Appeal Case: A15-0181
Opinion Mailing Date: 08/26/2016
Determination: Affirmed

Opinion

JAMES SHOPF v. DART CONTAINER CORPORATION OF PENNSYLVANIA

Attached is a copy of an Opinion from the Workers' Compensation Appeal Board filed this date in the above-captioned case. An appeal to the Commonwealth Court of Pennsylvania may be taken by any party aggrieved by the Board's decision, provided such appeal is taken within (30) days after the mailing date of the Board's decision. The Board is not responsible for the filing or processing of further appeals to the Court. Further appeals may be filed in person or by mail (accompanied by U.S. Postal Services Form 3817) with the Prothonotary of the Commonwealth Court of Pennsylvania, 601 Commonwealth Avenue, Suite 2100, PO Box 69185, Harrisburg, PA 17106-9185. The Commonwealth Court may also be contacted at 717-255-1650 with questions related to a further appeal.

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Notes:

OPINION

FRIONI, CHAIRMAN:

Before the Workers' Compensation Appeal Board (Board) is the Appeal of James Shopf (Claimant) from the Decision and Order of Workers' Compensation Judge (WCJ) Michael Hetrick modifying Claimant's benefit rate from total to partial based on the availability of a sedentary job. We affirm.

Claimant was employed by Dart Container Corporation of Pennsylvania (Defendant) as a machine operator. On November 17, 2011, Claimant was injured when he became caught on a machine's spinning component and his leg bent back over his head. Defendant issued a Notice of Temporary Compensation Payable (NTCP) describing the work injury as a broken right fibula, torn meniscus, ligament damage, and bruising to the chest and right shoulder and providing for payment of total disability benefits in the amount of $429.00 per week based on an average weekly wage of $589.88. The NTCP converted by operation of law. By a Notification of Suspension, Claimant's benefits were suspended as of November 19, 2012, based on a return to work with no wage loss.

Claimant filed a Reinstatement Petition alleging that total disability benefits should be reinstated as of April 17, 2013, because his work injury caused a decrease in earning power. Defendant filed an answer denying the allegations.[1]

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[1] Several other petitions were also filed. Claimant filed a Petition to Review Compensation Benefits seeking to expand the work injury description to include complex regional pain syndrome and right peroneal neuropathy. The parties stipulated that the work injury includes a right peroneal nerve injury, and the WCJ denied the request to add complex regional pain syndrome. Claimant and Defendant both filed Petitions for Review of Utilization Review Determination which the WCJ granted as to one provider's treatment and denied as to a second provider's treatment. None of these petitions are at issue in this appeal.

By a Decision and Order circulated on January 27, 2015, the WCJ granted a reinstatement of total disability benefits effective April 17, 2013. The WCJ found that Claimant's work injury caused a loss of earnings at that time because Defendant made available Claimant's pre-injury job in a 12-hour shift, but Claimant was limited to an 8-hour shift by his work injury. However, the WCJ also found that a sedentary job within Claimant's restrictions paying $360 per week was available to him as of March 6, 2014. Accordingly, the WCJ modified Claimant's benefits to the weekly partial disability rate of $159.72 effective March 6, 2014. Claimant appeals the modification of his benefits.

The Board's scope of review on appeal is limited to determining whether an error of law was committed and whether the necessary findings of fact are supported by substantial and competent evidence. Bethenergy Mines, Inc. v. WCAB (Skirpan), 612 A.2d 434, 436-37 (Pa. 1992). Substantial evidence has been defined as such relevant evidence that a reasonable mind might find adequate to support a conclusion based on the findings of fact. Mrs. Smith's Frozen Foods Co. v. WCAB (Clouser), 539 A.2d 11, 14 (Pa. Cmwlth. 1988).

Claimant argues on appeal that the WCJ erred in modifying compensation benefits based on a funded job with a different employer. Claimant asserts that the WCJ's decision in this regard ignores and goes against the humanitarian purposes of the Workers' Compensation Act[2] (Act) because the job was simply a litigation strategy meant to help Defendant reduce its workers' compensation liability, not to actually benefit Claimant in any way. Claimant also argues that he

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

tried the job but could not do it because of his pain and medications. We disagree.

An employer may obtain a modification if it can show that suitable employment was made available to the claimant. Kachinski v. WCAB (Vepco Constr. Co.), 532 A.2d 374, 380 (Pa. 1987). Once the employer proves that it referred the claimant to an available job, the burden shifts to the claimant to prove that he followed through on the job referral in good faith. If he cannot, benefits will be modified to partial disability. Id. In funded employment, the claimant takes a job with a new employer but is paid by the time-of-injury employer. Napierski v. WCAB (Scobell Co., Inc.), 59 A.3d 57, 59 n.1 (Pa. Cmwlth. 2013).

Claimant testified that his pre-injury job was very physical, requiring a great deal of kneeling, walking, lifting, pushing and pulling. Following the work injury, he underwent knee surgery in December 2011 and in August 2012. In September 2012, Claimant returned to sedentary work doing paperwork four hours a day, and by November 2012, he increased to doing light-duty work driving a forklift eight hours a day. In January 2013, Claimant underwent a functional capacity evaluation which released him to medium/heavy work, and he started doing his pre-injury job with assistance. Following an independent medical examination on March 20, 2013, Defendant told Claimant that he had to do his pre-injury job with no restrictions. Claimant tried but told Defendant on April 16, 2013, that he could no longer do the job because of leg pain. Claimant

testified that he could do a job that did not require much lifting or walking; a sedentary job would be best. (N.T. 5/30/13, pp. 18-28, 31-32).

Claimant submitted the testimony of Sunil Chandy, M.D., his treating physician. Dr. Chandy testified that Claimant could not do his regular job but could do sedentary work with an opportunity to stand on occasion. (Chandy Dep., 10/9/13, pp. 24-27).

At a subsequent hearing, Claimant testified that he has significant acute pain in his right leg and foot. Claimant acknowledged that he was offered a sedentary job making telephone calls to businesses from his home. The job was available 40 hours a week and paid $9 an hour. Claimant accepted the job even though it was "not up [his] alley." Claimant was provided with a cordless headset which allowed him to sit, stand or walk as needed. Claimant attempted the job on March 6, 2014, but did not complete his entire shift citing his medications and pain as the reasons. Claimant also stated that people he called were rude or hung up on him. Claimant testified that he worked a few more days and then stopped because it was increasing his pain which made him increase his medications. He resigned on March 28, 2014. (N.T. 5/29/14, pp. 11-21).

Defendant presented the testimony of Renee L. Wallace, vice president of vocational services for Catalyst RTW, a company specializing in a home-based return to work program. Wallace has worked in the vocational field for 23 years and is qualified to give expert testimony under the Act because of her prior experience.[3] Wallace explained that Catalyst works with employers/insurers to

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[3] Section 123.202(a)(4) of the Act 57 Regulations, 34 Pa. Code § 123.202(a)(4), provides that individuals with at least 5 years of vocational experience prior to August 23, 1996, are approved

place injured workers into funded employment jobs with a company called All Facilities. Catalyst and All Facilities are separate companies. All Facilities does lead generation for businesses that work primarily in the commercial real estate industry. All Facilities hires individuals to make survey calls to businesses in order to obtain information that All Facilities' customers can use to make sales calls. People working for All Facilities are not telemarketers. The job with All Facilities is sedentary and, because it is done in the home, workers can make the calls from anywhere they feel comfortable and have complete freedom of movement. Workers work 8 hours a day but have a 13-hour time span to complete the work, meaning they can work at their own pace and take breaks as needed.

Catalyst receives a flat fee from the time-of-injury employer/insurer when it refers an injured worker to All Facilities. Workers are paid by the hour and the employer pays the salary for the first 400 to 750 hours. The job is very entry-level, and All Facilities provides training and works with individuals to meet set performance goals. The job is a permanent position. When the individual progresses to meeting the productivity goals, the time-of-injury employer stops paying the salary and the individual becomes an employee of All Facilities and is paid by All Facilities. Wallace has found that All Facilities does a very good job of training home-based employees and provides very good long-term

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to conduct earning power assessment interviews. Claimant argues that it would be preferable if the vocational evaluation was done by an expert certified by the Bureau or a nationally recognized organization. However, Wallace is a qualified vocational expert under the regulations. It is up to the WCJ to determine the weight to be assigned to the evidence. Saville v. WCAB (Pathmark Stores, Inc.), 756 A.2d 1214, 1220 (Pa. Cmwlth. 2000).

employment prospects for people who successfully complete the funded portion of the employment.

At Defendant's request, Wallace did a vocational interview with Claimant in January 2014 and determined that he was an appropriate candidate for the program. Wallace opined that the job was vocationally suitable for Claimant because he is a high school graduate, is very personable and has experience dealing with people. Wallace sent Robert W. Mauthe, M.D., who had examined Claimant at Defendant's request, a description of the All Facilities job in January 2014 and he approved it as being within Claimant's physical capabilities. Claimant interviewed with All Facilities and was hired. He received training and was allowed to start making calls. The telephone records show that he only worked 5 hours. Wallace testified that had he not resigned, work would have continued to be available for him.

On cross-examination, Wallace testified that Catalyst markets to insurance carriers, third-party administrators and large self-insured employers as potential clients. The insurance company is Catalyst's client, not the injured worker. Catalyst's marketing materials advise clients that Catalyst can help with challenging claims with "impossible or non-existent medical releases" and claimants with "unmotivated or hopeless attitudes," and can provide cost-effective solutions and reduce settlement amounts.[4] When asked if Catalyst's goal is to help only the insurance carrier, Wallace testified that Catalyst's goal is to help both the insurance carrier and the injured worker explaining, "We are

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[4] Claimant submitted Catalyst's marketing materials into evidence.

trying to get people back to work which, in my opinion, benefits both parties." (Wallace Dep., 5/19/14, pp. 4-16, 21-27, 32-33, 35, 38-39).[5]

The WCJ found credible Renee Wallace's testimony that a sedentary phone survey position that was within Claimant's medical restrictions and vocationally appropriate was available at the weekly rate of $360 as of March 6, 2014. (Finding of Fact No. 64). The WCJ noted that no medical or vocational evidence contrary to Wallace's testimony was presented. The WCJ rejected as not credible Claimant's testimony that he could not do the job. (Finding of Fact No. 63(c)). The WCJ has complete authority over questions of credibility, conflicting medical evidence and evidentiary weight and is free to accept, in whole or in part, the testimony of any witness. Greenwich Collieries v. WCAB (Buck), 664 A.2d 703, 706 (Pa. Cmwlth. 1995). Determinations of credibility and the weight to be accorded evidence are the prerogative of the WCJ, not the Board. Vols v. WCAB (Alperin, Inc.), 637 A.2d 711, 714 (Pa. Cmwlth. 1994). Based on these findings, the WCJ modified Claimant's weekly compensation rate to $159.72 effective March 6, 2014.

We determine that the WCJ did not err in modifying Claimant's benefits. Defendant had the burden of proving the existence of an available job that was both medically and vocationally appropriate for Claimant, and it did so through the credible evidence it presented. Claimant nonetheless argues that the All Facilities job should not form the basis of a modification as it is not in keeping

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[5] Claimant submitted the deposition of Dr. Chandy and a report of Matthew A. Carissimi, D.C., and Defendant submitted depositions of Dr. Mauthe and Justin Kulp, its operations manager, and various UR determinations. In the interest of brevity, we summarized only the evidence relevant to the issues on appeal.

with the Act because it was meant to help Defendant reduce its financial liability, not to help Claimant. Claimant also characterizes Catalyst as a "sham operation." Claimant's Brief at 6. However, Claimant presented no evidence that Catalyst is not a legitimate business that locates job opportunities for injured workers. As for the funded employment position, Commonwealth Court has explained that "there is nothing untoward about funded employment. It is a legitimate way to bring an injured claimant back to work and reduce his disability from total to partial." Sladisky v. WCAB (Allegheny Ludlum Corp.), 44 A.3d 98, 103 (Pa. Cmwlth. 2012). Wallace credibly testified that the All Facilities job was an actual permanent position and that placing Claimant in that job was meant to help both Claimant, by returning him to productive employment, and Defendant, by reducing the workers' compensation payments. In short, Defendant proved that an appropriate sedentary job was available to Claimant as of March 6, 2014.

The burden then shifted to Claimant to show he followed through in good faith. He did not meet this burden because the WCJ rejected Claimant's testimony that he was unable to do the job. As such, the WCJ properly modified his benefits to partial based on the wages he would have earned with All Facilities.[6]

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[6] Claimant also argues that the WCJ erred in concluding that Defendant's contest of the reinstatement petition was reasonable. Under Section 440 of the Act, 77 P.S. §996, a claimant who is successful in whole or in part in the litigation is entitled to an award of attorney's fees, unless the contest is reasonably based. Whether an employer's contest is reasonable is a question of law fully reviewable on appeal. Essroc Materials v. WCAB (Braho), 741 A.2d 820, 826 (Pa. Cmwlth. 1999). The reasonableness of an employer's contest generally depends on whether the contest was prompted to resolve a genuinely disputed issue, which can be a legal or factual issue, or both. McGuire v. WCAB (H.B. Deviney Co.), 591 A.2d 372, 374 (Pa. Cmwlth. 1991). Claimant's appeal form contains a reference to unreasonable contest, but Claimant did not further develop the issue in his brief or at oral argument. At any rate, Claimant's disability was a genuinely disputed issue in this case. Although Defendant was unsuccessful in its

Accordingly:

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opposition to a reinstatement of total disability benefits as of April 17, 2013, it did succeed in obtaining a modification as of March 6, 2014, and ongoing. We are satisfied that the contest was reasonable.

ORDER

The WCJ's Decision and Order is **AFFIRMED**.

BY THE BOARD:

Alfonso Frioni, Jr., Chairman

CONCURRED IN BY:

Robert A. Krebs, Commissioner

William I. Gabig, Commissioner

Thomas Cummings, Commissioner

James Zurick, Commissioner

8/26/2016