

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Parkside Borough,	:	
Petitioner	:	
	:	
v.	:	
	:	
Workers' Compensation Appeal Board	:	
(Birney),	:	No. 551 C.D. 2008
Respondent	:	Submitted: August 15, 2008

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
 HONORABLE RENÉE COHN JUBELIRER, Judge
 HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
JUDGE BUTLER**

FILED: September 29, 2008

Parkside Borough (Parkside) petitions this Court for review of the February 27, 2008, Decision and Order of the Workers' Compensation Appeal Board (Board) affirming a Workers' Compensation Judge's (WCJ) decision to grant the claim petition filed by Robert Birney (Claimant). Parkside essentially presents three issues for this Court's review: 1) whether the Board committed an error of law in affirming the WCJ's decision that Claimant was entitled to benefits under the Workers' Compensation Act¹ beyond the date that a modified job was

¹ Act of June 2, 1995, P.L. 736, *as amended*, 77 P.S. §§1-1041.4, 2501-2708.

available; 2) whether the WCJ's finding that Claimant could not perform the work entailed in the modified job is supported by substantial evidence; and 3) whether a denial of benefits under the Heart and Lung Act² precludes Claimant from making a workers' compensation claim. For reasons that follow, we affirm the Board's decision and order.

Claimant, formerly a Sergeant for Parkside's police department, suffered injury during the course of his employment when he was involved in a motor vehicle accident on March 5, 2002. Claimant sustained injuries to his left shoulder, left arm and elbow, neck and spine. On February 25, 2003, Claimant filed a claim petition seeking disability and other benefits. On April 28, 2004, WCJ Joseph Stokes (WCJ Stokes) granted the petition. Parkside appealed to the Board, and the Board ordered a remand. The petition was again granted by WCJ Stokes on October 6, 2005. Parkside filed a second appeal to the Board and again the Board ordered a remand. On remand, the matter was reassigned and WCJ Kathleen DiLorenzo circulated a decision on August 31, 2007 granting the claim petition. Parkside appealed that decision to the Board. On February 27, 2008, the Board affirmed the WCJ's decision. Parkside timely filed an appeal to this Court.³

Parkside first argues that the WCJ's finding that Claimant could not perform the work entailed in the modified job was not supported by substantial evidence. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *McMullen v. Workers' Compensation Appeal Board (C & D Techs., Inc.)*, 858 A.2d 147, 149 (Pa.

² Act of June 28, 1935, P.L. 477, as amended, 53 P.S. §§637-638.

³ Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated. *Sysco Food Services of Phila. v. Workers' Compensation Appeal Board (Sebastiano)*, 940 A.2d 1270 (Pa. Cmwlth. 2008).

Cmwlth. 2004) (citation omitted). “[W]here, as here, a claimant is released to return to a modified job, the employer is required to show job availability within the limitations caused by the claimant's work injury.” *Graphic Packaging, Inc. v. Workers' Compensation Appeal Board (Zink)*, 929 A.2d 695, 702 (Pa. Cmwlth. 2007) (citation and footnote omitted).

The Board cited *Champion Home Building Co. v. Workers' Compensation Appeal Board (Ickes)*, 585 A.2d 550 (Pa. Cmwlth. 1990), for the proposition “it is the province of the judge as factfinder, to determine whether the Claimant is able to perform the offered position.” Board op. at 4. Parkside contends that because Parkside’s medical expert, Dr. L. Richard Trabulsi (Trabulsi) found the offered position to be within Claimant’s limitations, they have met their burden to have benefits suspended. However, as the Board stated, the WCJ specifically found the testimony of Claimant’s medical expert, Dr. Michael Tancredi (Tancredi), more credible and persuasive than the testimony of Trabulsi. WCJ’s Decision, circulated August 31, 2007.

The Board noted that Trabulsi testified Claimant did not suffer a back injury as a result of the work injury and therefore could perform the tasks of the offered position. The WCJ, however, specifically rejected that testimony and found in accordance with Tancredi that Claimant did in fact suffer a back condition as a result of his work injury.

Parkside argues that five of the WCJ’s findings of fact were in error. Specifically, Parkside contends the WCJ misinterpreted the evidence and assumed facts not in evidence, and therefore the findings are not supported by substantial evidence, not properly reasoned and ignore competent evidence. The specific findings complained of, however, all relate to whether Claimant could perform the

duties of the offered job within the limitations set by Trabulsi. The offered position was tailored to Trabulsi's limitations and the WCJ specifically found that Tancredi's testimony was more credible than Trabulsi's. Hence, finding in accordance with Tancredi that Claimant could not perform the duties of the offered job is a logical conclusion, and clearly based on substantial evidence.

As the Board noted, Tancredi testified "[i]t's mainly the lumbar spine that is keeping him out of light duty." Deposition of Michael Tancredi, D.C., October 14, 2003, at 80; Reproduced Record, at 78a. Trabulsi, finding no back injury, did not set limitations to accommodate said injury. Thus, Claimant could not perform the duties of the offered job. Accordingly, the Board did not err in affirming the WCJ's decision finding that Claimant was entitled to benefits beyond the date he was offered the modified position.

Parkside next argues that the unappealed denial of benefits under the Heart and Lung Act precludes Claimant from pursuing his workers' compensation benefits. Specifically, he contends the workers' compensation matter is barred by res judicata and collateral estoppel.

Res judicata encompasses two doctrines: "Strict" res judicata which is know[n] as claim preclusion and "broad" res judicata, which is know[n] as collateral estoppel or issue preclusion. Collateral estoppel or issue preclusion prohibits the re-litigation of questions of law or issues of fact that have already been litigated and determined by a final judgment. Collateral estoppel prohibits re-litigation where: (1) the legal or factual issues are identical; (2) they were actually litigated; (3) they were essential to the judgment; and (4) they were material to the adjudication. A prerequisite to the application of collateral estoppel is that the prior decision asserted to have preclusive effect must be a final judgment.

Duvall v. Dep't of Corrections, 926 A.2d 1220 (Pa. Cmwlth. 2007) (internal citations omitted).

Section 1(a) of the Heart and Lung Act provides, in pertinent part: any member of the State Police Force ... who is injured in the *performance of his duties* ... and by reason thereof is temporarily incapacitated from performing his duties, shall be paid ... his full rate of salary ... until the disability arising therefrom has ceased. 53 P.S. § 637(a) (emphasis added). In comparison, section 301(c) of the Workers' Compensation Act provides benefits to employees who are disabled as a result of sustaining an injury "arising in the course of his [or her] employment and related thereto." 77 P.S. § 411(1). This court has held that the relevant language of section 1(a) of the Heart and Lung Act has a more narrow focus than the relevant language of section 301(c) of the Workers' Compensation Act and, hence, that the standards for determining compensability under these two provisions are not the same.

Cresci v. Pa. State Police, 862 A.2d 726, 729-730 (Pa. Cmwlth. 2004) (footnotes and citations omitted). Thus, whether Claimant is entitled to benefits under the Heart and Lung Act for his injury presents a different issue than whether Claimant is entitled to workers' compensation benefits for that injury. *Id.* Accordingly, res judicata and collateral estoppel do not bar Claimant's claim under the Workers' Compensation Act, and the Board did not err in affirming the finding of the WCJ that the unappealed denial of benefits under the Heart and Lung Act did not bar Claimant's workers' compensation claim.

For these reasons, the order is affirmed.

JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 29th day of September, 2008, the order of the Workers' Compensation Appeal Board in the above captioned matter is affirmed.

JOHNNY J. BUTLER, Judge