IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Zook Molasses Company, Inc., Petitioner	:	
v.	:	
Worker's Compensation Appeal Board (Makarenko), Respondent	:	No. 1360 C.D. 2008
	:	Submitted: October 24, 2008

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: December 8, 2008

Zook Molasses Company, Inc. (Employer) petitions for review of the June 24, 2008 order of the Workers' Compensation Appeal Board (Board) affirming the July 27, 2007 order of a Workers' Compensation Judge (WCJ) granting Yevgeniey Makarenko's (Claimant) petition for reinstatement of benefits. Employer argues that medical evidence credited by the WCJ demonstrated that Claimant's condition had improved, not worsened. We disagree and affirm the Board's order.

Claimant injured his back in June 2004 while working for Employer. Claimant's benefits were suspended in September 2004 pursuant to a Notification of Suspension or Modification filed in accordance with Section 413(c) and (d) of

the Workers' Compensation Act (Act)[1] because he failed to accept a light-duty position[2] and, instead, voluntarily resigned to begin his own business in Florida. He moved to Florida in September 2004, but was unable to start his business due to his injury. Claimant also tried working for a friend's cleaning business in Florida, but had to quit after four days due to his injury. Claimant thus moved back to Pennsylvania. After returning, Claimant started seeing Mikhail Freylikh, M.D., a board-certified physical medicine and rehabilitation physician in the Philadelphia area. Claimant filed a Reinstatement Petition in December 2005, seeking reinstatement of benefits beginning September 30, 2005. Claimant presented the deposition testimony of Dr. Freylikh to support his claim. Employer presented the deposition testimony of Richard Trabulsi, M.D., a board-certified orthopedic surgeon, and I. Stanley Porter, M.D., the board-certified orthopedic surgeon who first evaluated Claimant in June 2004 and performed his surgery.

The WCJ granted the Reinstatement Petition, finding that Claimant was totally disabled from September 30, 2005 forward. Employer appealed to the Board which affirmed the WCJ's order. Employer then appealed to this Court. The Court's review of the Board's order is limited to determining whether Claimant's constitutional rights have been violated, whether an error of law has

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§ 774.2, 774.3. Section 413(c) was added by the Act of July 1, 1978, P.L. 692. Section 413(d) was added by the Act of June 24, 1996, P.L. 350.

[2] The light-duty position Employer made available included answering phones; working in the office; washing floors with a power washer which weighs approximately 10 lbs. for about 4 hours a day; cleaning windows that were approximately 6 feet high for about 2 hours a day; and emptying trash cans which were approximately 5-10 lbs. each for about 2-3 hours a day. However, there was no written job description for the light-duty work Employer offered. Sensenig Notes of Deposition Testimony, May, 16, 2006 (Sensenig N.T.) at 24-32; Reproduced Record (R.R.) at 183-191.

been committed or whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704; *Visteon Sys. v. Workers' Comp. Appeal Bd. (Steglik)*, 938 A.2d 547 (Pa. Cmwlth. 2007).

The burden of a claimant when petitioning for reinstatement of benefits under Section 413 of the Act, 77 P.S. § 772, depends on whether the benefits were terminated or suspended. *Pieper v. Ametek-Thermox Instruments Div.*, 526 Pa. 25, 584 A.2d 301 (1990). A reinstatement after a suspension of benefits does not require proof of the causal connection between his current condition and his work-related injury. *Id*. "Should a claimant seek to have a suspension lifted, he is required to demonstrate only that the reasons for the suspension no longer exist." *Id*. at 33, 584 A.2d at 304. Specifically:

> [T]he law requires a claimant to prove two things in order to show that the reasons for the suspension no longer exist. . . . First, he must prove that through no fault of his own[ ] his earning power is once again adversely affected by his disability. And [s]econd, that the disability which gave rise to his original claim, in fact, continues.

Id. at 33, 584 A.2d at 305 (citations and footnote omitted). Once a claimant has met his burden, "[a]n employer may rebut claimant's proof of loss of earnings by establishing the availability of work that claimant is capable of performing." *Id*. at 34 n.8, 584 A.2d at 305 n.8.

Employer argues that the WCJ and the Board erred in their decisions because Claimant's condition had not worsened, but actually improved. However, that is not the test when determining if benefits should be reinstated. Claimant

only has to show that his disability continues and that it adversely affects his earning power.

"[A] claimant is not required to produce unequivocal medical evidence to establish continuing disability, but rather, the testimony of the claimant alone can be sufficient to satisfy his burden of establishing that his disability continues." *Bailey v. Workers' Comp. Appeal Bd. (US Airways),* 865 A.2d 319, 323 (Pa. Cmwlth. 2005). Claimant testified that he continues to seek medical treatment for his injury, takes medication for his back pain, and has trouble walking, sitting and driving. Notes of Testimony, February 7, 2006 (N.T.) at 16-20; Reproduced Record (R.R.) at 56-62. This testimony alone is enough to establish that Claimant's disability continues. In addition, Claimant testified that he tried to open his own business and to do other work in Florida, but was unable to operate his business or perform the available work due to his injury. N.T. at 14-15; R.R. at 56-57. Therefore, through no fault of his own, Claimant's earning power was adversely affected by his disability.

Since Claimant meets the two-prong *Pieper* test, Employer could only rebut Claimant's proof by establishing the availability of a suitable job based on Claimant's restrictions. The WCJ determined that Dr. Porter, Employer's medical expert, noted that Claimant would never be able to return to his pre-injury position, and would not be capable of performing the light-duty work Employer had offered Claimant. The WCJ found:

> the testimony of Dr. Stanley Porter to be credible and convincing in its entirety . . . as it is consistent with that of Dr. Freylikh. Where the inconsistency lies in these physician's [sic] opinions, is the ability of Claimant to work in some capacity. With regard to this issue alone, this Judge finds the opinions of Dr. Porter to be more credible than those of Dr. Freylikh. Accordingly, this

> Judge finds that where the opinions of Dr. Freylikh differ from that of Dr. Porter they will be rejected.

WCJ Findings of Fact ¶ 44. Therefore, Employer did not establish the availability of suitable work.

Claimant's disability continues and adversely affects his earning power; Employer has failed to establish available, suitable work. Therefore, Claimant has met his burden, and the Board's June 24, 2008 order is affirmed.

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JOHNNY J. BUTLER, Judge

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O R D E R

AND NOW, this 8th day of December, 2008, the June 24, 2008 order of the Workers' Compensation Appeal Board is AFFIRMED.

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JOHNNY J. BUTLER, Judge