IN THE COMMONWEALTH COURT OF PENNSYLVANIA

George Rusinko, Petitioner	:	
v.	:	No. 281 C.D. 2010
Workers' Compensation Appeal Board (Mangar Industries), Respondent	:	Submitted: June 11, 2010

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: August 5, 2010

George Rusinko (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) reversing an order of a Workers' Compensation Judge (WCJ). The WCJ's order granted Claimant's Petition for Reinstatement pursuant to the Pennsylvania Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1 - 1041.4; 2501 - 2708. We affirm.

Claimant was injured during the course and scope of his work for Mangar Industries (Employer) on February 2, 2004. Employer accepted the injury, and the parties executed a Notice of Compensation Payable (NCP) describing the injury as a strain/sprain and contusion of the low back and right hip. On October

11, 2004, Claimant returned to a modified position in which he suffered no loss of wages, and a Notice of Suspension was issued thereafter.

On February 13, 2006, the parties executed a Supplemental Agreement acknowledging a recurrence of Claimant's disability as of January 25, 2006. On April 17, 2006, Claimant again returned to his modified position with no wage loss, and a second Notice of Suspension was issued thereafter. On August 24, 2007, Claimant's employment was terminated for carelessness, destruction of company property, and improper conduct.

On March 4, 2008, Claimant filed a Reinstatement Petition alleging that his work-related injury was causing decreased earning power as of August 25, 2007. Claimant concomitantly filed a Review Petition alleging an incorrect injury description, seeking to include a right hip fracture with persistent pain. Employer filed Answers to Claimant's Petitions, denying the material allegations therein. Hearings before the WCJ ensued.

Before the WCJ, Claimant testified, in relevant part, that his work after returning to modified duty was difficult and painful. Claimant further testified that he was fired after dismantling some old steel shelving for Employer, and that he would still be performing his modified duty position had his employment not been terminated.

Claimant also offered the testimony of a medical expert, Dr. Lynn Yang. Dr. Yang testified, *inter alia*, that Claimant was still disabled from performing his former position as a truck driver, and that certain other restrictions on lifting still existed.

Employer presented the testimony of Dr. Stanley Askin. With minimal disagreement with Claimant's medical expert not relevant to the issue on appeal, the two medical experts agreed that Claimant is not completely recovered from his original injury, remains in pain, and is limited in his ability to work while remaining capable of performing his modified duty position.

Employer also presented the testimony of Loc Nguyen, Harry Shaw, and Russ Wiley, who are all superiors and/or supervisors of Claimant in the warehouse in which he worked for Employer. In part most relevant to the instant matter, Nguyen, who has worked for Employer for seventeen years, testified that Claimant once improperly drove a vehicle over Employer's grass causing significant damage after a heavy rain when Employer's driveway was temporarily blocked by another vehicle, for which Claimant received a one-week suspension without pay. Nguyen also testified that Claimant's employment was terminated after he was given the job of disassembling shelving bolted to the floor, which Claimant accomplished by ripping the shelving out with a forklift, damaging the unit and creating an unsafe condition. Nguyen further testified that Claimant was not a good employee and did not have a good work ethic.

In relevant part, Shaw testified that Claimant's disciplinary record, the maintenance of which was one of Shaw's responsibilities, began in 1999 and included no less than six written disciplinary reports. Shaw testified that Claimant's disciplinary history also included backing over two trees on a vendor's property without reporting the accident, failing to follow instructions and cursing at a supervisor, an accusation of using a racial slur, and previous repeated careless

use of a forklift including one incident in which Claimant damaged Employer's warehouse roof. Shaw corroborated the incident of Claimant damaging Employer's grass, and further noted that Claimant had been written up for carelessness in 2006 on two occasions. Shaw testified that Claimant was also reported as having carelessly loaded materials and failing to follow instructions, for additional careless use of the forklift, and that a disciplinary report was prepared in August, 2007, for damaging the warehouse when he ripped the shelving out of the floor with a forklift. Shaw asserted that the forklift shelving incident was both intentional and unsafe, and caused Employer to fire Claimant.

Wiley described Claimant as a careless employee who did not pay attention to his forklift operation. Wiley further corroborated previous forklift carelessness incidents on the part of Claimant, and corroborated the incident of ripping the shelving out of the floor with the forklift as the tipping point of Claimant's unacceptable work performance with Employer.

The WCJ found Claimant's testimony generally credible, as well as the testimony of his supervisors. In the Discussion section of his Opinion, the WCJ wrote:

> This case presents a difficult legal issue of whether [C]laimant's careless conduct that led to his dismissal is sufficiently egregious to bar the reinstatement of wage loss compensation. The issue here is close. We have decided in the [C]laimant's favor because the credible evidence establishes that the [C]laimant had a long history as a careless employee, who did some negligent and careless acts long before the work injury that did not result in his dismissal. . . For whatever reason the [E]mployer put up with the [C]laimant's level of performance for a number of years. The [E]mployer

> continued to put up with that low level of performance even after the work injury. The [C]laimant's removal of shelving with the power of a forklift was surely a very bad idea, unsafe and harmful to [E]mployer's interest, but we concluded that it was not the level of misconduct required to end his wage loss compensation for a serious injury that obviously continues.

Reproduced Record (R.R.) at 151a.

By order dated October 31, 2008, the WCJ granted Claimant's Reinstatement and Review Petitions. Employer thereafter timely filed an appeal to the Board only on the issue of the WCJ's grant of Claimant's Reinstatement Petition.

In its Opinion, the Board concluded that the WCJ erred in concluding that the credible disciplinary history of Claimant did not constitute bad faith, in that such a finding was not supported by substantial competent evidence of record, and in that those actions constituted a lack of good faith as a matter of law pursuant to the Supreme Court's opinion in Vista International Hotel v. Workmen's Compensation Appeal Board (Daniels), 560 Pa. 12, 742 A.2d 649 (1999). By order dated February 18, 2010, the Board reversed the WCJ's grant of Claimant's Reinstatement Petition. Claimant now appeals.

This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of Board procedures, and whether necessary findings of fact are supported by substantial evidence. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Mrs. Smith's Frozen Foods v. Workmen's Compensation Appeal Board (Clouser), 539 A.2d 11 (Pa. Cmwlth. 1988).

Claimant presents one issue: where Claimant was fired for making frequent mistakes, did the Board err in reversing the WCJ’s conclusion that he was entitled to a reinstatement of benefits under the Act?

Claimant primarily argues that the Board applied the holding in Vista International too narrowly to the facts *sub judice*. Claimant correctly asserts that in Vista International, the Supreme Court distinguished between a discharge for bad faith and a discharge for misconduct. Claimant notes that the Supreme Court did not expressly define what conduct constitutes a proper basis for discharge for cause, which definition has evolved on a case-by-case basis through later precedents interpreting Vista International. Claimant argues that the instant facts do not evidence any clear misconduct, bad faith, or abhorrent behavior.

In Vista International, in part relevant to this appeal, the Supreme Court held that when a claimant is terminated for post-injury misconduct, the employer bears the burden of proving that the claimant was terminated for bad faith, and that a position would have been available but for the circumstances which merit the allocation of the consequences of the discharge to the claimant. In that precedent, the Supreme Court held that the claimant was eligible for post-discharge partial disability benefits since she retained a residual disability resulting from her work-related injury, and since it was found that the claimant was not at fault for her discharge.

We applied the general rule of Vista International in our subsequent opinion in Virgo v. Workers' Compensation Appeal Board, 890 A.2d 13 (Pa. Cmwlth. 2005). In Virgo, the claimant was discharged after receiving two negative annual evaluations, which evaluations showed that the claimant failed to follow specific instructions as well as failing to abide by certain employer policies. In that case, the claimant's violations of the employer's policies, and general failure to follow instructions, began prior to her work-related injury, and continued through the period following her work-related injury.[1]

At the time of her discharge, the claimant in Virgo was performing a modified-duty position due to work-related disability, and had petitioned for a reinstatement of her benefits following her discharge. Elaborating upon the precise standard that must be met for an employer to show a claimant's bad faith underlying a discharge following a work-related injury, as originally posited in Vista International, we stated:

> The question then is what is "lack of good faith," i.e., "bad faith" on the part of the claimant, so as to allocate the consequences of his or her discharge to him or her. Claimant, here, contends that for there to be "bad faith," Employer has to show a specific act that is tantamount to willful misconduct, suggesting a standard

[1] We emphasize that in this respect the facts of Virgo mirror those of the instant matter. Claimant also argues that while he "was simply not very good at his job," and that "as time passed his performance seemed to get worse and worse," his conduct does not rise to the level of actionable bad faith in that most of the conduct relied upon by Employer in its termination occurred before his workplace injury and thusly should not have been considered. However, the credible evidence as found by the WCJ unquestionably establishes that the disciplinary incidents in Claimant's history predate Employer's post-injury termination, in part sufficient to render Claimant's argument on this point without merit. R.R. at 28a-41a.

> much like what is used to determine whether a claimant is entitled to unemployment compensation benefits.
>
> While if an employer makes out willful misconduct that would be sufficient to deny unemployment compensation benefits, justify a suspension and preclude the reinstatement of benefits, . . . **the stricter willful misconduct standard is not the standard to determine "bad faith" in the context allocating fault in a workers' compensation case. . . Nonetheless, some "bad faith" willful misconduct on the part of the claimant that caused the discharge has to be established or benefits will not be suspended or will be reinstated. If, for example, a claimant receives unsatisfactory performance evaluations based solely on an inability to perform despite good faith efforts to do so, bad faith on the part of the claimant has not been made out. . . Simply put, to make out "bad faith" or "fault on the part of a discharged claimant," if an employer only shows that he or she "would if he or she could," then "bad faith" is not shown and benefits should continue or be reinstated; but if an employer establishes that the claimant "could if he or she would, and didn't," "bad faith" is established and a claimant is not entitled to continuing benefits.**

Virgo, 890 A.2d at 19 (citations omitted; emphasis added).

Whether a claimant acted in bad faith, for purposes of a post-injury discharge, is a finding of fact for the WCJ. Champion v. Workers' Compensation Appeal Board (Glasgow, Inc.), 753 A.2d 337 (Pa. Cmwlth. 2000), petition for allowance of appeal denied, 565 Pa. 651, 771 A.2d 1288 (2001). In the matter *sub judice*, the WCJ stated, in regards to Claimant's conduct on this issue:

> The [C]laimant's removal of shelving with the power forklift was surely a very bad idea, unsafe and harmful to the [E]mployer's interest, but we conclude that it was not the level of misconduct required to end his wage loss compensation for a serious injury that obviously continues.

R.R. at 151a.

We agree with the Board that the WCJ erred in finding that Claimant's actions were a "very bad idea, unsafe and harmful to the [E]mployer's interest[,]" while simultaneously failing to expressly find that the actions constituted bad faith. In viewing the Claimant's actions in light of the credible testimony of his supervisors, the record reveals that in regards to the fork lift shelving incident Claimant was reckless, did not follow instructions, was careless, destroyed company property, conducted him self improperly, and ripped the shelving out of the ground with a fork lift after being instructed to disassemble the unit. R.R. at 149a-151a. Additionally, Claimant's supervisor Shaw credibly testified that Claimant's acts in regards to this dispositive incident were intentional. R.R. at 34a-35a. Claimant does not dispute – and the record as a whole establishes – that the testimony cited constitutes substantial evidence supporting the WCJ's findings.

Claimant's conduct, then, cannot be viewed as an undertaking of his assigned work to disassemble the shelves that was an inability to perform that task despite his good faith efforts. Rather, the credible facts of record indicate a bad faith undertaking of his assigned work not based upon his abilities or inabilities. Vista International; Virgo; Champion.

Accordingly, we affirm.

JAMES R. KELLEY, Senior Judge

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Workers' Compensation Appeal Board (Mangar Industries), Respondent	:	

O R D E R

AND NOW, this 5th day of August, 2010, the order of the Workers' Compensation Appeal Board dated February 18, 2010, at A08-2161, is affirmed.

JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE McCULLOUGH FILED: August 5, 2010

Respectfully, I dissent. Although the Majority acknowledges that the critical issue in this case - whether Claimant's conduct constituted bad faith - *is a finding of fact for the WCJ*,[1] the Majority nevertheless upholds the Board's determination that Claimant's actions constituted bad faith *as a matter of law*. Moreover, in doing so, I believe that the Majority impermissibly reweighs the evidence and thus exceeds this Court's scope of review.

In February 2004, Claimant sustained a hip fracture in the course of his employment. (WCJ's Finding of Fact No. 1.) Employer issued a notice of

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[1] Champion v. Workers' Compensation Appeal Board (Glasgow, Inc.), 753 A.2d 337 (Pa. Cmwlth. 2000), appeal denied, 565 Pa. 651, 771 A.2d 1288 (2001).

compensation payable accepting liability for a low back/right hip strain/sprain contusion. (WCJ's Finding of Fact No. 2; R.R. at 1a.) Claimant underwent surgery to repair the fractured hip, and he returned to work in October 2004. In January 2006, Claimant underwent a second surgery to remove hardware. He returned to work in April 2006, although he no longer drove a truck. (WCJ's Findings of Fact No. 3, 5.) Claimant's employment ended on August 24, 2007, and Claimant subsequently petitioned for reinstatement of compensation.

At the hearing before the WCJ, Claimant described his ongoing symptoms, and the parties' medical experts agreed that Claimant is not completely recovered from the work injury, is limited in his ability to work and remains in pain. (WCJ's Findings of Fact 5-10.) Claimant also testified that, after his injury, Harry Shaw, Employer's warehouse supervisor, complained that Claimant was taking too long to get his work done. (R.R. at 55a-56a.)

Employer presented witness' testimony establishing that Claimant "was never a very good employee [and] made repeated errors," both before and after his work injury. (WCJ's Finding of Fact No. 14.) Loc Nguyen, Claimant's supervisor for ten years, testified that Claimant's employment was terminated after Claimant damaged a rack of shelving when he removed it with a forklift.[2] Nguyen stated that Claimant did not have a good work ethic and "showed to have no common sense sometimes." (R.R. at 26a.) During his testimony, Shaw reviewed Claimant's disciplinary record and characterized several specific incidents as negligent, rather than willful or reckless, conduct. (R.R. at 30a, 32a.) For

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[2] The Majority states that "Claimant's employment was terminated for carelessness, destruction of company property, and improper conduct." (Majority op. at 2.) I would note that, although this statement is supported by the testimony of Employer's witnesses, Claimant did not acknowledge any wrongdoing, and the WCJ made no such finding of fact.

example, Shaw stated that in 2005, Claimant raised the forktruck level up past the height it needed to be, causing it to go through the roof of the building. Shaw described this as negligent conduct and said Claimant was written up and told he needed to be more careful. (R.R. at 32a.)

Shaw said Claimant was dismissed in August 2007 because Shaw believed Claimant's conduct on this occasion was intentional. (R.R. at 34a.) "And since it was intentional, you know, *a lot of these incidents were negligence or just an accident. You know, things happen*. In this case here, as was the driving across the grass, this was intentional." (R.R. at 35a (emphasis added).)

Claimant related the events surrounding the August 24, 2007, incident as follows:

> I was disassembling racks in the warehouse. I was asked not to get anybody hurt and get the job done. It took us almost three days to do the disassembling of the racks and put them in another place where they would not handicap anybody. We did the job. We got it done. In fact, we got the job done a day-and-a-half early. And my immediate supervisor, Mr. Lott, told me Mr. Shaw wanted to see me. … I went over thinking I was going to get an atta boy and I got a you're fired.

(R.R. at 64a.) After Claimant's separation from employment, Employer did not contest his right to unemployment benefits, and Shaw stated that Employer gave Claimant four weeks severance pay. (R.R. at 37a.)

In his decision, the WCJ found the testimony of Claimant and his supervisors to be "generally credible." (WCJ's Finding of Fact 14.) The WCJ recognized the issue presented as "whether [Claimant's] careless conduct that led to his dismissal is sufficiently egregious to bar the reinstatement of wage loss compensation." (WCJ's op. at 6.) The WCJ considered Claimant's "long history as a careless employee," and he described Claimant's removal of shelves with a

forklift as "a very bad idea, unsafe and harmful to the employer's interest, but … not the level of misconduct required to end his wage loss compensation for a very serious injury that obviously continues." Id.

The Board reversed, concluding that Claimant's actions constituted bad faith "as a matter of law." (Board op. at 8.) Although the Board acknowledged that whether Claimant acted in bad faith is a question of fact for the WCJ, the Board opined that actions found to be "surely a very bad idea, unsafe and harmful to the employer's interest," cannot also be found to have been undertaken in good faith. Noting that the WCJ had accepted the testimony of Employer's witnesses, the Board concluded that Employer met its burden to establish that Claimant was discharged for cause and thus was not entitled to a reinstatement of benefits. In reversing the WCJ's determination, the Board cites only the testimony of Employer's witnesses and conspicuously overlooks Claimant's testimony, which also was found credible by the WCJ. The Majority not only does the same, but also emphasizes particular portions of witness testimony, ascribes more weight to particular excerpts, and determines that the evidence supports a contrary finding than that made by the WCJ.[3]

However, the appellate role in workers' compensation cases is not to reweigh evidence or review credibility of witnesses. Lehigh County Vo-tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652

[3] For instance, the Majority notes that "Shaw credibly testified that Claimant's acts [in this instance] were intentional." (Majority op. at 9.) I would emphasize that the WCJ found all witnesses "generally" credible and, despite this specific testimony, did not make this specific finding. Moreover, I point out that the record also includes evidence that Claimant made a number of mistakes and that prior incidents, including one that involved damage to the roof, that were considered by Employer to be careless but, apparently, tolerable. Employer ultimately discharged Claimant for conduct that Shaw believed was intentional, yet did not contest his

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A.2d 797 (1995). Rather, the Board or the reviewing court must simply determine whether, upon consideration of the evidence as a whole, the WCJ's findings have the requisite measure of support in the record. Id. When performing a substantial evidence analysis, we must view the record in a light most favorable to the party who prevailed before the WCJ. Joy Global, Inc. v. Workers' Compensation Appeal Board (Hogue), 876 A.2d 1098 (Pa. Cmwlth. 2005). In addition, on appeal, all inferences drawn from the evidence must be taken in favor of the party that prevailed before the WCJ. Lake v. Workers' Compensation Appeal Board (Whiteford National Lease), 746 A.2d 1183 (Pa. Cmwlth. 2000). Importantly, whether the record includes evidence that would support findings contrary to those made by the WCJ is irrelevant; the only pertinent inquiry is whether the record contains substantial evidence supporting the findings that were made. Williams v. Workers' Compensation Appeal Board (USX Corporation-Fairless Works), 862 A.2d 137 (Pa. Cmwlth. 2004).

Confined by our scope of review, and distasteful as it may be, I would conclude that the record contains substantial evidence to support the WCJ's findings that Claimant was a careless employee throughout his twelve years of employment, that his conduct on this particular occasion was not out of the ordinary and, under the circumstances, did not evidence bad faith warranting a disqualification for disability benefits.[4] Accordingly, I would reverse the Board's order.

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application for unemployment compensation and gave him a month's pay as severance.

[4] Moreover, the facts in Virgo v. Workers' Compensation Appeal Board (County of Lehigh), 890 A.2d 13 (Pa. Cmwlth. 2005), are easily distinguishable from the present matter. The claimant in Virgo was discharged pursuant to a progressive disciplinary policy under which the employer terminated employees who received two unsatisfactory annual evaluations, and the

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PATRICIA A. McCULLOUGH, Judge

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claimant had been warned that additional failure to follow the employer's instructions could result in her termination. In Virgo, *the WCJ found* that the claimant's loss of earnings was the result of her misconduct, and the Board and this court *affirmed* the WCJ's decision in that case. Thus, whereas the Majority relies on Virgo, I submit that these procedural dissimilarities preclude Virgo from controlling the analysis and outcome here.