IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tops Staffing, LLC and Gallagher Bassett Services,	:	
Petitioners	:	
v.	:	No. 1168 C.D. 2007
Workers' Compensation Appeal Board (Sink),	:	Submitted: November 16, 2007
Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: January 16, 2008**

Tops Staffing, LLC and Gallagher Bassett Services (Employer) petition for review of an order of the Workers' Compensation Appeal Board (Board) that affirmed the Workers' Compensation Judge's (WCJ) decision and order denying Employer's Suspension Petition. Employer argues that there is substantial evidence in the record establishing that it discharged David Sink (Claimant) for bad faith

conduct and that, therefore, the WCJ erred in determining that Claimant's loss of wages was not due to his own fault. For the reasons discussed below, we affirm.

The relevant facts in this case are as follows. Claimant sustained injuries to his knees while working for Employer, an employment agency, at One Call Rental on December 15, 2003. As a result of his work-related injuries, a Notice of Compensation Payable was issued, and Claimant received total disability benefits in the amount of $288.00 per week based on an average weekly wage of $320.00. Claimant was later cleared to return to work for Employer in a modified-duty position[1] at Channel Craft & Distribution, Inc. (Channel Craft), where he earned wages equal to his pre-injury wages.[2]

While working at Channel Craft, Claimant was required to complete work tickets documenting his daily productivity. The work tickets contained a line for a supervisor to initial after verifying that the productivity information recorded thereon by Claimant was accurate. On August 4, 2004, Claimant wrote his supervisor's initials next to the last two entries on his work ticket and then submitted the work ticket to the shop foreman. Channel Craft considered Claimant's actions to be a violation of its policy prohibiting falsification of documents. After Channel Craft notified Employer of Claimant's conduct, Employer terminated Claimant's employment. Following Claimant's discharge from his employment, Employer filed

[1] Claimant's modified-duty position involved placing jacks and balls into small plastic containers.

[2] Because Claimant returned to work without a loss of wages, his benefits were suspended pursuant to a Notification of Suspension.

a Suspension Petition, seeking to have Claimant's benefits suspended for unreasonably abandoning available employment within his physical capabilities.[3] The WCJ subsequently held several evidentiary hearings during which the parties were given the opportunity to present evidence regarding Employer's Suspension Petition.[4]

In support of its Suspension Petition, Employer presented the deposition testimony of Denise Yurkovich, the general manager at Channel Craft, Leslie Murphy, Claimant's floor supervisor at Channel Craft, and Dianne Peters, a branch manager for Employer (collectively Employer's witnesses). Employer's witnesses provided testimony indicating that Claimant's employment was terminated after it was discovered that he had written his supervisor's initials next to the last two entries on his work ticket for August 4, 2004, and then submitted the work ticket to the shop foreman. Employer's witnesses also provided testimony indicating that Claimant's

[3] Prior to Employer filing its Suspension Petition, Claimant had filed a Challenge to the Notification of Suspension and a Reinstatement Petition, alleging that his discharge from modified-duty work was pretextual.

[4] The first evidentiary hearing was held on December 16, 2004. During that hearing, the parties were also given the opportunity to present evidence regarding Claimant's Challenge to the Notification of Suspension and Claimant's Reinstatement Petition. Following the December 16, 2004 hearing, the WCJ issued an order granting Claimant's Challenge to the Notification of Suspension and directing Employer to reinstate Claimant's total disability benefits. As a result, Claimant requested to withdrawal his Reinstatement Petition. The WCJ then issued an order granting Claimant's request to withdraw his Reinstatement Petition and discontinuing all proceedings thereunder without prejudice. On December 30, 2004, Employer filed a Termination Petition, alleging that Claimant had fully recovered from his work-related injuries. The WCJ subsequently held evidentiary hearings on April 5, June 7, and December 22, 2005, to address Employer's Suspension Petition and Employer's Termination Petition, which were the only remaining petitions at issue.

conduct violated Channel Craft's policy prohibiting falsification of documents and that Claimant had been made aware of that policy.

In opposition to Employer's Suspension Petition, Claimant testified on his own behalf. Claimant admitted that he had written his supervisor's initials on his work ticket for August 4, 2004. However, Claimant testified that he did not intentionally falsify his supervisor's initials and that he did not receive instructions regarding how to complete the work tickets.

After reviewing the evidence that was presented by the parties, the WCJ issued a decision and order denying Employer's Suspension Petition.[5] The WCJ found Claimant's testimony regarding the circumstances surrounding his completion of the work tickets to be credible. (WCJ Decision, Findings of Fact (FOF) ¶ 8(b).) The WCJ discredited Ms. Yurkovich's and Ms. Murphy's testimony to the extent that it conflicted with Claimant's testimony. (FOF ¶ 8(c).) The WCJ also discredited Ms. Peters' testimony regarding the circumstances surrounding Claimant's discharge. (FOF ¶ 8(d).) Based on these credibility determinations, the WCJ found that Claimant did not intend to falsify his supervisor's initials. (FOF ¶ 8(b).) The WCJ also found that "Claimant was confused about the completion of the work ticket and that sufficient supervision and/or instruction was not provided to Claimant regarding completion of the [work ticket]." (FOF ¶ 8(c).) Ultimately, the WCJ found that Claimant was not terminated from his employment due to his own fault. (FOF ¶¶

[5] In the same decision and order, the WCJ also denied Employer's Termination Petition; however, the WCJ's denial of Employer's Termination Petition is not at issue on appeal.

8(a), (c).) Given these findings, the WCJ concluded that Employer failed to establish that it is entitled to a suspension of Claimant's benefits. (WCJ Decision, Conclusions of Law (COL) ¶ 1.)

Employer appealed the WCJ's decision and order to the Board, arguing that the WCJ erred in failing to grant its Suspension Petition. Following review, the Board issued an opinion and order affirming the determination of the WCJ. According to the Board, Employer bore the burden of proving that Claimant's bad faith conduct led to the loss of his modified-duty position, and because the WCJ rejected Employer's evidence as not credible, Employer was unable to meet its burden. (Board Op. at 6-7.) Employer now petitions this Court for review.[6]

On appeal, Employer argues that there is substantial evidence in the record establishing that it discharged Claimant for bad faith conduct and that, therefore, the WCJ erred in determining that Claimant's loss of wages was not due to his own fault. Specifically, Employer contends that Claimant acted in bad faith by intentionally falsifying his supervisor's initials on his work ticket in violation of Employer's policy, of which he had been made aware. Employer also contends that there is no substantial evidence in the record to support the WCJ's findings that Claimant did not intend to falsify his supervisor's initials and that Claimant was confused as to how to fill out the work tickets. We disagree.

[6] Our scope of review "is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated." Shop Vac Corp. v. Workers' Compensation Appeal Board (Thomas), 929 A.2d 1236, 1239 n.2 (Pa. Cmwlth. 2007).

Generally, in a suspension proceeding, the employer has the burden of proving that a job is available to the claimant at earnings equal to his pre-injury earnings and that the claimant is capable of performing that job despite a continuing medical disability. Foyle v. Workmen's Compensation Appeal Board (Liquid Carbonic I/M Corp.), 635 A.2d 687, 689 (Pa. Cmwlth. 1993). Where an employer seeks to suspend benefits based on a claimant's post-injury involuntary discharge, the employer must prove that "suitable work was available or would have been available but for circumstances which merit allocation of the consequences of the discharge to the claimant, such as claimant's lack of good faith." Vista Int'l Hotel v. Workmen's Compensation Appeal Board (Daniels), 560 Pa. 12, 29, 742 A.2d 649, 658 (1999). "[A] partially disabled employee who, by act of bad faith, forfeits his employment would not be eligible for total disability benefits, as suitable employment was in fact available but for the employee's own wrongful conduct." Id. at 28-29, 742 A.2d at 658.

Bad faith is not the same as the willful misconduct standard that is necessary to deny unemployment compensation benefits; it is a lesser standard. Virgo v. Workers' Compensation Appeal Board (County of Lehigh-Cedarbrook), 890 A.2d 13, 19 (Pa. Cmwlth. 2005). To establish bad faith or fault on the part of a discharged claimant, the employer must show that the claimant could have properly performed his or her job duties if he or she would have put forth the effort to do so, but that he or she didn't put forth such effort. See id. The determination of whether a claimant was discharged for bad faith conduct is a question of fact to be resolved by the WCJ as fact finder. Champion v. Workers' Compensation Appeal Board (Glasgow, Inc.), 753 A.2d 337, 340 (Pa. Cmwlth. 2000).

In the present case, the WCJ determined that Claimant was not at fault for his discharge and, thus, that Claimant's conduct did not amount to bad faith conduct. (FOF ¶¶ 8(a)-(c).) In making this determination, the WCJ relied on Claimant's testimony, which was found to be credible, and several admissions by Employer's witnesses. By attacking the WCJ's determination that Claimant's conduct did not amount to bad faith conduct, Employer is essentially challenging the credibility determinations that were made by the WCJ.

It is well settled that "the WCJ is the ultimate fact finder and is the sole authority for determining the weight and credibility of evidence." Lombardo v. Workers' Compensation Appeal Board (Topps Co., Inc.), 698 A.2d 1378, 1381 (Pa. Cmwlth. 1997.) The fact that one party to a proceeding may view testimony differently than the fact finder is simply not grounds for reversal if the findings are supported by substantial evidence. Second Breath v. Workers' Compensation Appeal Board (Gurski), 799 A.2d 892 (Pa. Cmwlth. 2002). Substantial evidence is "such relevant evidence [that] a reasonable mind might accept as adequate to support a conclusion." Bethenergy Mines v. Workmen's Compensation Appeal Board (Skirpan), 531 Pa. 287, 292, 612 A.2d 434, 436-37 (1992) (quoting Republic Steel v. Workmen's Compensation Appeal Board (Shinsky), 492 Pa. 1, 5, 421 A.2d 1060, 1062-63 (1980)).

Here, Claimant testified that he did not try to copy his supervisor's writing or make it look like she had written her initials. (WCJ Hr'g Tr. at 14-15, December 22, 2005.) Claimant also testified that nobody at Channel Craft had discussed with him the importance of filling out the work tickets or showed him how to complete the

work tickets until after he had written his supervisor's initials on the August 4, 2004 work ticket and submitted the same. (WCJ Hr'g Tr. at 19-21, 23, December 16, 2004; WCJ Hr'g Tr. at 11-12, December 22, 2005.) Claimant further testified that he had tried to locate his supervisor at the end of his shift on August 4, 2004, but could not find her. (WCJ Hr'g Tr. at 14, December 22, 2005.) Additionally, Claimant testified that he had been instructed to put his work ticket in the box in the foreman's office at the end of the day and that he had never been instructed to do otherwise. (WCJ Hr'g Tr. at 15-16, December 22, 2005.) Finally, Claimant testified that at the beginning of his shift on August 5, 2004, he went to his supervisor and told her that he had put her initials on his work ticket on the previous day. (WCJ Hr'g Tr. at 16, December 22, 2005.)

Moreover, Ms. Yurkovich admitted that learning a new process is tough for people and that they have to be shown what needs to be done. (Yurkovich Dep. at 30, September 14, 2005.) Ms. Yurkovich also admitted that Claimant's August 4, 2004 work ticket was the first work ticket that he had to fill out on his own. (Yurkovich Dep. at 29-30.)

Additionally, Ms. Murphy, like Ms. Yurovich, admitted that Claimant's August 4, 2004 work ticket was the first work ticket that he had to fill out on his own. (See Murphy Dep. at 7, 13-14, September 14, 2005.) Ms. Murphy also admitted that she did not remember if she had instructed Claimant that if there was no verification on a work ticket at the end of the day, the ticket was to be left at his work station until the next morning. (Murphy Dep. at 17-18, 23.) Ms. Murphy further admitted that

she did not recall if she had discussed Claimant's August 4, 2004 work ticket or any possible errors regarding the same with Claimant. (Murphy Dep. at 28.)

We conclude that Claimant's testimony, which was found to be credible, along with the admissions made by Employer's witnesses, constitutes substantial evidence in support of the WCJ's findings. Because the WCJ's findings establish that Claimant's actions resulted from confusion and insufficient instructions from Employer, and not an intention to falsify documents or an unwillingness to perform his job properly, we further conclude that the WCJ was correct in determining that Claimant's actions did not amount to bad faith conduct and that Claimant was not at fault for his loss of wages. Accordingly, the Board's order is affirmed.

RENÉE COHN JUBELIRER, Judge

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O R D E R

NOW, January 16, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge