IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Terry Bufford,	:	
Petitioner	:	
	:	
v.	:	No. 1553 C.D. 2007
	:	Argued: February 7, 2011
Workers' Compensation Appeal	:	
Board (North American Telecom),	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED: June 8, 2011**

In an August 17, 2010 opinion and order, our Supreme Court reversed and remanded this Court's April 17, 2008 order that affirmed an order of the Workers' Compensation Appeal Board (Board) and upheld denial of the reinstatement petition of Claimant Terry Bufford (Claimant), where he had worked light-duty for the time-of injury employer North American Telecom (NATC), left voluntarily for a better job with a subsequent employer, suffered a layoff and then sought a reinstatement of benefits pursuant to Section 413(a) of the Workers' Compensation Act (Act).[1] For the reasons that follow, we remand to the Board with directions to remand to a Workers' Compensation Judge (WCJ) for a

---

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 772.

determination as to whether time-of-injury employer NATC established at the time of the subsequent employer's layoff that Claimant failed to pursue in good faith any available positions that he was capable of performing or whether there is some circumstance barring receipt of benefits under provisions of the Act or in the Supreme Court's decisional law.

The background of this case is as follows. In September 1998, Claimant suffered a work-related low-back strain while working for NATC. NATC issued a notice of compensation payable and Claimant eventually returned to work there at a light-duty position. In March 1999, Claimant voluntarily left NATC to work for subsequent employer Ronco Machine at a higher paying and less onerous job. His benefits were suspended due to the fact that he had no earnings loss. After four and one-half years of renewing successive six-month contracts, Ronco declined to renew Claimant's contract in January 2003.

In March 2003, Claimant filed a reinstatement petition, alleging a worsening of his condition and decreased earning power due to the 1998 work injury. The WCJ rendered a decision in April 2005, accepting as credible the testimony of Dr. William R. Prebola, board-certified in physical medicine and rehabilitation. Having examined Claimant on November 26, 2003, Dr. Prebola opined that he "was not completely disabled but had a partial impairment based on his work injury and could return to work, with modifications, in a medium duty work category. . . ." WCJ's April 15, 2005 Decision, Finding of Fact (F.F.) No. 22. Accordingly, the WCJ denied Claimant's reinstatement petition, determining that "[t]he credible evidence establishes that claimant was unable to continue performing modified duty employment [with Ronco] on and after January 24, 2003, because he was laid off for economic reasons, and not because of any

worsening of his work injury or with regard to any work injury which he sustained while working with [NATC].” WCJ’s April 13, 2005 Decision, Conclusion of Law No. 5.

The WCJ also accepted the testimony of John Dieckman, a certified rehabilitation counselor, who met with Claimant in May 2004 and issued an earning power assessment report. Specifically, the WCJ accepted Dieckman’s testimony that Claimant “was vocationally capable of performing the positions [from a labor market survey] in the immediate Scranton, Wilkes-Barre area, which would have earned him $326.00 per week had he chosen to apply for the positions available in January 2004.” WCJ’s April 15, 2005 Decision, F.F. No. 23.[2]

On appeal, the Board remanded the matter to the WCJ to render findings and conclusions as to whether Claimant’s decision to end his employment with NATC was the sole cause of his wage loss and to reconsider, if necessary, the denial of the reinstatement petition consistent with this Court’s decisions in *Horne v. Workers’ Compensation Appeal Board (Chalmers & Kubeck)*, 840 A.2d 460 (Pa. Cmwlth. 2004), and *Welsh v. Workmen’s Compensation Appeal Board (L.W. Miller Roofing Company)*, 686 A.2d 59 (Pa. Cmwlth. 1996).[3] Both of those cases involved the denial of benefits where the respective claimants’ loss of earnings was due to voluntary decisions to leave their original employers for better jobs and not

---

[2] Counsel for Claimant objected to the taking of Dieckman’s deposition on the ground that the insurance carrier did not determine whether there was work available with NATC before pursuing a labor market survey. Dieckman’s September 24, 2004 Deposition, Notes of Testimony at 38-39; Supplemental Reproduced Record at 515-16. The WCJ overruled the objection. WCJ’s April 15, 2005 Decision, F.F. No. 18.

[3] In *Bufford v. Workers’ Compensation Appeal Board (North American Telecom)*, ___ Pa. ___, 2 A.3d 548 (2010), the Supreme Court overruled both of these decisions, in part.

due to their original work injuries. Such claimants were presumed to assume the risks typically associated with such decisions, including the risk of a layoff.

The WCJ in an October 2006 remand decision denied reinstatement, determining that Claimant changed jobs due to higher wages and not due to his work injury. Further, the WCJ determined that Claimant was capable of performing the light-duty NATC position, that there were no duties which he was unable to perform despite his original work injury and that there was no change in his physical condition. WCJ's October 26, 2006 Decision, F.F. No. 5. The Board affirmed the denial and Claimant appealed to the Commonwealth Court.

Before the Commonwealth Court, Claimant asserted that the correct burden of proof was found in *Stevens v. Workers' Compensation Appeal Board (Consolidation Coal Company)*, 563 Pa. 297, 760 A.2d 369 (2000), a case where the Supreme Court considered the applicable burden of proof for reinstatement where a claimant is not fully recovered from a work injury and has been discharged from employment with a different employer based on unsatisfactory work performance. The claimant in that case suffered a work-related injury with his coal industry employer, retrained as a private investigator, got a job in that industry, but was unable to do the job despite his best efforts. The Supreme Court determined that his reinstatement petition was properly granted where he met his burden of establishing that his work-related injury continued and that his earning power was once again affected through no fault of his own. In so determining, the Court noted that he was not a claimant who deliberately failed to meet his new employer's standards and there was no evidence of available employment that he was capable of performing.

Employer maintained that the Board correctly found *Stevens* to be inapplicable, asserting that the appropriate precedents were the Commonwealth Court's decisions of *Horne* and *Welsh*, cases where the respective claimants were held responsible for their decisions to seek better jobs and for any unforeseen consequences. We affirmed the denial of the reinstatement petition, concluding that Claimant's problem was the WCJ's determination of the facts, not any misapplication of the burden of proof. In so determining, we noted that *Stevens*, *Horne* and *Welsh* all reiterated the traditional reinstatement-after-suspension standard found in *Pieper v. Ametek-Thermox Instruments Division*, 526 Pa. 25, 584 A.2d 301 (1990), that a claimant must prove that through no fault of his own his earning power is once again adversely affected by disability and that the disability which gave rise to the original claim continues. Claimant appealed our decision and the Supreme Court decided to revisit "the issue of the appropriate allocation of the relevant burdens of proof when workers' compensation claimants seek reinstatement of suspended benefits pursuant to Section 413(a) of the [Act]."[4] *Bufford v. Workers' Comp. Appeal Bd. (N. Am. Telecom)*, ___ Pa. ___, ___, 2 A.3d 548, 550 (2010) (footnote omitted).

The Supreme Court in a unanimous opinion reversed and remanded, rejecting our holding that "the act of leaving post-injury employment to take

---

[4] In pertinent part, Section 413(a) provides as follows:

> [W]here compensation has been suspended because the employe's earnings are equal to or in excess of his wages prior to the injury[,] . . . payments under the agreement or award may be resumed at any time during the period for which compensation for partial disability is payable, unless it be shown that the loss in earnings does not result from the disability due to the injury.

employment with another employer for reasons unrelated to the work injury is a 'fault' contemplated by the *Pieper* and *Stevens* standard or a reason of its own to bar reinstatement of benefits under Section 413(a)." *Bufford*, ___ Pa. at ___, 2 A.3d at 555. To that end, the Court commented that "the decision of the Commonwealth Court appears at odds with basic considerations of the economic underpinnings of our society, where workers should be encouraged to take opportunities to lawfully better their economic circumstances, not [be] penalized for doing so." *Id*. at ___, 2 A.3d at 556.

Moreover, the Supreme Court noted that "[t]he issue regarding Claimant's disability, for which he sought a reinstatement of benefits, is one of loss of earning power." *Id*. at ___, 2 A.3d at 556. The Court further stated that "[i]n both *Stevens* and the present case, loss of earnings power is traced to an inability to perform *pre-injury* employment, with the loss of earnings arising anew for each claimant because of discharge from modified-duty with the second employer." *Id*. at ___, 2 A.3d at 556 (emphasis in original). The Supreme Court held, therefore, that we "erred by interpreting the concept of 'fault' under the *Pieper* and *Stevens* standard to encompass matters other than job availability or those matters that specifically bar a claimant from reinstatement of benefits under the Act or our decisional law." *Id*. at ___, 2 A.3d at 556-57. Further, it held that we "erred in this case by divorcing the concept of 'fault' from job availability." *Id*. at ___, 2 A.3d at 557. Stating that fault is *not* part of a claimant's burden, therefore, the Court modified the standards found in *Pieper* and *Stevens* as follows:

> A claimant seeking reinstatement of suspended benefits must prove that his or her earning power is once again adversely affected by his or her disability, and that such disability is a continuation of that which arose from his or her original claim. The claimant need not re-prove

> that the disability resulted from a work-related injury during his or her original employment. Once the claimant meets this burden, the burden then shifts to the party opposing the reinstatement petition. In order to prevail, the opposing party must show that the claimant's loss in earnings is not caused by the disability arising from the work-related injury. *This burden may be met by showing that the claimant's loss of earnings is, in fact, caused by the claimant's bad faith rejection of available work within the relevant required medical restrictions or by some circumstance barring receipt of benefits that is specifically described under provisions of the Act or in this Court's decisional law.*

Id. at ___, 2 A.3d at 558 (emphasis added).

In view of the above, the Supreme Court summarized that a "claimant remains eligible for reinstatement of suspended benefits where [his] employment with a post-injury employer is terminated, even where [he] had previously performed modified post-injury duties for the time-of-injury employer." *Id*. at ___, 2 A.3d at 558. Further, it stated that "[t]here is nothing in the Act supporting the conclusion of the Commonwealth Court that a claimant is ineligible for a reinstatement of suspended benefits because he or she left modified-duty post-injury employment with the time-of-injury employer for better pay or working conditions with another employer and is later laid off." *Id*. at ___, 2 A.3d at 555. Finally, the Supreme Court specifically disapproved of our holdings in *Horne* and *Welsh*, to the extent that they are to the contrary.

On remand, Claimant argues that, having established that he had a loss of earnings due to the fact that he was laid off through no fault of his own and was unable to return to his pre-injury job, the burden should have shifted to NATC to establish that there was work available or that circumstances merited the allocation of the loss of earning to his wrongful conduct. In that regard, he asserts

that NATC never presented testimony regarding the availability of work within his restrictions at the time of Ronco's layoff. He acknowledges that NATC presented, over his objections, evidence that a vocational counselor evaluated him, but points out that the evaluation occurred more than a year after the layoff. Further, he maintains that NATC presented no evidence to establish any improper conduct and that his benefits, therefore, should have been reinstated.

In response, NATC asserts that this Court cannot decide whether reinstatement should occur. NATC points out that the WCJ never directly addressed the issue of whether it sustained its burden to rebut Claimant's reinstatement claim or made any specific fact-findings as to fault or bad faith. It contends, therefore, that remand for such findings is required and that any new fact-findings should only augment those already rendered. If this Court determines that a remand is not required, then NATC maintains that Claimant's conduct in voluntarily quitting his then available post-injury job should be considered in connection with its burden of proof. It points out that the Supreme Court stated that consideration of a claimant's fault is relevant to examining whether an employer rebutted a claimant's reinstatement claim. It asserts, therefore, that any initial bad faith in leaving the available post-injury position should run with the claim and cannot now be cured.

As Claimant posits, the Supreme Court determined that he met his burden under *Pieper* and *Stevens* by establishing that his loss of earnings arose anew due to discharge from a modified-duty position with a subsequent employer. We are, therefore, at the point where NATC must prove that "[C]laimant's loss of earnings is, in fact, caused by [his] bad faith rejection of available work within the relevant required medical restrictions or by some circumstance barring receipt of

benefits that is specifically described under provisions of the Act of in [the Supreme Court's] decisional law." *Id*. at ___, 2 A.3d at 558. We agree with NATC that this Court may not determine whether it met its burden. We disagree with NATC, however, that the "fault" that it must show in order to prevail is related to Claimant's decision to leave his light-duty position with his time-of-injury employer; our Supreme Court specifically determined that Claimant exhibited no bad faith in leaving the light-duty position with NATC to take the better paying and less onerous job with the subsequent employer. Indeed, our Supreme Court noted that such "workers should be encouraged to take opportunities to lawfully better their economic circumstances, not [be] penalized for doing so." *Id*., ___ Pa. at ___, 2 A.3d at 556. Contrary to NATC's contention, therefore, the "fault" that it must show in order to prevail is Claimant's failure, if any, at the time of the subsequent employer's layoff, to pursue in good faith any available positions that he was capable of performing.

Accordingly, we remand this matter to the Board with directions to remand it to a WCJ for a determination as to whether time-of-injury employer NATC established that Claimant failed to pursue in good faith any available positions that he was capable of performing at the time of the subsequent employer's layoff or whether there is some circumstance barring receipt of benefits that is specifically described under provisions of the Act or in the Supreme Court's decisional law.

____

BONNIE BRIGANCE LEADBETTER,
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Terry Bufford, Petitioner	:	
v.	:	No. 1553 C.D. 2007
Workers' Compensation Appeal Board (North American Telecom), Respondent	:	

O R D E R

AND NOW, this 8th day of June, 2011, this matter is REMANDED to the Workers' Compensation Appeal Board with directions to remand it to a Workers' Compensation Judge for a determination as to whether time-of-injury employer North American Telecom established that Claimant Terry Bufford failed to pursue in good faith any available positions that he was capable of performing at the time of the subsequent employer's layoff or whether there is some circumstance barring receipt of benefits that is specifically described under provisions of the Workers' Compensation Act or in the Supreme Court's decisional law.

JURISDICTION RELINQUISHED.

____

BONNIE BRIGANCE LEADBETTER,
President Judge