IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Terry Bufford,	:	
Petitioner	:	
	:	
v.	:	No. 1553 C.D. 2007
	:	SUBMITTED: January 18, 2008
Workers' Compensation Appeal	:	
Board (North American Telecom),	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** April 17, 2008

Claimant Terry Bufford petitions for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed the order of the Workers' Compensation Judge (WCJ) denying claimant's reinstatement petition. The sole issue before us is whether the WCJ erred in concluding that claimant's current loss of earnings was attributable solely to his voluntary resignation from his time-of-injury employer and not to his original work injury. We affirm.

In September 1998, claimant, while working as a communications installer for North American Telecom (NATC), suffered a work-related low back strain when a vehicle struck him while he was standing on the side of the road and caused him to be pinned against his own vehicle. NATC issued a notice of

compensation payable and claimant eventually returned to work for that time-of-injury employer at a light-duty position.

In March 1999, claimant voluntarily left the available light-duty position with NATC to work at Ronco Machine at a higher paying job with less onerous job requirements. NATC filed a notification of suspension, suspending claimant's benefits due to a lack of earnings loss. After four and one-half years of renewing successive six-month contracts, Ronco declined to renew claimant's contract in January 2003. In March 2003, claimant filed a reinstatement petition therein asserting a worsening of condition and a decreased earning power due to injury. In April 2005, the WCJ denied claimant's reinstatement petition, determining that "[t]he credible evidence establishes that claimant was unable to continue performing modified duty employment on and after January 24, 2003, because he was laid off for economic reasons, and not because of any worsening of his work injury or with regard to any work injury which he sustained while working with [NATC]." WCJ's April 13, 2005 Decision, Conclusion of Law No. 5.

Upon consideration of the WCJ's April 2005 decision, the Board determined that it was unable to determine whether claimant's decision to terminate his employment with NATC was the sole cause of his wage loss. Thus, it remanded the matter to the WCJ to render findings of fact and conclusions of law in that regard and to reconsider, if necessary, the denial of the reinstatement petition consistent with *Welsh v. Workmen's Compensation Appeal Board (L.W. Miller Roofing Company)*, 686 A.2d 59 (Pa. Cmwlth. 1996) and *Horne v. Workers' Compensation Appeal Board (Chalmers & Kubeck)*, 840 A.2d 460 (Pa. Cmwlth. 2004).

Both *Welsh* and *Horne*, in relevant part, involved the denial of benefits where the respective claimants' loss of earnings was due to voluntary decisions to leave their original employers for better jobs and not to their original work injuries. Citing *Welsh*, we reiterated in *Horne* that "an injured claimant who voluntarily leaves a light-duty job with his employer in order to take another job with a different employer assumes the risks typically associated with such a decision, including the risk of a lay-off." *Horne*, 840 A.2d at 467.

In his decision on remand, the WCJ determined that claimant's decision to voluntarily terminate his employment with NATCO was not due to his work injury, but instead due to his desire to obtain higher wages from Ronco. As for the work injury, the WCJ accepted the testimony of Dr. William R. Prebola, board-certified in physical medicine and rehabilitation. Based thereon, the WCJ found that claimant was capable of performing the light-duty NATC position, that there were no duties which he was unable to perform despite his original work injury and that there was no change in his physical condition. Thus, the WCJ concluded that claimant was not entitled to a reinstatement of benefits almost four years after he voluntarily terminated available employment with NATCO. The Board affirmed and claimant's petition for review to this court followed.[1]

What claimant challenges on appeal is what had to be proven in order to warrant reinstatement of benefits following his lay-off by subsequent employer Ronco. To wit, he maintains that the Board should have followed the burden of proof set forth in *Stevens v. Workers' Compensation Appeal Board (Consolidated*

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[1] On appeal, we are limited to determining whether an error of law was committed or whether necessary findings of fact are supported by substantial evidence. *Virgo v. Workers' Comp. Appeal Bd. (County of Lehigh-Cedarbrook)*, 890 A.2d 13 (Pa. Cmwlth. 2005).

Coal Company), 563 Pa. 297, 760 A.2d 369 (2000), which he contends would have changed the result.

In *Stevens*, the Supreme Court considered "the applicable burden of proof for reinstatement of benefits where a claimant has not fully recovered from a work-related injury and has been terminated from employment with a different employer based upon unsatisfactory job performance." *Id.* at 302, 760 A.2d at 372. Stevens suffered a work-related injury with his original employer such that he was unable to return to work in the coal industry. He retrained as a private investigator and obtained a job in that industry, but was unable to do the job adequately despite his best efforts. On appeal, the Supreme Court determined that Steven's reinstatement petition was properly granted where he met his burden of establishing that his work-related injury continued and that his earning power was once again affected through no fault of his own. In so determining, the Court noted that this was not a claimant who deliberately failed to meet his new employer's standards. Lastly, the Court noted that there was no evidence of available employment that Stevens was capable of performing.

Employer NATC contends that the Board correctly found *Stevens* to be inapplicable, maintaining that the *Stevens* standard applies only to injured claimants, not fully recovered from work-related injuries, who were obliged to leave pre-injury employment as a result of disabling work injuries. It asserts that the present case instead concerns an injured claimant who voluntarily left light-duty work with his time-of-injury employer and within his physical restrictions, for reasons unrelated to the original work injury. It thus argues that *Stevens* does not impose an alternative theory of proof for reinstatement and that the appropriate precedents are *Horne* and *Welsh*.

We begin by noting that "[a] suspension of benefits is a suspension of an employer's obligation to pay benefits because, although the claimant may still suffer from a medical disability, there is currently no loss of earnings, i.e., no disability for purposes of the Act, attributable to the work-related injury." *Virgo*, 890 A.2d at 18 (quoting *Pappans Family Restaurant v. Workers' Comp. Appeal Bd. (Ganoe)*, 729 A.2d 664, 665 (Pa. Cmwlth. 1999)). This was the situation when time-of-injury employer NATC secured a suspension following claimant's departure to work at higher wages for post-injury employer Ronco.

As for the standard applicable at this stage of the proceedings, we note that *Stevens*, *Welsh* and *Horne* all recite the oft-quoted traditional reinstatement after suspension standard set forth by the Supreme Court in the seminal case of *Pieper v. Ametek-Thermox Instruments Division*, 526 Pa. 25, 34, 584 A.2d 301, 305 (1990):

> First, [a claimant] must prove that through no fault of his own his earning power is once again adversely affected by his disability. And second, that the disability which gave rise to his original claim, in fact, continues.

Indeed, citing *Welsh*, this court in *Horne* acknowledged that even a claimant who left his original employer to go to a subsequent employer was not forever precluded from a reinstatement of benefits and could attempt to establish his right thereto pursuant to the *Pieper* standard. Finally, the Supreme Court in *Stevens* reiterated the *Pieper* court's statement that, if a claimant proved a recurrence of loss of earnings through no fault of his own, then an employer could "rebut claimant's proof of loss of earnings by establishing the availability of work that claimant is capable of performing." *Stevens*, 563 Pa. at 306, 760 A.2d at 374.

In the present case, we conclude that claimant's dilemma originates with the WCJ's determination of the *facts*, rather than from any misapplication of

the burden of proof.[2] To wit, the WCJ determined that claimant failed to prove that he was entitled to a reinstatement of benefits, accepting the testimony of employer's medical expert that "claimant had been capable of performing the position that he held with NATC and there were no duties which he was not able to perform despite his injury and there was no change in his condition as established by the medical records." WCJ's October 19, 2006 Decision, Finding of Fact (F.F.) No. 5. In addition, the WCJ rejected "the testimony of the claimant that he left the light duty position with NATC to go to Ronco because of his work injury, but on the contrary left because of improved economic circumstances and conditions which would provide him with a greater rate of pay. . . ." F.F. No. 6.

Given the WCJ's fact-findings,[3] that is where our inquiry ends. The burden simply never shifted to NATC to establish the availability of work that claimant was capable of performing.[4] Unlike the *Stevens* claimant, who was physically unable to perform his pre-injury job, claimant in the present case voluntarily left a job with his original employer which he was capable of

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[2] As the *Stevens* court noted, "there are innumerable factual circumstances that may arise in the re-employment context." 563 Pa. at 303 n.2, 760 A.2d at 397 n.2. This court commented upon much the same thing in *Horne*, noting that the situation in that case presented a "variation from the facts and holding in *Welsh*." *Horne*, 840 A.2d at 467.

[3] A WCJ is the final arbiter over questions of credibility and may accept or reject, in whole or in part, the testimony of any witness. *Hills Dep't Store No. 59 v. Workmen's Comp. Appeal Bd. (McMullen)*, 646 A.2d 1272 (Pa. Cmwlth. 1994).

[4] Claimant maintains that the burden should have shifted to NATC because he exhibited no "bad faith" in seeking a better paying job thereby saving NATC's workers' compensation carrier from having to pay the balance of his pre-injury wages. We do not, however, necessarily always equate "fault" with bad faith. Fault, in this context, can be equated with taking responsibility for one's decisions. As we noted in *Welsh*, "where a claimant voluntarily leaves a light-duty position, the duties of which he was able to perform despite his injury, to take another job," his earning power is adversely affected through fault of his own. *Id*. at 61. Such a claimant merely made a decision to take a risk, which due to the uncertainties of life, might or might not have turned out for the better.

performing. The real problem for claimant is that his *factual* situation is more analogous to those in *Horne* and *Welsh*, cases in which the respective claimants were held responsible for their decisions to seek better employment and for any unforeseen consequences emanating from those decisions.

Accordingly, we conclude that the Board did not err in affirming the denial of the reinstatement petition. Thus, we affirm.

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BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 17th day of April, 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