[J-107-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PITT OHIO EXPRESS	: No. 54 WAP 2005
	:
	: Appeal from the Order of the
	: Commonwealth Court entered May 4,
	: 2005 at No. 2430 CD 2004, reversing the
v.	: Order of the Workers' Compensation
	: Appeal Board entered October 14, 2004 at
	: A04-0275.
WORKERS' COMPENSATION APPEAL BOARD (WOLFF)	:
	:
	:
APPEAL OF: DUANE WOLFF	: ARGUED: September 11, 2006

DISSENTING OPINION

MR. JUSTICE BAER **DECIDED: DECEMBER 27, 2006**

Today the Majority holds that where a claimant rejects an available modified job in bad faith, that claimant is thereafter saddled with the taint of his bad faith regardless of any changed circumstances related to the claimant's medical condition, and an employer is forever relieved of its burden of showing job availability for purposes of obtaining a suspension of benefits. Because I believe the Majority's decision does not comport with extant specific Pennsylvania statutory or case law or the more generalized but universally recognized humanitarian purposes of the Workers' Compensation Act, I respectfully dissent.

The facts of this case are relatively straightforward. On April 3, 1996, the claimant, Duane Wolff (Claimant), began receiving total disability benefits for an acknowledged and uncontested work-related back injury he suffered while employed with Pitt Ohio Express (Employer) as a truck driver. Thereafter, on November 4, 1997, Employer filed a petition to

suspend Claimant's benefits arguing that Claimant was capable of performing light-duty work, but refused, in bad faith, to accept a then open light-duty position, which was commensurate with his abilities. The WCJ granted a suspension of benefits finding that Employer was able to demonstrate Claimant's ability to perform light-duty work, the availability of an appropriate position, and Claimant's bad faith refusal to accept that position.

Following a period of suspension, it is uncontested that Claimant once again became totally disabled, and was reinstated to full benefit status pursuant to a supplemental agreement entered into by Employer and Claimant in September 2000. Thirteen months later, in October 2001, Employer filed a new petition to suspend Claimant's total disability benefits, asserting that Claimant was, once again, physically capable of performing light duty work. The Employer, however, did not submit evidence of a then-open light-duty position. Rather, Employer argued that because Claimant had once refused a light-duty position from Employer when his disability status had changed from full to partial, Employer was no longer required to show job availability.

The WCJ agreed and granted Employer's suspension petition. On appeal, the Workers' Compensation Appeal Board reversed holding that Employer was required to provide Claimant with an available job that he was capable of working. The Commonwealth Court then reversed the Board, reinstating the WCJ's decision, that Employer need not show job availability after Claimant had once refused to accept a light-duty job from Employer. We accepted allocatur to determine finally the issue.

As noted by the Majority, in Kachinski v. Workers' Compensation Appeal Bd. (Vepco Construction Company), 532 A.2d 374(Pa. 1987), this Court established the following requirements an employer must establish to meet its burden on a petition to suspend a claimant's benefits based upon a claim that the claimant's disability has changed:

> 1. The employer who seeks to modify a claimant's benefits on the basis that he has recovered some or all of his ability must first produce medical evidence of a change in condition.
>
> 2. The employer must then produce evidence of a referral (or referrals) to a then open job (or jobs), which fits in the occupational category for which the claimant has been given medical clearance, e.g., light work, sedentary work, etc.
>
> 3. The claimant must then demonstrate that he has in good faith followed through on the job referral(s).
>
> 4. If the referral fails to result in a job, then claimant's benefits should continue.

Id. at 380.

The Majority rules that Employer is not required to meet its burden on prong two of the foregoing test because Claimant had, on a previous occasion, refused an available job referral in bad faith. The Majority states that "[i]f we allowed a claimant to reject a job in bad faith and then place a burden on the employer to provide the claimant another job *whenever he chooses*, we would reward bad faith conduct and circumvent the purposes of the Workers' Compensation Act." Majority Slip Op. at 5 (emphasis added). Respectfully, I believe the Majority, in so ruling, ignores the fact that in this case it is undisputed that Claimant's benefits were reduced after he had refused light-duty work but that he was receiving total disability benefits at the time *Employer* sought a new suspension of benefits.

This is not a case where the claimant refuses a position in bad faith and then, when the position is filled by Employer, *chooses* to obtain the position and seeks reinstatement to total benefits because the position is no longer available. Such was the situation in Spinabelli v. Workers' Compensation Appeal Bd. (Massie Buick), 614 A.2d 779 (Pa. Cmwlth. 1992). There, the claimant's benefits were reduced from total to partial based upon the fact that he refused, in bad faith, to perform a position offered by the employer

within his physical capability. Thereafter, the claimant filed a reinstatement petition indicating that he was willing to accept the employer's modified-duty position but that because it was no longer available, total benefits should be reinstated.

The Commonwealth Court, in affirming the denial of reinstatement aptly noted that

> Where we have a finding that a claimant has failed to pursue jobs in good faith, we do not believe the employer has the responsibility of keeping a job open indefinitely, waiting for the claimant to decide when he wants to work. As the board states in its decision, claimant's loss of earning power is not due to his disability, but due to his lack of good faith in pursuing work made available to him, which was within his physical limitations. In order to receive a reinstatement of total disability benefits, claimant must prove a change in his condition such that he could no longer perform the jobs previously offered to him.

Id at 780.

In a case such as Spinabelli, I would agree that, without showing a change in physical status, the claimant is not entitled to a reinstatement of benefits as his disability status continues because of his bad faith; but where, as here, the claimant is reinstated to full benefits based upon an uncontested change in his physical status, such that he can no longer perform light-duty work, if the employer seeks to once again suspend his benefits, all of the Kachinski requirements should be met anew, including the employer's requirement of demonstrating job availability.

Any decision contrary to one where, under these facts, an employer must anew meet the full Kachinski requirements would permit employers to lock in the claimant's disability status permanently at the time of his bad faith refusal regardless of a change in his physical condition. One's disability status, however, is not considered static under the Workers' Compensation Act. Rather, the Act contemplates a claimant's changing circumstances, particularly with regard to disability status, and therefore permits modification,

reinstatement, suspension or termination at any time. See Dillon v. Workers' Compensation Appeal Bd. (Greenwich Collieries), 640 A.2d 386, 391 (Pa. 1994) (noting that "determinations of the status of an injured employee's disability are subject to change," and that "[t]he [Act] itself explicitly provides that 'the board, or referee designated by the Board may, at any time, modify, reinstate, suspend, or terminate, an original or supplemental agreement award, upon petition filed by either party").

Finally, in addition to the foregoing analysis of the Act and the cases interpreting it, it is worthy of note that the Majority's holding is contrary to the bedrock principle that "the Pennsylvania Workers' Compensation Act is remedial in nature and intended to benefit the worker, and, therefore, the Act must be liberally construed to effectuate its humanitarian objectives." Peterson v. Workmen's Compensation Appeal Bd. (PRN Nursing Agency), 597 A.2d 1116, 1120 (Pa. 1991) (collecting cases). Accordingly, "'[b]orderline interpretations of [the] Act are to be construed in [the] injured party's favor.'" Hannaberry HVAC v. Workers' Compensation Appeal Bd. (Snyder, Jr.), 834 A.2d 524, 528 (quoting Harper & Collins v. Workmen's Compensation Appeal Bd. (Brown), 672 A.2d 1319, 1321 (1996)).

Because, in my view, Employer's argument is contrary to both the law and the wise policy upon which it is premised, I would reverse the order of the Commonwealth Court.