

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Boger Concrete Co.	:	
and Erie Insurance Co.,	:	No. 423 C.D. 2014
	:	Submitted: August 8, 2014
Petitioners	:	
	:	
v.	:	
	:	
Workers' Compensation	:	
Appeal Board (Conlow),	:	
	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE FRIEDMAN

FILED: September 18, 2014

Boger Concrete Company and Erie Insurance Company (together, Employer) petition for review of the February 19, 2014, order of the Workers' Compensation Appeal Board (WCAB) that affirmed the decision of a workers' compensation judge (WCJ) to grant, in part, Employer's modification petition. We reverse and remand for further proceedings.

On April 14, 2008, Brian Conlow (Claimant) sustained a low-back injury during the course and scope of his employment with Employer and commenced receiving workers' compensation benefits. On June 20, 2011, Employer filed a modification petition alleging that work was generally available to Claimant.

Claimant filed an answer denying that the jobs set forth in the earning power assessment were physically, vocationally, and educationally suitable for Claimant and, therefore, were not open and available to him.

At a hearing before the WCJ, Employer introduced a notice of ability to return to work prepared by William Monacci, M.D., Claimant's treating physician. Dr. Monacci released Claimant to work with no lifting greater than 50 pounds and only intermittent sitting and standing. (WCJ's Decision at 7.)

Employer also introduced the deposition testimony of Caroline Ann Potter, a vocational expert. Potter interviewed Claimant and identified jobs within Claimant's physical and vocational abilities. Specifically, Potter identified seven positions, four of which were approved by Dr. Monacci. (*Id.* at 3-4.)

Employer further introduced the deposition testimony of Dr. Monacci, who has been Claimant's treating physician since 2008. As a result of Claimant's work-related back injury, Dr. Monacci performed two surgeries on Claimant's back. Dr. Monacci reviewed various job descriptions and, on June 10, 2011, specifically approved Claimant to work full-time as a surveillance agent at Penn National Gaming (Penn). (WCJ's Decision at 7-8.)

Claimant testified that he is still in pain, takes prescribed medication for the pain, and is very sleepy due to the medication. Claimant does not feel capable of working or driving. (*Id.* at 1.)

On June 22, 2012, the WCJ granted the modification petition, in part.<sup>1</sup> The WCJ found that, even though the Penn surveillance position approved by Dr. Monacci was full-time, Claimant was capable of performing the position for only ten hours per week. “While this position has been advanced in a full[-]time capacity, the modification of benefits is based on the [C]laimant’s ability to perform this position two hours per day (one in the morning and the other in the afternoon) five days per week, for a total of ten hours per week.” (WCJ’s Findings of Fact, No. 1.) Because the position paid \$12 per hour, the WCJ determined that Claimant had an earning capacity of \$120 per week. The WCJ granted, in part, Employer’s modification petition to reflect Claimant’s earning capacity. On appeal, the WCAB affirmed. Employer, thereafter, filed a petition for review with this court.<sup>2</sup>

Before this court,<sup>3</sup> Employer argues that substantial evidence does not support the WCJ’s finding that Claimant is capable of working only ten hours per week. We agree.

On appeal, “the reviewing court must simply determine whether, upon consideration of the evidence as a whole, [the WCJ’s] findings have the requisite

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<sup>1</sup> After the close of the record but before disposition of the case, the WCJ who heard the evidence retired. As such, the case was reassigned to another WCJ.

<sup>2</sup> This court granted Employer’s supersedeas petition by order dated June 5, 2014.

<sup>3</sup> Our review is limited to determining whether constitutional rights were violated, an error of law was committed, or necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

measure of support in the record.” *Lehigh County Vo-Tech School v. Workmen’s Compensation Appeal Board (Wolfe)*, 652 A.2d 797, 800 (Pa. 1995).

Neither Employer’s witnesses nor Claimant testified that Claimant could work only one hour in the morning and one hour in the afternoon. Rather, Employer presented evidence that Claimant could work full-time, whereas Claimant testified that he was not capable of working at all.

Specifically, Dr. Monacci released Claimant to work the full-time surveillance position with no lifting greater than 50 pounds and intermittent sitting and standing. The WCJ found that the Penn surveillance position is sedentary in nature and that the physical activities required by the position “are within the parameters established by Dr. Monacci, as reflected in his approval of this position on June 10, 2011.” (WCJ’s Findings of Fact, No. 1.) The WCJ credited Dr. Monacci’s testimony that Claimant could perform the surveillance position. (*Id.*)

However, the WCJ seemingly credited Claimant’s testimony as the reason for granting Employer’s modification petition, in part. “It is certainly acknowledged that the [C]laimant has been subject to a serious course of medical and surgical treatment as the result of the incident giving rise to this claim, which has served as the basis for the granting of a modification of benefits in a very limited capacity.” (*Id.*) (emphasis added.)

As previously stated, however, neither Dr. Monacci nor Claimant testified that Claimant could work only two hours per day, one hour in the morning and one hour in the afternoon. Nothing in the record supports this finding.<sup>4</sup>

Accordingly, we reverse the WCAB's decision and remand with directions to the WCAB to remand to the WCJ to make new findings of fact and conclusions of law, along with the necessary credibility determinations.

Jurisdiction relinquished.

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ROCHELLE S. FRIEDMAN, Senior Judge

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<sup>4</sup> Although the WCJ issued an eleven page decision, he made only three findings of fact that comprised one page.

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	:	
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ORDER

AND NOW, this 18<sup>th</sup> day of September, 2014, we hereby reverse the February 19, 2014, order of the Workers' Compensation Appeal Board and remand for proceedings consistent with this opinion.

Jurisdiction relinquished.

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ROCHELLE S. FRIEDMAN, Senior Judge