IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Pittsburgh and UPMC Benefits Management Services, Inc., Petitioners	:	
v.	:	No. 714 C.D. 2011
	:	SUBMITTED: September 23, 2011
Workers' Compensation Appeal Board (Stolar), 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: November 22, 2011**

The City of Pittsburgh (City) appeals from the order of the Workers' Compensation Appeal Board (Board) that, in relevant part, affirmed the order of the Workers' Compensation Judge (WCJ) denying its petition for the suspension of Daniel Stolar's benefits. We affirm.

Stolar sustained a work-related injury in 2003 while employed by the City's police department as a K-9 Police Officer. His injury, not disputed at this point in the litigation, is bilateral carpal tunnel syndrome. From 2003 to 2004, Stolar received benefits under the law commonly known as the Heart and Lung

Act.[1] In 2004, Stolar accepted a disability pension, and his Heart and Lung Act benefits converted into workers' compensation benefits. In 2008, the City filed a suspension petition, alleging that Stolar was capable of performing modified-duty work, but had retired and was not seeking employment.

After a hearing, the WCJ found that the City had proved that Stolar was capable of performing medium-duty work, but also found that Stolar had made a genuine effort to obtain employment, and could therefore not be found to have removed himself from the workforce. For this reason, the WCJ denied the suspension petition. On appeal, the Board analyzed this case in light of *City of Pittsburgh v. Workers' Compensation Appeal Board (Robinson)*, 4 A.3d 1130 (Pa. Cmwlth. 2010), *appeal granted by* __ Pa. __, 17 A.3d 917 (2011), a case that this court decided after the WCJ entered her order. The Board affirmed, and an appeal to this court followed.

On appeal, the City argues that the Board misinterpreted *Robinson*, and erred in concluding that Stolar had not retired. It is well established that a claimant's retirement relieves the employer of the obligation to demonstrate job availability and puts the burden on the claimant to show that he is either seeking employment after retirement or that he was forced into retirement by the work-related injury. *See Se. Pa. Transp. Auth. v. Workers' Comp. Appeal Bd. (Henderson)*, 543 Pa. 74, 669 A.2d 911 (1995). In *Robinson*, this court considered how cases where claims of retirement are disputed should be evaluated. This court held that when the parties dispute whether a claimant is retired, a totality of the circumstances test should apply. This court noted that:

[1] Act of June 28, 1935, P.L. 477, *as amended*, 53 P.S. §§ 637-38.

> [c]ircumstances that could support the holding that a claimant has retired include: (1) where there is no dispute the claimant has retired; (2) the claimant's acceptance of a retirement pension; or (3) the claimant's acceptance of a pension and refusal of suitable employment within her restrictions.

Robinson, 4 A.3d at 1138.

The City argues that the Board failed to apply the totality of the circumstances test and instead treated the circumstances listed above as the exclusive means by which an employer could prove retirement. A fair reading of the Board's opinion shows that this is not the case. The Board correctly noted that the circumstances listed in *Robinson* were non-exclusive examples. Board Opinion at 4. The Board then evaluated the facts as found by the WCJ, including that Stolar had accepted a pension based on his injury, which did not preclude him from seeking other employment, that he had applied for positions with multiple employers, and that he had met with a representative from the Office of Vocational Rehabilitation (OVR). The Board considered all of these factors and concluded that the City had failed to establish under the totality of the circumstances that Stolar had voluntarily retired. The Board did not err in its application of *Robinson*.

The City next argues that the Board's conclusion that Stolar had not retired was not supported by substantial evidence. As the facts relied upon by the Board to make this conclusion were originally found by the WCJ, this argument is at heart a challenge to the WCJ's factual findings. The City first points to Stolar's testimony during direct examination, in which the following exchange took place:

> Q: And what was your date of retirement?
>
> A: I believe it was 12/04.

Reproduced Record (R.R.) at 46a. While this exchange may appear damning initially, a closer examination reveals it to be less than meets the eye. In context, it

is clear that Stolar's counsel was referring only to Stolar's departure from his job with the City, and not to the sort of permanent voluntary retirement contemplated by our Supreme Court in *Henderson*. Stolar's further testimony regarding his attempts to find additional employment make it clear that, despite his counsel's poor choice of words, he did not consider himself retired, nor did he intend to remove himself from the workforce.

The City then takes on the specifics of Stolar's job search, arguing that his search was not extensive enough to justify the WCJ's finding that he had made a genuine effort to find employment. In workers' compensation cases, the WCJ is the ultimate finder of fact, and we will not disturb factual findings supported by substantial evidence of record. *Prot. Tech., Inc. v. Workers' Comp. Appeal Bd. (Dengler)*, 665 A.2d 557 (Pa. Cmwlth. 1995). The WCJ's opinion details three employment applications made by Stolar, as well as his meeting with the OVR. More importantly, the WCJ found Stolar's testimony that he was seeking employment credible. Credibility determinations are the province of the WCJ, and will not be disturbed on appeal. *Clear Channel Broad. v. Workers' Comp. Appeal Bd. (Perry)*, 938 A.2d 1150 (Pa. Cmwlth. 2007). Because the finding that Stolar undertook a genuine job search is supported by substantial evidence and credible testimony, we cannot disturb it.

For all the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 22nd day of November, 2011, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge