

After a hearing, the WCJ found credible medical testimony that Zaborowski may be able to perform sedentary or light duty work, but also found that Zaborowski had not voluntarily removed himself from the workforce. In support of this finding, the WCJ pointed to Zaborowski's credited testimony that, considering his continuing pain and other symptoms, he did not believe he could work, but that he had not taken a retirement pension from the City, and was willing to try a modified-duty position if one was offered by the City. Because she found that Zaborowski had not voluntarily removed himself from the workforce, 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 Zaborowski 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 SEPTA 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:

[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 quoted the *Robinson* language, but simply did not treat the listed examples as exclusive. Rather, the Board evaluated the facts as found by the WCJ and concluded that the City had failed to establish under the totality of the circumstances that Zaborowski had voluntarily retired. The Board noted that the WCJ had found credible Zaborowski's testimony that he had not been looking for work because he did not believe he was capable of working, and that he was willing to attempt modified duty work if it was offered by the City. This, in conjunction with the fact that Zaborowski had not taken a retirement pension, led the Board to conclude that the City had not met its burden to prove, by the preponderance of the evidence, that Zaborowski had chosen to retire. Therefore, the Board did not err in its application of *Robinson*.

For all the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Pittsburgh and UPMC	:	
Benefits Management Services, Inc.,	:	
Petitioners	:	
	:	
v.	:	No. 979 C.D. 2011
	:	
Workers' Compensation Appeal	:	
Board (Zaborowski),	:	
Respondent	:	

ORDER

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