IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ahmed Hagag, Petitioner	:	
v.	:	No. 655 C.D. 2011
Workers' Compensation Appeal Board (Applebee's), Respondent	:	Submitted: August 26, 2011

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: October 13, 2011

Ahmed Hagag (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) affirming the decision of a workers' compensation judge (WCJ) that granted the petition of Applebee's (Employer) to suspend Claimant's compensation benefits pursuant to the provisions of the Pennsylvania Workers' Compensation Act (Act).[1] We affirm.

On April 11, 2006, Claimant filed a claim petition for benefits in which he alleged, inter alia, that he suffered a low back injury while in the course and scope

[1] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1 – 1041.4, 2501 – 2708.

of his employment as a janitor for Employer. By a decision dated May 1, 2007, a WCJ determined that Claimant suffered a work-related injury in the nature of an L5-S1 disc herniation and S-1 radiculopathy, and that he was disabled as a result of this injury. Accordingly, the WCJ granted Claimant's petition and awarded Claimant benefits at a rate of $202.50 per week.

On June 23, 2008, Employer filed a motion to modify or suspend Claimant's benefits as of June 11, 2008. The petition alleged, inter alia, that Claimant was capable of performing light duty work as of May 13, 2008, and that Employer had made a position available which was refused by Claimant in bad faith on June 11, 2008. On July 7, 2008, Claimant filed an answer to the petition in which he denied that he was capable of returning to work, and in which he alleged that he remained disabled.

On March 9, 2009, a hearing on Employer's petition was conducted before a WCJ.[2] In support of the petition, Employer presented the deposition testimony of Michael Dawson, M.D., a physician board certified in orthopedic surgery and pain management, and Paul Trzaska, Employer's human resources manager. In opposition to the petition, Claimant testified and presented the deposition testimony of Robert Cavoto, D.C., a chiropractic physician.

Dr. Dawson testified that he examined Claimant in August of 2007 and in May of 2008. In May of 2008, Claimant told Dr. Dawson that he was very much better than he was in August of 2007, and that he only had early morning stiffness in

[2] Claimant had also filed a petition for review of a utilization review (UR) determination on May 15, 2008. Claimant's petition was consolidated for hearing and disposition by the WCJ with Employer's suspension petition. However, the disposition of Claimant's petition is not at issue in the instant appeal.

the lower back with intermittent numbness in the right leg. Claimant said that he found it difficult to sit or stand for any length of time.

Dr. Dawson stated that his physical examination of Claimant in May of 2008 revealed that Claimant stood straight and was able to flex his lumbar spine to 80 degrees, the norm being 90 degrees. Claimant's side bending was 20 degrees to the left and 15 degrees to the right, the norm being 20 degrees to either side. Claimant's extension was 15 degrees, which is normal. Claimant's straight leg test was 90 degrees on the left and 45 degrees on the right, the norm being 90 degrees. Claimant exhibited posterior tenderness at L5-S1, and over the right L5-S1 facet joints. There was no motor weakness in Claimant's lower limbs, his hip points were normal, his ankle reflexes were normal, and there was no anterior spine tenderness. Based on Claimant's statement that he was feeling much better, and based upon his examination, Dr. Dawson doubted that Claimant was putting forth a full effort at the examination.

Dr. Dawson opined that, as of May of 2008, Claimant was not totally disabled and that he could work light duty with no more than occasional lifting of 20 pounds or frequent lifting and carrying of 10 pounds. Dr. Dawson released Claimant to restricted light duty work, and completed a physical capabilities form to that effect.

Mr. Trzaska testified that he received the physical capabilities form. On June 3, 2008, he sent the form to Claimant by certified mail, along with a cover letter and a modified job description. In the letter, Mr. Trzaska instructed Claimant to report to Employer's general manager at a specific address on June 11, 2008, at 2:00 p.m. Claimant did not appear at the meeting, and Mr. Trzaska had no communication with him after sending him the form and letter. Mr. Trzaska testified that if Claimant had appeared at the meeting, he would have been offered a modified duty position at

his pre-injury location, at his pre-injury wage, and at his pre-injury schedule of five to six hours per day, five days per week. Mr. Trzaska stated that the modified duty job is still available to Claimant, and that Employer can accommodate an employee if he or she needs to lie down during their shift due to pain.

Dr. Dawson testified that he reviewed Employer's modified job description for the position offered to Claimant, and opined that the job definitely fell within the restrictions that he imposed on Claimant. He stated that it would have been appropriate for Claimant to perform the modified job that was offered, and that he would be capable of performing the duties of that position five to six hours per day, five days per week.

On September 9, 2009, the WCJ issued a decision disposing of Employer's petition in which she determined that the testimony offered by Claimant and his witness, Dr. Cavoto was not credible. WCJ Decision at 5-6. Rather, the WCJ found the foregoing testimony of Mr. Trzaska and Dr. Dawson to be more credible, and accepted it as fact. Id. As a result, the WCJ found as fact: (1) Dr. Dawson noted a remarkable improvement by the second examination of Claimant; (2) Employer offered Claimant a job within his modified duty restrictions at earnings equal to or greater than his pre-injury wage; (3) Claimant is capable of returning to work on a modified basis, and Employer would have worked with him on an individual basis regarding further modifications; and (4) Claimant acted in bad faith in failing to respond to the modified duty job offer. Id.

Based on the foregoing, the WCJ concluded: (1) Employer had sustained its burden of proving a change in Claimant's condition, that he is no longer totally disabled, and that he is able to return to light duty work; (2) Employer had sustained its burden of proving that it offered Claimant a job within his modified duty

restrictions at wages equal to or greater than his pre-injury wages; (3) Claimant had not shown that he exercised good faith by failing to respond to the offer of the light duty job; and (4) Claimant's benefits should be suspended effective June 11, 2008, based upon his lack of good faith and his failure to return to a light duty position offered to him by Employer that was within his physical and vocational capabilities. WCJ Decision at 6. Accordingly, the WCJ issued an order granting Employer's suspension petition effective June 11, 2008. Id. at 7.

On September 21, 2009, Claimant appealed the WCJ's decision to the Board. On March 17, 2011, the Board issued an opinion and order affirming the WCJ's decision. Claimant then filed the instant petition for review.[3]

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[3] In a workers' compensation proceeding, this Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of appeal board procedures, and whether necessary findings of fact are supported by substantial evidence. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995). "Substantial evidence" is such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Waldameer Park, Inc. v. Workers' Compensation Appeal Board (Morrison), 819 A.2d 164 (Pa. Cmwlth. 2003); Hoffmaster v. Workers' Compensation Appeal Board (Senco Products, Inc.), 721 A.2d 1152 (Pa. Cmwlth. 1998). In performing a substantial evidence analysis, the evidence must be viewed in a light most favorable to the party who prevailed before the WCJ. Waldameer Park, Inc.; Hoffmaster. In a substantial evidence analysis where both parties present evidence, it is immaterial that there is evidence in the record supporting a factual finding contrary to that made by the WCJ; rather, the pertinent inquiry is whether there is any evidence which supports the WCJ's factual finding. Waldameer Park, Inc.; Hoffmaster.

In addition, it is well settled that, in a workers' compensation proceeding, the WCJ is the ultimate finder of fact. Hayden v. Workmen's Compensation Appeal Board (Wheeling Pittsburgh Steel Corp.), 479 A.2d 631 (Pa. Cmwlth. 1984). As the fact finder, the WCJ is entitled to accept or reject the testimony of any witness, including a medical witness, in whole or in part. General Electric Co. v. Workmen's Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), petition for allowance of appeal denied, 529 Pa. 626, 600 A.2d 541 (1991). Questions of credibility and the resolution of conflicting testimony are within the exclusive province of the fact finder. American Refrigerator Equipment Company v. Workmen's Compensation Appeal Board (Jakel), 377 A.2d 1007 (Pa. Cmwlth. 1977). Thus, determinations as to witness credibility and

(Continued....)

The sole claim raised by Claimant in this appeal is that the Board erred in affirming the WCJ's decision granting Employer's suspension petition because Employer failed to show a change in his physical condition by substantial medical evidence. We do not agree.

Pursuant to Section 306(b)(2) of the Act, 77 P.S. § 512(2), an employer can seek a modification of a claimant's benefits by either offering the claimant a specific available job that he is capable of performing, or establishing "earning power" through expert testimony. Vaughn v. Workers' Compensation Appeal Board (Carrara Steel Erectors), 19 A.3d 545 (Pa. Cmwlth. 2011). Where, as here, the employer seeks a suspension of benefits based upon the offer of a specific available job with that employer, we look to the burden of proof set forth in Kachinski v. Workers' Compensation Appeal Board (Vepco Construction Co.), 516 Pa. 240, 532 A.2d 374 (1987). Id.

In Kachinski, our Supreme Court held that:

> 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.[4]
>
> 2. The employer must then produce evidence of a referral (or referrals) to a then open job (or jobs), which fits in

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evidentiary weight are within the exclusive province of the WCJ and are not subject to appellate review. Hayden.

[4] Where, as here, a change in benefits is based on job availability and not a change in physical condition, an employer is not required to demonstrate a change in a claimant's physical status. Channellock, Inc. v. Workers' Compensation Appeal Board (Reynolds), 965 A.2d 1239 (Pa. Cmwlth. 2008) (quoting Lukens, Inc. v. Workmen's Compensation Appeal Board (Williams), 568 A.2d 981, 983 (Pa. Cmwlth. 1989), petition for allowance of appeal denied, 527 Pa. 656, 593 A.2d 426 (1990)).

> 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).
>
> 4. If the referral fails to result in a job then the claimant's benefits should continue.

Id. at 252, 532 A.2d at 380.

Where a modification petition is predicated upon the fact that an employer made a medically approved position available to a claimant, the employer need only establish that the job referrals were within the claimant's physical capabilities and were available. Kilker v. Workmen's Compensation Appeal Board (E.J. Rogan & Sons), 667 A.2d 1215 (Pa. Cmwlth. 1995). It is the claimant's burden to demonstrate that he has made a good faith effort to return to the work force when he is able. Id. Where the claimant has failed to act in good faith, the modification of benefits is appropriate. Id. With these principals in mind, we now turn to the claim raised by Claimant in the instant appeal.

Claimant submits that the Board erred in affirming the WCJ's decision because Employer failed to produce any evidence demonstrating a change in his physical condition. In the instant case, however, Employer was seeking a modification of Claimant's benefits based on job availability and not a change in his physical condition. As noted above, in such a case, the employer is not required to show a change in the claimant's physical status to support a modification of his benefits. Channellock, Inc.; Lukens.

In addition, at the hearing before the WCJ, Claimant specifically testified that he received the job offer from Mr. Trzaska, and that he did not respond to that offer. See N.T. 3/9/09 at 11-12. As a result, the modification of benefits was

appropriate, Kilker, and Claimant's allegation of error in this regard is patently without merit.

Moreover, even if it is assumed that Employer was required to demonstrate a change in Claimant's physical condition, as alleged by Claimant, it is clear that Employer sustained its burden of proof in this regard. "[I]n order to meet its burden under the first prong of the *Kachinski* test, an employer need only adduce medical evidence that the claimant's current physical condition is different than it was at the time of the last disability adjudication…." Lewis v. Workers' Compensation Appeal Board (Giles & Ransome, Inc.), 591 Pa. 490, 501, 919 A.2d 922, 928 (2007). In the instant case, Employer's medical expert, Dr. Dawson, clearly and unequivocally testified as to the improvement in Claimant's physical condition between his first office visit in August of 2007 and his second office visit in May of 2008, and as to Claimant's ability to perform the duties of the available light duty job offered by Employer. See N.T. 11/25/08 at 9-16.

Accordingly, the order of the Board is affirmed.

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JAMES R. KELLEY, Senior Judge

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O R D E R

AND NOW, this 13th day of October, 2011, the order of the Workers' Compensation Appeal Board, dated March 17, 2011, at No. A09-1712, is AFFIRMED.

JAMES R. KELLEY, Senior Judge