

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kelly Dougherty,	:	
Petitioner	:	
	:	
v.	:	No. 52 C.D. 2008
	:	
Workers' Compensation Appeal	:	
Board (County of Lackawanna),	:	
Respondent	:	
	:	
County of Lackawanna,	:	
Petitioner	:	
	:	
v.	:	No. 142 C.D. 2008
	:	Submitted: June 27, 2008
	:	
Workers' Compensation Appeal Board	:	
(Dougherty),	:	
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 SENIOR JUDGE McCLOSKEY

FILED: August 19, 2008

Kelly Dougherty (Claimant) and the County of Lackawanna (Employer) have filed cross-petitions for review of a decision of the Workers' Compensation Appeal Board (Board) that had affirmed an order of the Workers' Compensation Judge (WCJ) (1) granting Claimant's claim petition for a closed period and (2) suspending Claimant's benefits for the work-related injuries she sustained based upon his

conclusion that she was capable of performing light-duty work that Employer had made available to her. We now affirm.

The facts as found by the WCJ are summarized below. Claimant sustained an injury to her lower back during the course of her employment as a nurse's aid on October 29, 2004,¹ when she attempted to lift a patient. Claimant reported the injury to Employer, but continued to work while receiving physical therapy. Employer re-assigned Claimant to a light-duty position between October 29, 2004, and November 19, 2004, after which time she returned to her full-duty position. Claimant discontinued her physical therapy and ultimately claimed that her October 29 injury caused her to become disabled such that, when she engaged in work activities on June 13, 2005, she could not bear the pain. Claimant saw a neurologist, Dr. Pamela Costello, on June 14, 2005. Dr. Costello did not examine or see Claimant anytime after that date.

Claimant presented to the WCJ the medical testimony of Dr. Costello, who opined that Claimant had sustained a lumbar spine injury with herniated discs and back pain with radiculopathy, and that her employment had caused these injuries. Dr. Costello noted that she reviewed the films of a lumbar MRI performed on March 29, 2005, which revealed bulging discs at L3-4, L4-5 and L5-S1, partially effacing the thecal sac at L4-5. Dr. Costello testified that she did not believe that Claimant was capable of performing the duties of her full-duty position, but reluctantly permitted her to return to light-duty work.

Dr. David Cooper testified as Employer's medical expert. Dr. Cooper, who examined Claimant on September 1, 2005, described Claimant's condition as lumbar

¹ At various places in his opinion the WCJ indicates that Claimant sustained her injury on October 9, rather than October 29; however, the testimony in the record indicates the actual date of her injury was October 29, 2004.

strain, and testified that she had fully recovered from that injury as of the time of his examination, and that she was capable of returning to work at her pre-injury job without restrictions. Dr. Cooper noted that he also reviewed the films of Claimant's MRI of March 29, 2005. Dr. Cooper opined that these films showed no evidence of any nerve root pinching or impingement. As to the bulging discs, Dr. Cooper attributed the same to obesity and cigarette smoking and indicated that any disc changes would be classified as degenerative in nature. However, on cross-examination, Dr. Cooper acknowledged that x-rays of Claimant's spine showed no signs of degenerative changes and that no degenerative changes were noted in the radiology report accompanying the MRI.

Employer also presented the testimony of its assistant administrator, Kevin Russin, who testified regarding (1) Claimant's brief post-injury assignment to a light-duty position; (2) Claimant's request on May 4, 2005, to obtain a different shift, with no request for light-duty work; (3) that Employer makes the light-duty position available in order to keep an employee working; and (4) that Claimant has not returned to work since June 9, 2005. Mr. Russin also testified that Employer would have been willing as of October 14, 2005, to modify its light-duty position to accommodate any restrictions on Claimant.

The WCJ determined that Claimant's testimony was credible. Further, with regard to Dr. Costello, the WCJ accepted her testimony as credible as to the status of Claimant's condition until June 14, 2005 (the date she examined Claimant), but rejected her opinion in that regard after that date. With regard to Employer's witness, Dr. Cooper, the WCJ rejected Dr. Cooper's testimony in its entirety. The WCJ noted that he was rejecting the testimony of Dr. Cooper as his opinion that Claimant suffered from degenerative changes in her lumbar spine was not supported by the x-rays and

MRI. To the contrary, the WCJ indicated that the x-rays and MRI were devoid of any such degenerative changes.

Based upon his factual findings and credibility determinations, the WCJ concluded that Claimant had established a work-related injury to her lumbar discs on October 29, 2004, that rendered her disabled as of June 9, 2005. The WCJ also concluded that Employer had established that Claimant was capable of returning to light-duty work as of August 5, 2005, and that Employer would have made such work available to Claimant as of October 14, 2005. The WCJ specifically determined that Mr. Russin had provided notice to Claimant of the availability of work through communications with her attorney, but that Claimant never responded to the notice. Thus, the WCJ granted Claimant's petition for a closed period, denied a petition to terminate filed by Employer, but granted a suspension of benefits based upon the unresolved injury and Claimant's ability to perform available light-duty work.

In these appeals,² Claimant asserts that the Board erred in affirming the WCJ's conclusion that Claimant was capable of performing light-duty work, that Employer had made such work available and that, therefore, Employer was entitled to a suspension of benefits; Employer contends that the testimony of Claimant's medical expert was equivocal and thus incompetent to support the WCJ's findings regarding Claimant's alleged work-related injury. Employer also argues that the WCJ erred in

² Our scope of review in a workers' compensation appeal is limited to determining whether an error of law was committed, constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704. Further, in Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002), our Supreme Court held that "review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in which such question is properly brought before the court." Wintermyer, 571 Pa. at 203, 812 A.2d at 487.

concluding that Claimant was totally disabled during the closed period. Rather, Employer claims, during that period, Claimant was capable of performing suitable work that Employer made available to her.

We will first address Employer's argument that the WCJ's decision was erroneous based upon Employer's view that Dr. Costello's testimony was equivocal. We believe that Employer has not properly raised this issue. Nowhere in its appeal to the Board did Employer raise the question of incompetency. Rather, Employer only challenged the factual findings by asserting that the WCJ ignored the testimony of Employer's medical witness. However, the WCJ found that witness' testimony not credible and explained the reasons for this finding. Nor did Employer challenge the WCJ's legal conclusions on the basis of the alleged incompetency of Dr. Costello's testimony. Further, the Board's decision strongly suggests that Employer never brought this issue before the Board. Thus, we must conclude that Employer has waived this issue. See Pa. R.A.P. 1551; GA & FC Wagman, Inc. v. Workers' Compensation Appeal Board (Aucker), 785 A.2d 1087 (Pa. Cmwlth. 2001).

Even if Employer had not waived this issue, our review of Dr. Costello's testimony confirms that her testimony was not equivocal regarding Claimant's work-related disability. Dr. Costello testified to a reasonable degree of medical certainty that Claimant's disabling condition was caused by an event that occurred at work in October of 2004. Employer points to Dr. Costello's testimony that she did not review Claimant's medical records relating to a post-injury motor vehicle accident and, thus, argues that her lack of familiarity with that accident and failure to review records of Claimant's treatment after the accident renders her testimony incompetent. However, Dr. Costello, while acknowledging that she did not review those records, reflected Claimant's observation that her condition did not worsen after the accident. Dr.

Costello also testified regarding the reasons why she reached the conclusion that the accident was not the cause of Claimant's disability. A workers' compensation judge, in reviewing a medical expert's testimony, may consider the fact that the expert did not review all medical records of a claimant. However, that absence of review goes only to the weight and credibility of the witness, not to the competency of her testimony. James Corporation v. North Allegheny School District, 938 A.2d 474 (Pa. Cmwlth. 2007). Based upon the foregoing, even if Employer had not waived this issue, we would conclude that Dr. Costello's testimony was not equivocal.

Employer also argues that the WCJ erred in awarding total disability benefits even for the closed period because, it asserts, Claimant failed to establish the duration of her injury. Employer claims that, even if Claimant was unable to perform her full-duty responsibilities, the light-duty position she had performed earlier at the time of her initial injury remained available to her. However, as the Board noted, Employer did not establish that light-duty work was available until October 14, 2005. Based upon the foregoing, we reject Employer's argument that the Board erred in affirming the WCJ decision to grant total disability benefits for the closed period.

We now address Claimant's argument that the Board erred in affirming the WCJ's granting of Employer's suspension petition. Claimant asserts that, once the WCJ determined that she had sustained her burden of proof as to the existence of her injury, the Board erred in affirming the WCJ's decision to suspend benefits when the Employer presented no credible evidence that Claimant's injury had resolved. However, we note that the WCJ only accepted Dr. Costello's testimony regarding Claimant's ability to work up through the date of her examination of Claimant. Although Dr. Costello indicated that she would have preferred Claimant not to return to work at all, she did ultimately permit Claimant to return to light-duty work. Further, Claimant herself

indicated that she was capable of performing light-duty work. In response to a question from Employer's counsel as to whether or not she feels she can perform the light-duty job, Claimant responded in the affirmative. Contrary to Claimant's argument, the WCJ considered (1) Dr. Costello's own, albeit reluctant, approval for Claimant to return to light-duty work, and (2) Claimant's own testimony that she could perform the requirements of the light-duty job. Thus, we reject Claimant's argument that the Board erred in affirming the WCJ's decision to grant total disability benefits only for a closed period.

Claimant also argues that the Board erred in affirming the WCJ's suspension of her benefits because the Employer filed a Notice of Ability to Return to Work on the basis of the opinion of Dr. Cooper, Employer's medical expert, whose testimony the WCJ determined to be not credible. Claimant also asserts that Employer did not offer Claimant suitable work on or before October 14, 2005, and did not offer suitable light-duty work after that date. However, as the Board discussed, the Supreme Court's decision in Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.), 516 Pa. 240, 532 A.2d 374 (1987), does not require an Employer to offer a job to a Claimant, but rather only requires that an Employer refer a Claimant to a suitable and available job. The WCJ found that the testimony of Employer's witness, Mr. Russin, on October 14, 2005, in which he stated that a job was available, satisfied that requirement.

Claimant contends that Employer failed to comply with Section 306(b)(3) of the Pennsylvania Workers' Compensation Act, Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §512(3), arguing that Employer's reliance upon the discredited testimony of Dr. Cooper in issuing the Notice of Ability to Return to Work constituted a violation of that Section. However, that provision only requires that an Employer issue

prompt written notice that a claimant is capable of returning to work in some capacity upon receipt of medical information supporting the notice. The later determination by a WCJ that the opinion of Employer's expert (upon which Employer relied in issuing the Notice) is not credible is irrelevant. Claimant does not argue that Employer did not issue prompt written notice. Hence, we cannot say that the Board erred in affirming the WCJ's conclusion that a suspension was warranted.

Accordingly, the order of the Board is affirmed.

JOSEPH F. McCLOSKEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kelly Dougherty,	:	
Petitioner	:	
	:	
v.	:	No. 52 C.D. 2008
	:	
Workers' Compensation Appeal	:	
Board (County of Lackawanna),	:	
Respondent	:	
	:	
County of Lackawanna,	:	
Petitioner	:	
	:	
v.	:	No. 142 C.D. 2008
	:	
Workers' Compensation Appeal Board	:	
(Dougherty),	:	
Respondent	:	

ORDER

AND NOW, this 19th day of August, 2008, the order of the Workers' Compensation Appeal Board is hereby affirmed.

JOSEPH F. McCLOSKEY, Senior Judge