IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Hair Express,	:	
Petitioner	:	
	:	
v.	:	No. 890 C.D. 2011
	:	Submitted: August 26, 2011
Workers' Compensation Appeal Board (Heath),	:	
Respondent	:	

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: October 14, 2011**

Hair Express (Employer) petitions for review of the order of the Workers' Compensation Appeal Board (Board) affirming the remand decision of a Workers' Compensation Judge (WCJ) in favor of Lori Heath (Claimant) and denying Employer's petition for modification/suspension of benefits filed pursuant to Section 306(b)(2) of the Workers' Compensation Act (Act).[1] Employer contends the Board erred in affirming the WCJ's decision because he relied upon Claimant's subjective opinion regarding her capabilities rather than the medical and vocational testimony Employer submitted. Upon review, we affirm.

Claimant sustained a work-related injury in the nature of right carpal tunnel syndrome on June 10, 2003, while working for Employer as a hair stylist. Employer acknowledged the injury in a compensation agreement.

[1] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §512.

Several years later, Employer filed its petition to modify/suspend compensation benefits as of June 27, 2007, based upon a labor market survey performed by Louis Szollosky, a vocational case manager and rehabilitation counselor (Vocational Expert). A hearing ensued before a WCJ. During the hearing, Employer submitted deposition testimony of Dr. Randall Culp (Employer's Physician) and of its Vocational Expert.

Based upon the labor market survey he conducted, Vocational Expert identified the following four jobs as available to Claimant and within her capabilities and restrictions:[2] (1) Mane Street Hair as a receptionist/shampooer; (2) Super Cuts as a receptionist; (3) Empire Beauty School as an admissions representative; and, (4) Home Depot in the phone center, requiring some stocking.[3] Reproduced Record (R.R.) at 180a-183a. Vocational Expert testified he limited the labor market survey to jobs within 19 miles of Claimant's home. R.R. at 180a. He testified that the driving time to the Empire Beauty School and Home Depot jobs would be more than 30 minutes. R.R. at 239a, 243a.

Employer's Physician first examined Claimant on November 1, 2005. R.R. at 63a. He treated Claimant in 2006 and recommended a functional capacities evaluation. Employer's Physician testified that based upon the evaluation, he released Claimant to return to work with a permanent lifting restriction of 10 pounds and no repetitive use. R.R. at 71a. Employer's Physician approved the

[2] Employer closed its business in 2004, and it had no job for Claimant. R.R. at 8a.

[3] Initially, Vocational Expert marked the Home Depot job as requiring lifting of up to 20 pounds, which is error. He resubmitted the same job as within the 10-pound lifting restriction.

four jobs from the labor market survey. R.R. 72a. He opined that Claimant could perform keyboarding and had no restrictions on driving. R.R. at 81a-83a.

At the hearing, Claimant testified she injured her right hand and wrist in January 2003 and continued to work until June 10, 2003, when the pain in her forearm became "terrible" and she was unable to grip things. Notes of Testimony, 6/17/08 (N.T.), at 10-12; R.R. at 10a-12a. Claimant underwent four surgeries on her right wrist and elbow, and she continues to receive injections in her right wrist. Claimant takes a number of pain medications and experiences average pain at a five to a seven on a 10-point scale; her pain is "always there." R.R. at 25a. She testified she cannot type on a keyboard. N.T. at 41-42; R.R. at 41a-42a.

On her own volition, Claimant attempted to return to work as a hair stylist in 2005 or 2006 for one day, but was unable to perform the functions due to the pain and dropping things. Claimant also attempted to return to work in the summer of 2007 at Erin's Salon for a few weeks on a part-time basis, but she could not continue because she had too much difficulty performing the functions assigned. N.T. at 13-16; R.R. at 13a-16a.

Claimant testified that she cannot drive longer than 10 minutes at a time because her forearm goes to sleep, and her fingers get tingly so she feels "really bad pain, just shoots down [her] fingers." R.R. at 24a. Although she did not believe she could perform the essential functions, Claimant testified she applied for the Mane Street and Super Cuts jobs, but was not hired. N.T. at 31-35;

R.R. at 31a-35a. Claimant did not apply to the Home Depot or Empire Beauty School jobs as they were not within her capabilities or her driving tolerance.

Claimant submitted the deposition testimony of Dr. Richard Zamarin (Claimant's Physician). Claimant's Physician did not agree with Employer's Physician's restriction that Claimant could perform fine motor manipulation and keyboarding for three hours per day at one time. R.R. 305a. Claimant's Physician testified he would classify her skills as "intermittent," meaning Claimant may be able to do a task, like keyboarding, for no more than 15 minutes at a time, and dependent upon her pain level. R.R. at 306a-307a. Claimant's Physician testified he believed Claimant experiences pain and numbness while driving. R.R. at 304a. He opined Claimant may be able to do the labor market survey jobs if she can do them with her non-dominant left hand and only as her pain tolerance allows. R.R. at 307a-308a.

Claimant also submitted the testimony of a non-expert vocational counselor regarding her abilities to return to her prior job as a hair stylist. He testified that he found her "most significantly disabled," the highest level of disability recognized by the Office of Vocational Rehabilitation. R.R. at 342a.

Ultimately, the WCJ denied Employer's suspension/modification petition finding Claimant credible and rejecting any testimony, including expert testimony, in conflict with Claimant's testimony regarding her abilities. The Board initially reversed in part and remanded because exhibits, including Claimant's Physician's deposition, were missing from the exhibits before the Board, making it

unclear whether the exhibits were properly in the record. The Board instructed the WCJ to consider the medical evidence properly submitted and determine whether the Home Depot and Empire Beauty School jobs were available to Claimant and within her capabilities.

On remand, and without additional evidence or argument, the WCJ issued a second decision denying Employer's petition. The WCJ found Claimant's testimony "credible, persuasive and worthy of belief," and stated, "Claimant herself is in the best position to evaluate her own complaints of and tolerance for pain." WCJ Op., Finding of Fact (F.F.) No. 10a. The WCJ found Claimant applied for the jobs identified in the labor market survey that she thought she could drive to even though she was uncertain whether she could perform the jobs. Id. He found Claimant applied for and was not offered a position at either Mane Street Hair or Super Cuts. The WCJ thus concluded the jobs were not available to her. F.F. No. 10b.

The WCJ further credited Claimant's testimony regarding her pain while driving, noting Claimant's Physician's testimony that there is evidence to support Claimant's claims of numbness and pain in her dominant hand. F.F. No. 10c. The WCJ found that Claimant could not perform the essential functions of both the Home Depot and Empire Beauty School jobs, which required use of a keyboard and entailed over 10 minutes of driving time. F.F. No. 10d. The WCJ thus determined that the Home Depot and Empire Beauty School jobs were not actually available to Claimant. Id.

The Board affirmed the WCJ's remand decision, stating Employer failed to meet its burden in proving that the positions were available for Claimant within her qualifications and physical abilities. Employer appeals to this Court.[4]

Employer seeks modification or suspension of Claimant's benefits based upon the labor market survey results. An employer seeking modification or suspension of benefits bears the burden of proving the claimant's earning power has increased. Riddle v. Workers' Comp. Appeal Bd. (Alleg. City Elec., Inc.), 603 Pa. 74, 981 A.2d 1288 (2009). An employer can meet this burden through expert testimony showing that a claimant is capable of performing work that is available in her usual employment area. Id. Any work identified through expert testimony must be actually available to the claimant to support modification or suspension. Allied Prods. & Svcs. v. Workers' Comp. Appeal Bd. (Click), 823 A.2d 284 (Pa. Cmwlth. 2003).

Employer argues the WCJ erred in not crediting the testimony of its experts that Claimant could perform the essential functions of the four jobs identified in the labor market survey.

In a workers' compensation proceeding, the WCJ is the ultimate fact-finder and "has exclusive province over questions of credibility and evidentiary weight …." Anderson v. Workers' Comp. Appeal Bd. (Penn Center for Rehab), 15 A.3d 944, 949 (Pa. Cmwlth. 2010). The WCJ is free to accept or reject the expert

[4] This Court's review is limited to determining whether there was a violation of constitutional rights, errors of law committed, or a violation of Board procedures, and whether
(Footnote continued on next page…)

testimony of any witness, including a medical witness, in whole or in part. Id.; Riggle v. Workers' Comp. Appeal Bd. (Precision Marshall Steel), 890 A.2d 50 (Pa. Cmwlth. 2006).

In essence, Employer challenges the WCJ's credibility determinations. Credibility determinations are not reviewable by this Court. Anderson. This Court declines Employer's invitation to reweigh the evidence to find the medical and vocational experts more credible than Claimant as to her actual abilities given her pain. See id.

Employer cites three cases for the proposition that Claimant's subjective opinion as to her abilities is insufficient without a supporting credible medical opinion. See World Kitchen, Inc. v. Workers' Comp. Appeal Bd. (Rideout), 981 A.2d 342 (Pa. Cmwlth. 2009); State Workmen's Ins. Fund v. Workmen's Comp. Appeal Bd. (Hoover), 680 A.2d 40 (Pa. Cmwlth. 1996); Walk v. Workmen's Comp. Appeal Bd. (U.S. Air, Inc.), 659 A.2d 645 (Pa. Cmwlth. 1995). None of these cases is analogous to the situation before us, and none of them holds that medical evidence supporting a claimant's subjective claim of pain is required when the WCJ credits Claimant. Most notably, all of these cases defer to the findings or credibility determinations of the WCJ.

(continued…)

necessary findings of fact were supported by substantial evidence. Lehigh County Vo-Tech School v. Workers' Comp. Appeal Bd. (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

Here, the WCJ found Employer did not meet its burden of proving that Claimant was capable of performing any of the four jobs presented. The WCJ rejected the testimony of Employer's medical and vocational experts. F.F., Nos. 10a. 10b. Specifically, the WCJ found Claimant credible that due to the pain and numbness in her hand, she could not do keyboarding and was unable to drive for more than approximately 10 minutes at a time. Based upon Claimant's credible testimony, the WCJ concluded that neither the Empire Beauty School nor Home Depot jobs were within Claimant's capabilities. Further, the WCJ credited Claimant's Physician's testimony that Claimant experiences pain and numbness in her dominant hand. The record is clear that Claimant's Physician limited Claimant's fitness to perform any of the positions because of her pain. R.R. at 307a-308a.

Employer insists the contradiction between Employer's Physician's testimony regarding Claimant's abilities and likely pain, and Claimant's testimony should be resolved it its favor. Otherwise, Employer argues, the workers' compensation system may be compromised by self-serving testimony. We repeatedly hold, however, that a WCJ can give more credence to a claimant's testimony regarding incapacitating pain than to a doctor's testimony. Victor's Jewelers v. Workers' Comp. Appeal Bd. (Bergelson), 604 A.2d 1127, 1128 (Pa. Cmwlth. 1992) (holding that "severe pain, even without evidence of anatomical cause, will support a finding of continued disability." (emphasis added)); Hygrade Food Products v. Workers' Comp. Appeal Bd., 437 A.2d 89 (Pa. Cmwlth. 1981). It is also clear that testimony of such pain, *if accepted by the WCJ*, can support a finding of continued disability. Id.; Campbell v. Workers' Comp. Appeal Bd. (Antietam Valley Animal Hosp.), 705 A.2d 503, 507 (Pa. Cmwlth. 1998).

In short, there is ample lay and expert evidence in the record as to Claimant's pain and its effect upon her abilities. The WCJ committed no error in crediting Claimant's testimony here.[5] Accordingly, the Board's decision is affirmed.

ROBERT SIMPSON, Judge

[5] In its petition for review and statement of issues, Employer asserted that the WCJ did not issue a "reasoned decision" because he relied upon Claimant's subjective testimony as to her pain. However, Employer declined to develop this argument in its brief. See Harvilla v. Delcamp, 521 Pa. 21, 555 A.2d 763 (1989) (inclusion of argument in statement of issues without additional briefing is insufficient under Pa. R.A.P. 2119); see also Rapid Pallet v. Unemployment Comp. Bd. of Review, 707 A.2d 636 (Pa. Cmwlth. 1998). Further, Employer failed to raise this issue to the Board and it is thus waived. See McGaffin v. Workers' Comp. Appeal Bd. (Manatron, Inc.), 903 A.2d 94 (Pa. Cmwlth. 2006). Regardless, the WCJ clearly explained his credibility determinations and other findings and thus issued a reasoned decision in accordance with Section 422(a) of the Act, 77 P.S. §834, and Daniels v. Workers' Comp. Appeal Bd. (Tristate Transp.), 574 Pa. 61, 828 A.2d 1043 (2003).

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O R D E R

AND NOW, this 14th day of October, 2011, the Order of the Workers' Compensation Appeal Board dated May 6, 2011 at No. A10-0715 is **AFFIRMED**.

ROBERT SIMPSON, Judge