IN THE COMMONWEALTH COURT OF PENNSYLVANIA

UPMC St. Margaret Hospital and UPMC Benefit Management Services, Inc., Petitioners	:	
v.	:	
Workers' Compensation Appeal Board (Morrow), Respondent	:	No. 1752 C.D. 2010
	:	Submitted: December 17, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: February 28, 2011

UPMC St. Margaret Hospital (Employer) challenges the order of the Workers' Compensation Appeal Board (Board) which affirmed the decision of the Workers' Compensation Judge (WCJ) to grant the reinstatement petition of Gary Morrow (Claimant).

Claimant worked for Employer as a project floor technician. His worked entailed washing walls, ceilings, and floors. On May 18, 2007, Claimant suffered a work-related injury to his back and received temporary total disability benefits.

On March 24, 2008, Employer suspended Claimant's benefits because he returned to work at earnings equal to or greater than his time of injury earnings in a light duty capacity. On July 16, 2008, Employer discharged Claimant from

employment because he violated Employer's policy against fighting. Claimant petitioned to reinstate his benefits effective July 16, 2008, on the basis that his injury caused a decrease in his earning power.

Before the WCJ, Claimant testified that he could hear "loud voices" from the manager's office when he was talking to the secretary, Diane. Notes of Testimony, August 19, 2008, (N.T.) at 13; Reproduced Record (R.R.) at 22a. Benny Burton (Burton), a housekeeper with Employer, exited the office and was yelling, "I quit. F this place." N.T. at 15; R.R. at 24a. Claimant recounted, "As he passed behind me, he hit me in the back." N.T. at 16; R.R. at 25a. Claimant felt pain and "cringed." N.T. at 17; R.R. at 26a. Burton left but then "when he came back in, he hit me in the right shoulder." N.T. at 17-18; R.R. at 26a-27a. Claimant told Burt "Please keep your hands off me. Please don't hit me again." N.T. at 18; R.R. at 27a. Burton then "walked real [sic] fast . . . right up into my face." N.T. at 19-20; R.R. at 28a-29a. Burton told Claimant, "I'll F you up. I'll hurt you." N.T. at 20; R.R. at 29a. Claimant characterized Burton as "crazy". N.T. at 21; R.R. at 30a. At this point Claimant "was afraid. . . . I grabbed him and I put him down. I punched him in the chest, and then, held onto his arm, and my foot was right in here [Burton's left shoulder]." N.T. at 21; R.R. at 30a. When he heard voices telling him to let Burton up, Claimant did so. N.T. at 22; R.R. at 31a. Claimant testified that he grabbed Burton because "I felt fear, that he was going to do it again." N.T. at 26; R.R. at 35a. No one came to Claimant's aid when Burton was "in his face." N.T. at 28-29; R.R. at 38a. On cross-examination, Claimant admitted that he did not ask for help after Burton made contact with him and he did

not move back away from him when Burton approached him. N.T. at 40-41; R.R. at 49a-50a.

John Merkt (Merkt), director of environmental services for Employer and Claimant's supervisor, testified that he was in a conference with Burton in his office just before Claimant's confrontation with him. Notes of Testimony, October 29, 2008, (N.T. 10/29/08) at 7-8; R.R. at 72a-73a. After Burton left his office, Merkt called security to have Burton removed from the building. N.T. 10/29/08 at 8; R.R. at 73a. Merkt testified that he overheard Claimant tell Burton, "We could take this outside right now." N.T. 10/29/08 at 10; R.R. at 75a. Merkt saw Claimant "had him pinned down and I could see him put his foot on his head and he punched him a couple of times hard in the upper chest." N.T. 10/29/08 at 10; R.R. at 75a. Merkt investigated and determined that Claimant "grabbed another employee by the neck in a situation that somewhat could have been avoided, that he could have walked away, that that was considered fighting on the premises, and by the corrective action policy, the decision was to terminate." N.T. 10/29/08 at 13; R.R. at 78a. Merkt believed that Claimant's actions "went way beyond defending himself." N.T. 10/29/08 at 23; R.R. at 88a. On cross-examination, Merkt admitted that Burton was brought to his office because "there were some behavioral issues with him.". . . "He [Burton] was using inappropriate language, and he seemed to be slurring words." N.T. 10/29/08 at 25; R.R. at 90a.

James Krakovsky (Krakovsky), lead environmental services aide for Employer, testified that he observed the fight between Burton and Claimant. Krakovsky believed that Claimant could have walked away, but instead Claimant

told Burton "if you touch me again, we're going to go." N.T. 10/29/08 at 42; R.R. at 107a.[1]

The WCJ granted Claimant's reinstatement petition and made the following relevant findings of fact:

> 5. Based upon a review of the foregoing, I find that the claimant has met his burden of proof in the Reinstatement Petition.
> . . . .
> b. I do not find that Mr. Morrow [Claimant] as [sic] acting in bad faith at the time of the incident involving Benny Burton.
>
> c. I find that the employer quickly terminated claimant following this incident, and that little consideration was given to his good work record. I conclude that his hasty termination was because Mr. Morrow [Claimant] as [sic] on restricted duty for his work injury.
>
> 6. I accept the testimony of Mr. Morrow [Claimant] as more credible than the testimony of Mr. Spiek, Mr. Merkt and Mr. Krakovsky. I note that Mr. Spiek and Mr. Merkt both agreed that Mr. Burton was acting unusual and in a 'rage,' told both of them as supervisors, 'F-you' and refused their direction to go to Employee Services. I note that Mr. Spiek agreed that Mr. Burton was called in for being aggressive towards other employees and was in a rage when he left the office.
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> 7. I note that neither supervisor took control of a situation with a clearly 'disturbed' employee. Neither Mr. Merkt nor Mr. Spiek escorted the claimant from the room. Surely Mr. Merkt as Director could have directed

[1] Daniel Spiek (Spiek), daylight supervisor for Employer, corroborated the testimony of Merkt and Krakovsky.

> another employee to call security and certainly Mr. Spiek did nothing to stop the altercation between Mr. Burton and Mr. Morrow [Claimant]. He watched . . . instead.
>
> 8. Simply put, the employer failed to provide adequate supervision for Benny Burton, an employee who was in a rage, failed to follow his supervisor's instructions and went out and struck Mr. Morrow [Claimant] twice.
>
> 9. I accept Mr. Morrow's [Claimant] testimony that he was acting in self-defense after being struck by Mr. Burton twice. I do not find that Mr. Morrow [Claimant] acted in bad faith in the incident involving Mr. Burton.

WCJ's Decision, February 27, 2009, Findings of Fact Nos. 5-9 at 5-6; R.R. at 163a-164a.[2] The Board affirmed.[3]

Employer contends that the Board erred when it affirmed the WCJ because Claimant's loss of earning power was attributable to the termination of his employment for fighting rather than the work-related injury, that the Board erroneously applied Vista International Hotel v. Workers' Compensation Appeal Board (Daniels), 560 Pa. 12, 742 A.2d 649 (1999), and that the Board erred because it failed to address whether the WCJ issued a reasoned decision.[4]

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[2] On March 13, 2009, the WCJ issued an amended order in which she approved Claimant's bill of costs of $309.35.

[3] The Board affirmed as amended and changed the date of reinstatement to July 15, 2008. The WCJ had incorrectly listed the date as July 15, 2007.

[4] This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact were supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

A claimant seeking a reinstatement of benefits following a suspension of benefits must prove that, *through no fault of his or her own*, the (1) claimant's *earning power is once again adversely affected by the disability*, and (2) the disability that caused the original claim continues. Pieper v. Amtek-Thermox Instruments Div. and Workmen's Compensation Appeal Board. 526 Pa. 25, 584 A.2d 301 (1990). The WCJ must thus determine whether the claimant established a continuation of his disability and loss of earnings. Pieper. As the burdened party, the claimant has to meet both his burden of production and burden of persuasion regarding the required elements. Osram Sylvania v. Workers' Compensation Appeal Board (Wilson), 893 A.2d 186 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 588 Pa. 787, 906 A.2d 545 (2006).

An employer may rebut a claimant's proof of loss of earnings by establishing the availability of work that claimant is capable of performing. Todloski v. Workmen's Compensation Appeal Board (Supermarket Service Corp.), 539 A.2d 517 (Pa. Cmwlth. 1988).

Where a claimant has been discharged while receiving workers' compensation benefits, whether the workers' compensation claimant may receive post-discharge total disability benefits depends upon whether the *employer* demonstrates that suitable *work was or would have been available* but for circumstances meriting allocation of the consequences of the discharge to the claimant, such as lack of good faith. Osram Sylvania. Whether a claimant is terminated for conduct amounting to bad faith is a factual determination to be made by the WCJ based on credibility determinations. Shop Vac Corp. v. Workers' Compensation Appeal Board (Thomas), 929 A.2d 1236 (Pa. Cmwlth. 2007).

Employer argues that the Board and the WCJ ignored the testimony of all the witnesses, including Claimant, that Claimant grabbed his co-worker by the neck, threw him to the ground and punched him in the chest. Claimant admitted that he violated Employer's policy when he engaged in the altercation. Further, Employer argues that Claimant failed to establish that his medical condition worsened or that his disability recurred through no fault of his own. Employer asserts that the Board erred when it affirmed the WCJ's determination that Claimant's bad faith actions did not lead to the termination of his employment even though Krakovsky and Spiek both testified that Claimant had the ability to walk away and avoid any further confrontation with Burton.

A review of the record and the WCJ's decision reveals that the WCJ did not ignore the testimony of the witnesses. While Claimant admitted that he grabbed Burton and put him to the ground, the factfinder believed he did so because he was afraid that Burton was going to attack him. The WCJ, as the ultimate finder of fact in compensation cases, has exclusive province over questions of credibility and evidentiary weight, and is free 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). This Court will not disturb a WCJ's findings when those findings are supported by substantial evidence. Nevin Trucking v. Workmen's Compensation Appeal Board (Murdock), 667 A.2d 262 (Pa. Cmwlth. 1995).

The WCJ found that Claimant acted in self-defense during the altercation with Burton. While the WCJ may have looked at the actions, or lack thereof, of Employer's witnesses in trying to stop the altercation or prevent it, the

WCJ found Claimant credible that he feared Burton was going to attack him. Further, the WCJ did not have to determine whether Claimant committed willful misconduct as construed in an unemployment compensation proceeding.

Because the finding that Claimant acted in self-defense is well-supported in the record, this Court finds no error on the part of the Board and the WCJ. Claimant met his burden and proved that his disability once again caused his loss of earning power because Employer had no work available for him and he did not act in bad faith. Claimant was put on light duty because of his disability. When Employer took away the opportunity for him to work the light duty job, which was not his fault, he incurred a loss of earning power caused by his disability.

Employer next contends that the Board erroneously applied Vista[5] regarding an involuntary discharge from employment. Essentially, Employer is revisiting the same issue and asserting that Claimant's actions were not in self-defense. Clearly, the WCJ's finding on this issue was supported by the credited evidence.[6]

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[5] In Vista, our Supreme Court addressed whether a partially disabled claimant, who is subsequently discharged from employment, is eligible for a reinstatement of total disability benefits. In Vista, the Supreme Court held "as a general rule, where a work-related disability is established, a post-injury involuntary discharge should be considered in connection with the separate determination of job availability rather than as dispositive of loss of earnings capacity." Id. at 27, 742 A.2d at 657. The Supreme Court explained "[u]nder this approach, a partially disabled employee who, by act of bad faith, forfeits his employment would not be eligible for total disability benefits, as suitable employment was in fact available but for the employee's own wrongful conduct." Id. at 28-29, 742 A.2d at 658.

[6] Employer also contends that the WCJ did not issue a reasoned decision because she failed to address her reasons for disregarding Employer's policy and procedure manual when she determined that Claimant met his burden of proof. A review of the record reveals that

(Footnote continued on next page…)

Accordingly, this Court affirms.

BERNARD L. McGINLEY, Judge

(continued…)

Employer did not raise this issue before the Board in its appeal from the WCJ's decision which is why the Board did not address it. The doctrine of waiver applies in workers' compensation proceedings. Dobransky v. Workmen's Compensation Appeal Board (Continental Baking Co.), 701 A.2d 597 (Pa. Cmwlth. 1997). The waiver doctrine requires that issues be raised at the earliest opportunity. Rox Coal Co. v. Workers' Compensation Appeal Board (Snizaski), 570 Pa. 60, 807 A.2d 906 (2002). Here, Employer clearly did not raise this issue at the earliest possible opportunity. Therefore, this issue was waived.

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O R D E R

AND NOW, this 28th day of February, 2011, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge