IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kenya Lowe, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Temple University Hospital), Respondent	:	No. 1075 C.D. 2012
	:	Submitted: December 28, 2012

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COVEY FILED: January 16, 2013

Kenya Lowe (Claimant) petitions this Court for review of the Workers' Compensation Appeal Board's (Board) May 15, 2012 order affirming the Workers' Compensation Judge's (WCJ) June 10, 2011 order on remand suspending Claimant's benefits. There are two issues for this Court's review: (1) whether Temple University Hospital's (Employer) proffered non-union job was available, and (2) whether the Board erred in finding that Claimant did not act in good faith when she declined Employer's job offer because of her school schedule. We affirm.

Claimant was employed full-time as a registered nurse in Employer's labor and delivery unit when she injured her left shoulder on August 22, 2005. She was a member of Employer's nursing union. Employer issued a notice of compensation payable, pursuant to which Claimant received workers' compensation benefits. On April 23, 2007, Claimant's physician issued a notice of Claimant's ability to return to work with restrictions. On November 5, 2007, Claimant took a

part-time, sedentary job as a clinical educator at Holy Redeemer Hospital. Based upon a February 11, 2008 supplemental agreement, Claimant received partial disability benefits from Employer.

In February or March 2008, Employer notified Claimant that her employment had been terminated. On or around May 20, 2008, Employer offered Claimant a full-time job as a night-shift clinical coordinator/nurse supervisor that was within Claimant's physical restrictions. She declined Employer's job offer because it was a night job and she previously worked during the day. On June 10, 2008, Employer filed a petition to suspend Claimant's benefits because she refused to return to work as of June 9, 2008, despite a good faith job offer that was within her physical capabilities. Hearings were held before a WCJ. On January 19, 2010, the WCJ denied Employer's suspension petition on the basis that Employer failed to prove that it offered Claimant available and appropriate employment in good faith, and that Claimant declined the offer in good faith. Employer appealed.

By order issued January 25, 2011, the Board reversed the WCJ's order, thereby suspending Claimant's benefits, stating that Employer made a good faith job offer that did not require the same pre-injury hours, and that Claimant did not act in good faith by refusing it. The Board remanded the matter to the WCJ "for specific findings on the wages of the clinical coordinator job offered by [Employer] and whether or not [Employer] was entitled to a suspension of Claimant's benefits based on the wages paid for that position." January 25, 2011 Board Op. at 5.[1]

On June 13, 2011, the WCJ issued a decision on remand. Based upon her findings that "the position offered by [Employer] paid wages greater than

[1] Claimant appealed the Board's January 25, 2011 order to this Court at No. 252 C.D. 2011. By March 7, 2011 order, this Court quashed that appeal because "the remand involves the exercise of discretion and the order . . . is interlocutory and not immediately appealable pursuant to Pa.R.A.P. 311(f)[(relating to appeals from administrative remand orders as of right)]." Certified Record.

Claimant's pre-injury wages," Claimant's benefits were suspended as of June 9, 2008. Claimant appealed, arguing that the Board erred by substituting its credibility determination for the WCJ's, and finding Employer made a good faith job offer when the record demonstrated that Employer was aware that she had secured her own employment, was attending night school, and the job was a non-union position. By order issued May 15, 2012, the Board affirmed the WCJ's remand order, and stated that "[a]s we have already addressed these arguments in our prior Opinion, we need not revisit them again here. The [WCJ] did as directed in compliance with the remand Order and we see no need to disturb her Decision." May 15, 2012 Board Op. at 2. Claimant appealed to this Court.[2]

The suspension of benefits is addressed by Section 413(a) of the Workers' Compensation Act (Act)[3] which states, in pertinent part:

> A workers' compensation judge designated by the department may, at any time, . . . suspend . . . a . . . supplemental agreement . . . upon proof that the disability[4] of an injured employe has . . . decreased . . . or finally ceased . . . . Such . . . suspension . . . shall be made as of the date upon which it is shown that the disability of the injured employe has . . . decreased . . . or finally ceased . . . .

This Court has held:

> In order to be entitled to a suspension of benefits, an employer must prove that the work injury no longer affects the claimant's earning power. To meet its burden, the employer must provide evidence of a referral to an available

[2] "This Court's scope and standard of review of an order of the Board is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether Board procedures were violated, whether constitutional rights were violated or an error of law was committed." *World Kitchen, Inc. v. Workers' Comp. Appeal Bd. (Rideout)*, 981 A.2d 342, 346 n.5 (Pa. Cmwlth. 2009).

[3] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 772.

[4] Relative to the workers' compensation law, "[d]isability is synonymous with loss of earning power." *Ginyard v. Workers' Comp. Appeal Bd. (City of Phila.)*, 733 A.2d 674, 676 (Pa. Cmwlth. 1999).

> job that is within the claimant's medical restrictions. If the employer produces such evidence, the burden shifts to the claimant to prove that she acted in good faith to follow through on the job referral. If the claimant fails to make such a showing, her benefits can be modified.

Miegoc v. Workers' Comp. Appeal Bd. (Throop Fashions/Leslie Fay and ITS Hartford), 961 A.2d 269, 273 (Pa. Cmwlth. 2008) (citations omitted).

Claimant argues that Employer's proposed job was not available to her because it was a non-union position. Claimant specifically contends that because Employer discharged her, if she accepted the offered position, she would be returning as a new employee, her union seniority and benefits will have been lost, and she would not be put in the same position as if she had never been injured. We disagree.

We acknowledge that in *St. Joe Container Co. v. Workmen's Compensation Appeal Board (Staroschuck)*, 534 Pa. 347, 633 A.2d 128 (1993), the Pennsylvania Supreme Court held that a job is not available to a claimant if, by accepting it, he or she will lose union benefits such as seniority. *See also ABF Freight Sys., Inc. v. Workers' Comp. Appeal Bd. (Iten)*, 744 A.2d 348 (Pa. Cmwlth. 2000). However, in *Newhouse v. Workers' Compensation Appeal Board (PJ Dick/Trumbull Corp.)*, 803 A.2d 828 (Pa. Cmwlth. 2002), this Court held:

> In *ABF Freight*, we specifically adopted a 'subjective analysis of the entire array of benefits available through union membership when assessing the availability of a non-union position to a unionized claimant under *Kachinski [v. Workmen's Comp. Appeal Bd. (Vepco Constr. Co.)*, 516 Pa. 240, 532 A.2d 374 (1987)].' *Id.* (citation omitted). Under *ABF Freight*, therefore, **an offer of a non-union position to a union claimant is unavailable as a matter of law only upon a showing that the acceptance of such an offer would result in a loss of union benefits or status**.

Id. at 831 (emphasis added).

In this case, it is undisputed that Employer's proffered job is a non-union position. It is not clear, however, whether Claimant's acceptance of that job would

have jeopardized her union seniority or benefits. Claimant testified that she understood that since Employer discharged her, she would have to return as a new employee. When asked if she checked with either Employer or the nurse's union about what would happen, she testified that she was told by a union representative "beforehand" that she "would come back as a new employee, all seniority would be lost." Reproduced Record (R.R.) at 56a. However, Julie Dodge, Employer's recruiter, testified by deposition that had Claimant accepted Employer's prospective employment, she would have been a rehire, rather than a new employee. *See* R.R. at 96a. She contended that whether Claimant would have regained her union status if she had accepted the offered job would be up to the union, but she knows of situations in which that had been done. R.R. at 94a. She stated that the union is "pretty fair. Just about anything that we've asked out of the norm, or out of the context of the contract, they've been very open about it. So, they're always open for discussion." R.R. at 94a-95a. She testified that it "would have been up to the union to decide whether or not she would lose seniority." R.R. at 97a. Moreover, the fact that Claimant had already accepted and was working at a non-union job that was similar to the one Employer offered her, belies her argument that she would suffer greater detriment by accepting a non-union position.

In *Newhouse*, this Court held that the claimant

> failed to cite to any evidence of record showing that [c]laimant would lose any union benefit or status, or would be harmed in any way whatsoever by accepting the non-union position at issue. As distinguished from the facts at issue in *ABF Freight* and *St. Joe Container*, [c]laimant's failure to produce or enter any such evidence results in a failure to establish the non-union position as unavailable, and the Board did not err in so concluding.

Id. at 831. We likewise conclude that without evidence that Claimant's union seniority or benefits would have been detrimentally affected by accepting Employer's offered job, the position was not unavailable to her as a matter of law.

Claimant next argues that the Board erred in finding that she did not act in good faith when she declined Employer's job offer because of her school schedule. We disagree. First, the credible evidence does not support a conclusion that Claimant could not work nights because she was attending school. According to Claimant's testimony before the WCJ, the offered job was within her physical restrictions, and she was physically capable of performing the job duties. Yet, Claimant "declined the offer," because "it was a nightshift position and I haven't worked nights [for Employer] since my first year. I had already secured a job." R.R. at 44a-45a, 49a. Although Claimant does not recall the manner in which she responded to the job offer, she claims she told Employer she "was in school." R.R. at 57a. According to Ms. Dodge's testimony, however, Claimant left a voicemail for her in which Claimant said "she had received my letter, and she could not accept the position because she could not work nights." R.R. at 94a. The WCJ ultimately found credible Claimant and Ms. Dodge's testimony that Claimant received the job offer and declined it because it was a nighttime position, and because she had secured another part-time job. It is well established that "[t]he WCJ is the ultimate factfinder and has exclusive province over questions of credibility and evidentiary weight." *Univ. of Pa. v. Workers' Comp. Appeal Bd. (Hicks)*, 16 A.3d 1225, 1229 n.8 (Pa. Cmwlth. 2011). Where, as here, they are supported by the record, "[w]e are bound by the WCJ's credibility determinations." *Bedford Somerset MHMR v. Workers' Comp. Appeal Bd. (Turner)*, 51 A.3d 267, 272 (Pa. Cmwlth. 2012).

In addition, the Board reversed the WCJ's conclusion that Claimant could reasonably refuse a job offer on the basis that "it was a night time position, whereas Claimant's time of injury job was a day time position." January 19, 2010

WCJ Op. at 4. The law requires that a WCJ's decision is "free . . . from material legal error." *Green v. Workers' Comp. Appeal Bd. (US Airways)*, 28 A.3d 936, 940 (Pa. Cmwlth. 2011). In *Swope v. Workmen's Compensation Appeal Board (Harry Products, Inc.)*, 600 A.2d 670 (Pa. Cmwlth. 1991), this Court specifically held that a proffered job need not have the same hourly schedule as a pre-injury job, as long as the claimant is physically capable of performing the job, and there is no medical reason for an identical schedule. The WCJ's conclusion to the contrary was in error. Accordingly, we hold that Employer met its burden of offering an available job to Claimant within her physical limitations, but she failed to accept the job offer in good faith. Thus, the Board properly reversed the WCJ's decision thereby granting Employer's suspension petition effective June 9, 2008, since the position offered to Claimant paid wages greater than Claimant's pre-injury wages.

Based upon the foregoing, the Board's order is affirmed.

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ANNE E. COVEY, Judge

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O R D E R

AND NOW, this 16th day of January, 2013, the Workers' Compensation Appeal Board's May 15, 2012 order is affirmed.

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ANNE E. COVEY, Judge