

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Christina Wellington, :
Petitioner :
 :
v. : No. 658 C.D. 2011
 : SUBMITTED: August 26, 2011
Workers' Compensation Appeal :
Board (Bemis Company, Inc.), :
Respondent :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: October 28, 2011

Christina Wellington petitions for review of the order of the Workers' Compensation Appeal Board (Board), which affirmed the order of the Workers' Compensation Judge (WCJ) granting her claim petition, but denying her request for lost wage benefits, finding that her job loss was due to her own bad faith. Wellington disputes the WCJ's conclusions regarding her job loss, as well as the WCJ's finding that Employer Bemis Company's contest was reasonable. We affirm.

At this stage in the litigation, the parties in this case agree that in May 2008, Wellington suffered a work-related injury to her left wrist and was subsequently given a light-duty assignment, which involved sitting at a table and

flipping through plastic bags. On November 10, 2008, she was discharged for sleeping at her light duty position. Prior to her discharge, Wellington had filed claim and penalty petitions. After a hearing, at which the WCJ heard conflicting testimony about both Wellington's injury and her discharge, the WCJ granted the claim petition and denied the penalty petition. However, the WCJ found that Wellington was discharged for bad faith, and therefore held that she was not eligible for wage benefits. Wellington appealed to the Board, which affirmed. An appeal to this court followed. Because no party has appealed the WCJ's findings with respect to Wellington's injury, her physical condition is not at issue before us. The only issues preserved for review before this court are whether the circumstances of Wellington's discharge make her ineligible for benefits, and if Employer's contest was reasonable.

Wellington argues that the WCJ's finding that her discharge resulted from her lack of good faith is not supported by substantial evidence. In a case such as this, where the claimant returned to a modified position and then was terminated, the employer must show "that suitable work was available or would have been available but for circumstances which merit allocation of the consequences of the discharge to the claimant, such as claimant's lack of good faith." *Virgo v. Workers' Comp. Appeal Bd. (County of Lehigh-Cedarbrook)*, 890 A.2d 13, 18 (Pa. Cmwlth. 2005) [quoting *Stevens v. Workers' Comp. Appeal Bd. (Consolidation Coal Co.)*, 563 Pa. 297, 310, 760 A.2d 369, 377 (2000)].

Before the WCJ, Employer presented evidence that sleeping on the job was a rule violation punishable by suspension or dismissal, and that Wellington was aware of that policy. In addition, Employer's safety specialist testified that he observed Wellington sleeping at her workstation for approximately five minutes,

and that he took a photograph and a short video recording of her doing so. The photo and video were admitted into evidence. In response, Wellington testified that she was not sleeping and her counsel pointed out that the hood she was wearing in the photo and video obscured her eyes, making a determination of whether she was sleeping difficult. In addition, Wellington presented testimony from a union representative to the effect that Wellington's dismissal was disproportionate, as others with similar rule violations had only been suspended, not dismissed. In rebuttal, Employer called its Human Resources Manager, who testified to the differences between the various cases of sleeping on the job he had encountered, including differences in the violators' service time with the company. The WCJ, accepting the testimony of the Human Resources Manager and the safety specialist, concluded that Wellington was discharged for bad faith and that she was therefore not entitled to benefits after the date of her discharge.

The WCJ's conclusion that Wellington was discharged for bad faith is clearly supported by substantial evidence. The credited testimony of Employer's two witnesses, as well as the photographic and video evidence, is more than enough to support the conclusion that Wellington was sleeping on the job, and that discharging her for doing so was consistent with Employer's written policy.

Wellington also disputes the WCJ's finding that Employer's contest was reasonable. However, in addition to the testimony detailed above, the WCJ heard conflicting medical testimony regarding Wellington's injury. Where medical evidence is conflicting on a material issue, and there is no evidence the contest was frivolous or made to harass the claimant, an employer's contest is reasonable. *Gunther v. Workers' Comp. Appeal Bd.*, 444 A.2d 1342 (Pa. Cmwlth. 1982). We are satisfied that this was the case here.

For all the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

Judge McCullough did not participate in the decision in this case.

