJ concluded that the November job offer was within Redclift's restrictions. The WCJ further concluded that Employer's November job offer was a good faith referral, but that Redclift's response was not in good faith. For this reason, the WCJ granted the suspension petition, and the Board affirmed. An appeal to this court followed.

On appeal, Redclift argues that the job offer was not accompanied by a required Notice of Ability to Return to Work and that Employer's job offer was in bad faith, because it was based on stale medical information, included a job description that was lacking in specificity and required tasks beyond Redclift's physical abilities.

An employer must provide a Notice of Ability to Return to Work when it receives medical evidence that an employee is able to return to work in any capacity. Section 306(b)(3) of the Workers' Compensation Act (Act),[2] 77 P.S. § 512(3). Redclift asserts that such notice was required after October 30, 2007, when Dr. Williams approved the job description ultimately included in the November job offer letter. This is a misinterpretation of the law for which Redclift cites no support. Dr. Williams had already concluded that Redclift was able to

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[2] Act of June 2, 1915, P.L. 736, *as amended*. Section 306(b)(3) 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 . . ." 77 P.S. § 512(3).

return to work, with restrictions. This conclusion had already been provided to Redclift in the August 7, 2007 Notice of Ability to Return to Work. Dr. Williams' signature on the description of the offered job was not new medical information of the sort that would require a new notice; it merely showed his conclusion that the proposed job met the restrictions he had imposed based on his prior examination of Redclift. Because no additional notice was required, the Board did not err in affirming the WCJ on this point.

Redclift also appears to assert that the August 7 Notice was not "prompt" as required by Section 306(b)(3) of the Act. This court has held the promptness requirement of this section "requires an employer to give a claimant notice of medical evidence it has received a reasonable time *after* its receipt lest the report itself become stale. It also requires an employer to give notice to the claimant a reasonable time *before* the employer acts on this information." *Kleinhagan v. Workers' Comp. Appeal Bd. (Knif Flexpak Corp.)*, 993 A.2d 1269, 1272-73 (Pa. Cmwlth. 2010) [quoting *Melmark Home v. Workers' Comp. Appeal Bd. (Rosenberg)*, 946 A.2d 159 (Pa. Cmwlth. 2008)] (emphasis in original). In this case, Employer provided Redclift notice approximately one month after the date of Dr. Williams' report, and three months before the job offer at issue in this case. Redclift gives no reason why either of these time periods should be considered unreasonable, and we therefore affirm the holding of the Board that the notice was timely.

Next, Redclift asserts that Employer's November job offer was in bad faith for a number of reasons. Our Supreme Court has set out a three step procedure for cases in which employers seek modification or suspension of benefits:

> 1. The employer who seeks to modify a claimant's benefits on the basis that he has recovered some or all of his ability must first produce medical evidence of a change in condition.
>
> 2. The employer must then produce evidence of a referral (or referrals) to a then open job (or jobs), which fits in the occupational category for which the claimant has been given medical clearance, e.g., light work, sedentary work, etc.
>
> 3. The claimant must then demonstrate that he has in good faith followed through on the job referral(s).

Kachinski v. Workers' Comp. Appeal Bd. (Vepco Constr. Co.), 516 Pa. 240, 252, 532 A.2d 374, 380 (1987). When the referrals at issue are to jobs with the employer itself, the burden is on the employer to show that it offered to the claimant a specific job that it has available, which the claimant is capable of performing. *South Hills Health Sys. v. Workers' Comp. Appeal Bd. (Kiefer)*, 806 A.2d 962 (Pa. Cmwlth. 2002).

Redclift first asserts that Employer's job offer was based on stale medical information. As explained above, the November job offer was designed to conform to the restrictions enumerated in Dr. Williams' July report, which was in turn based on a May physical exam. Redclift offers no bright line by which this court should determine when a doctor's opinion becomes "stale," nor does she assert that her medical condition substantially changed between May and November. The WCJ found that not only was there no reason to believe that Dr. Williams' opinion was stale, but that Redclift's own expert witness, Dr. Mauthe, testified that Redclift's condition had actually improved since Dr. Williams' exam. WCJ Opinion, Finding of Fact 74. This court's role in reviewing a WCJ's factual findings is limited to determining if they are supported by substantial evidence, or

if they are in capricious disregard of the evidence. *Leon E. Wintermyer, Inc. v. Workers' Comp. Appeal Bd. (Marlowe)*, 571 Pa. 189, 812 A.2d 478 (2002). The WCJ's finding that Dr. Williams' opinion adequately represented Redclift's condition is supported by substantial evidence, including the testimony of both medical experts. We therefore cannot reverse on this basis.

Finally, Redclift argues that Employer's bad faith was demonstrated by the job description itself, which allegedly was lacking in specifics and included tasks beyond Redclift's capacity. The job description attached to the November job offer had been approved by Dr. Williams as conforming to the restrictions he had imposed. The WCJ reviewed the offered job, and found as a fact that it was described in sufficient detail and conformed to Dr. Williams' restrictions. WCJ Opinion, Finding of Fact 74. Because this finding is supported by substantial evidence, including expert testimony, this argument must fail.

For all the foregoing reasons, we affirm.

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BONNIE BRIGANCE LEADBETTER,
President Judge

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Workers' Compensation Appeal Board (Secure Health, LP.),	:	
Respondent	:	

O R D E R

AND NOW, this 21st day of December 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby AFFIRMED.

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BONNIE BRIGANCE LEADBETTER,
President Judge