IN THE COMMONWEALTH COURT OF PENNSYLVANIA

James Ralph, Petitioner v. Workers' Compensation Appeal Board (Westmoreland Mechanical Testing), Respondent	: : : : : : : : :	 No. 1130 C.D. 2008 SUBMITTED: September 19, 2008

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** December 15, 2008

Claimant James Ralph petitions for review of the June 3, 2008 order of the Workers' Compensation Appeal Board (Board) that affirmed the order of the Workers' Compensation Judge (WCJ) granting the suspension petition of Westmoreland Mechanical Testing (Employer). We affirm.

In December 2005, Claimant suffered a back injury in the course of his job as a technician in Employer's research and development laboratory. Claimant returned to modified-duty work with Employer in July 2006, successfully continuing in that capacity until Monday, November 6, 2006. On the next day, he

took a day off in order to attend a hearing related to a May 2005 charge for driving under the influence.

After that November 7th hearing, Claimant telephoned his supervisor to advise him of the outcome and of the transportation that he had arranged for the suspension period. When his driver failed to show up the next morning, Claimant telephoned his supervisor to advise him of that fact. Indeed, Claimant called his supervisor every day that week in order to keep him apprised of the situation. On Thursday November 9th, in response to Claimant's suggestion of a leave of absence, his supervisor gave him one week in which to resolve his transportation problem. Despite Claimant's efforts, however, he had to advise his supervisor on Monday, November 13th that he had made no headway in obtaining alternate transportation and could not give a date certain as to his return to work. When Claimant telephoned his supervisor on November 14th to advise him that he may have been able to locate another driver, the supervisor referred Claimant to the human resources director.

The human relations director advised Claimant that Employer had terminated him for missing work without an excuse. Notwithstanding Employer's graduated disciplinary procedure, the director testified that he was permitted to terminate an employee for missing more than three consecutive days of work without an excuse and that Claimant at the time of the termination had already missed four and one-half days of work. The director acknowledged that Claimant was a productive employee, but maintained that the technician position was too important to be left vacant and too expensive in overtime costs for existing employees to continue covering.

In December 2006, Employer filed a petition to modify and/or suspend Claimant's benefits, alleging that he had returned to work on July 5, 2006. The WCJ granted the petition and the Board affirmed the WCJ's order. Claimant's timely petition for review to this Court followed.[1]

Claimant raises the issue of whether the Board erred as a matter of law in concluding that the WCJ applied the correct burden of proof, given the absence of a specific finding that Employer terminated his employment for "bad faith" conduct.[2] The disputed language of the WCJ in that regard is as follows:

> The decision I have to make in this case is not whether or not the employer acted wisely in terminating the claimant or whether the termination of the claimant was indeed fair. The finding I have to make in this situation is whether or not the claimant was terminated as a result of his work injury or terminated for good cause, I hesitate to use the term "willful misconduct," not related to the work injury.

Finding of Fact No. 5.

Citing *Virgo v. Workers' Comp. Appeal Bd. (County of Lehigh-Cedarbrook)*, 890 A.2d 13 (Pa. Cmwlth. 2005), Claimant asserts that a finding of bad faith is essential in a situation such as his where an employee is subjected to a

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[1] As the present appeal presents a question of law, our appellate review over the Board's order is plenary. *Deliman v. Dep't of Transp., Bureau of Driver Licensing*, 718 A.2d 388 (Pa. Cmwlth. 1998).

[2] Claimant also raises the issue of whether the Board erred in failing to address the fact that because the reason underlying his inability to drive, the May 2005 DUI, predated his December 2005 work injury, his loss of earnings remained the result of his disability due to injury. As Employer correctly states, however, Claimant failed to raise this issue below and raised it for the first time in his petition for review filed with this Court thereby waiving any right to raise it on appeal. *McDonough v. Unemployment Comp. Bd. of Review*, 670 A.2d 749 (Pa. Cmwlth. 1996). In addition, as Employer also correctly points out, it was not the DUI that precipitated the termination, but instead Claimant's unexcused absence from the workplace.

post-injury discharge. He suggests that the humanitarian purpose of the bad faith standard is to deter employers wishing to avoid their obligations from simply discharging employees working modified-duty positions for reasons unrelated to their work injuries.

As for his case, Claimant maintains that the WCJ failed to apply the correct burden by neglecting to address 1) any alleged bad faith conduct prior to termination; 2) Employer's violation of its graduated disciplinary policy; 3) Employer's failure to permit Claimant to use vacation time for his absence; and 4) Employer's breach of its oral agreement to afford him a full week in which to locate alternate transportation. Given the WCJ's failure to address these additional factors, Claimant maintains that his termination was clearly pretextual.

Employer agrees that the standard of proof as set forth in *Virgo* is applicable, but contends that the WCJ accurately applied it when he determined that the suspension was warranted in that Claimant was at fault. To wit, the WCJ concluded that Claimant's inability to show up for work precipitated the termination. It emphasizes that, under *Virgo*, the bad faith standard is met when a claimant *could* perform his job if he *would*, but *didn't*. Employer points out that it is undisputed that Claimant was physically capable of performing his modified-duty job. Further, it notes that the Court in *Virgo* stated that an employer does not have to establish the "willful misconduct" necessary in unemployment compensation matters.

As for the alleged violation of its disciplinary policy, Employer points out that the WCJ accepted as credible the testimony of its human resources director that termination for excessive absenteeism was a possibility at the first step of its established policies and procedures. *Hills Dep't Store No. 59 v. Workmen's Comp.*

Appeal Bd. (McMullen), 646 A.2d 1272 (Pa. Cmwlth. 1994) (credibility determinations are within the purview of the WCJ as the final arbiter of evidence.) In addition, Employer points out that Claimant never requested to use his vacation days to cover his absence. Finally, with regard to the "full" week in which Claimant's supervisor afforded him to obtain transportation, Employer notes that Claimant advised his supervisor in a *subsequent* conversation that he had not been able to secure transportation and did not know when he would be able to return to work. It was at that point that the decision was made to fire Claimant. In resolving the parties' respective arguments, we turn first to a restatement of the appropriate burden of proof.

Mindful that "work-related disability, once established, is presumed to continue until proven otherwise,"[3] we recently reiterated that an employer attempting to suspend the benefits of a partially disabled employee "must establish either that work within the claimant's restrictions was available or that the claimant's disability was caused by something other than the work-related injury." *Erisco*, 955 A.2d at 1068 (citing *Virgo*). We stated that an "employer can meet this burden by demonstrating that suitable work was available or would have been available but for the claimant's wrongful conduct or circumstances which merit allocation of the consequences of the discharge to the claimant, such as the claimant's lack of good faith." *Erisco*, 955 A.2d at 1068 [citing *Stevens v. Workers' Comp. Appeal Bd. (Consol. Coal Co.)*, 563 Pa. 297, 760 A.2d 369 (2000)].

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[3] *Erisco Indus., Inc. v. Workers' Comp. Appeal Bd. (Luvine)*, 955 A.2d 1065, 1068 (Pa. Cmwlth. 2008) [citing *Pappas Family Rest. v. Workers' Comp. Appeal Bd. (Ganoe)*, 729 A.2d 661 (Pa. Cmwlth. 1999)].

In *Virgo*, we summarized what is required to show a lack of good faith in a post-injury discharge case.

> Simply put, to make out "bad faith" or "fault on the part of a discharged claimant," if an employer shows that he or she "would if he or she could," then "bad faith" is not shown and benefits should continue or be reinstated; but if an employer establishes that the claimant "could if he or she would, and didn't," "bad faith" is established and a claimant is not entitled to continuing benefits.

Id. at 19. Citing *Pappans*, we repeated that "the stricter willful misconduct standard [sufficient to deny unemployment compensation benefits] is not the standard to determine 'bad faith' in the context allocating fault in a workers' compensation case." *Virgo*, 890 A.2d at 19.

In the present case, we conclude that the WCJ's reasoning was in line with the above-stated burden for the suspension of benefits in post-injury discharge cases. Contrary to Claimant's suggestion, a WCJ need not use magic words such as "bad faith" in rendering his decision. In a case such as this one, where a claimant's conduct is contrary to an employer's interests but not necessarily inimical, the necessary determination is whether the facts merit a conclusion that work was or would have been available to him but for his wrongful conduct or circumstances which warrant apportionment of the consequences of the discharge to him, such as a lack of good faith. *Erisco*.

Here, the WCJ in support of his conclusion that the facts warranted a suspension noted that Claimant during his November 13th conversation with Employer indicated that he had not made any headway in obtaining transportation and could not provide a timeline as to when he could return to work. In addition, contrary to Claimant's assertions, the WCJ considered the evidence concerning

Employer's disciplinary policy and its oral offer to afford Claimant time in which to find alternate transportation. It is within the purview of the WCJ as the ultimate finder of fact both to construe the evidence and to determine the weight to be afforded the evidence. *Joy Global, Inc. v. Workers' Comp. Appeal Bd. (Hogue)*, 876 A.2d 1098 (Pa. Cmwlth. 2005).

In any event, given the WCJ's findings, Employer clearly demonstrated that suitable work was available to Claimant but for the circumstances of his self-imposed transportation problem, which resulted from Claimant's criminal conviction and merited allocation of the consequences of the discharge to him. *Erisco*. Accordingly, we conclude that the WCJ did not err in granting Employer's suspension petition and affirm the Board's order.

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BONNIE BRIGANCE LEADBETTER,
President Judge

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v.	:	No. 1130 C.D. 2008
Workers' Compensation Appeal Board (Westmoreland Mechanical Testing), Respondent	:	

<u>O R D E R</u>

AND NOW, this 15th day of December, 2008, the order of the Workers' Compensation Appeal Board in the above captioned matter is hereby AFFIRMED.

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BONNIE BRIGANCE LEADBETTER,
President Judge