IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mary Ann Bittner, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Highmark Inc.), Respondent	:	No. 1655 C.D. 2007
	:	Submitted: November 30, 2007

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: February 11, 2008

Mary Ann Bittner (Claimant) appeals from the decision and order of the Workers' Compensation Appeal Board (Board) that affirmed the Workers' Compensation Judge's (WCJ) denial of her Petition to Review and Petition to Reinstate Benefits.

Claimant, a claims supervisor at Highmark, Inc. (Employer), was injured in the course of her employment on May 1, 2000, as she lifted a metal bin from a shelf. A Notice of Compensation Payable (NCP) was issued on November 28, 2000, which described her injury as a left elbow strain. Claimant signed a Supplemental Agreement and returned to regular duty with no loss of earnings as of October 24, 2002. Claimant continued to work her regular duty job without loss of earnings until she was discharged for cause on September 22, 2005, for falsifying company records and insubordination.

After her discharge, Claimant filed a Petition to Reinstate benefits and alleged that as of September 24, 2005, she "lost [her] light duty job through no fault of her own." Petition to Review Compensation Benefits and Reinstate Compensation Benefits, October 26, 2005, at 1; Reproduced Record (R.R.) at 4a-5a. Claimant also filed a Petition to Review to Amend the NCP to include "radial tunnel syndrome and neuroma."

Employer filed a timely denial of all of Claimant's material allegations. Employer also filed a Suspension Petition on April 6, 2006, and alleged that "Dr. Askin has released the Claimant to return to work without restrictions" and "Claimant would have been able to return to her work at her pre-injury position at Employer, Highmark, Inc. if she had not been discharged for her own willful misconduct." Petition to Suspend Compensation Benefits, April 6, 2006, at 1-3; R.R. at 120a-122a.

The petitions were consolidated and a hearing was scheduled before the WCJ.

Claimant testified that one of her duties as a supervisor was to draft annual employee performance appraisals. Claimant recommended wage increases based on employee performance appraisals of between zero and three percent, subject to the approval of her director supervisor, Joseph Imgrund (Imgrund). Notes of Testimony, March 9, 2006 (N.T. 3/9/06), at 15-16; R.R. at 41a-42a.

On September 14, 2005, Claimant completed a performance appraisal for Linda Harvey (Harvey) and recommended a 1% raise. N.T. 3/9/06 at 21-22; R.R. at 47a-48a. Imgrund reviewed the appraisal, but because an increase based on

the statistics was not warranted Imgrund instructed Claimant to change the 1% to 0%.[1]

Claimant testified that, using "Wite-Out," she changed the 1% to 0% and placed two originals of the performance appraisal back into Imgrund's bin for his signature. N.T. 3/9/06 at 23; R.R. at 49a. After Imgrund signed the two original forms, he returned them to Claimant. Claimant signed off and gave them to her secretary, Judy Kitner, to send to Human Resources.

On September 22, 2005, Imgrund and Deb Mackin (Mackin) of Employee Relations, met with Claimant to discuss a problem with the Harvey performance appraisal. They showed Claimant Harvey's performance appraisal which contained a 1% increase. A signature block containing Imgrund's signature had been copied, cut out, and taped over Imgrund's signature on the original 0% performance review to make it appear as though he had approved the 1% raise. Employer terminated Claimant on September 22, 2005, for falsifying a document and direct insubordination.

In support of her Review Petition, Claimant presented the deposition testimony of her treating physician, Randall W. Culp, M.D (Dr. Culp), board-certified in orthopedic surgery and hand surgery. Dr. Culp testified that he first treated Claimant on October 18, 2005, after her discharge from Employer. She had previously undergone an "epicondylar release and radial tunnel decompression"

[1] As Imgrund explained, an employee must have an "exceed expectations rating" in order to get any kind of increase. Because Harvey only had an "achieved expectations rating" Imgrund did not agree with Claimant's recommendation of the 1% raise. Notes of Testimony, June 9, 2006 (N.T. 6/9/06), at 10; R.R. at 137a.

and a "carpal tunnel release." Deposition of Randall W. Culp, M.D., May 23, 2006, (Dr. Culp Deposition) at 12, 14; R.R. at 220a, 222a. Dr. Culp performed surgery on Claimant to move a nerve and remove scar tissue from the first surgeries. Dr. Culp opined that the diagnosis for which he treated her "emanated from the natural progression of her initial injury of May of 2000." Dr. Culp Deposition at 18-19; R.R. at 226a-227a.

On cross-examination, Dr. Culp admitted that he did not review records from Claimant's treating physicians in 2005. He also admitted that he did not know the reason why Claimant was not working at the time of his evaluation. He acknowledged that his nerve tests and physical exam were normal, that Claimant had a full range of motion in her wrists and elbow areas and a negative Tinel's test as of January 24, 2006.

Employer presented the testimony of Imgrund, Claimant's supervisor and Director of Claims. Imgrund stated that he signed a performance appraisal on September 14, 2005, for Harvey that showed a 0% raise. The Harvey performance appraisal was subsequently brought to his attention by Human Resources "who notified him that "something was wrong with [Harvey's] merit review." N.T. 6/9/06 at 27; R.R. at 154a. Imgrund explained "because of the pay scale and the fact that [the review] went down [to Human Resources] as an achieves [expectations] with a one percent, that violated our rules." N.T. 6/9/06 at 27; R.R. at 154a.

When Imgrund was shown the performance appraisal, which indicated a 1% increase with an "achieved expectations" rating, he was "confused" because that was not what he signed. Imgrund testified that his signature was taped on top

of the original performance appraisal and purported to give Harvey a 1% increase. It was stipulated that the document had a different signature block taped over with Imgrund's signature. N.T. 6/9/06 at 10-13; R.R. at 137a-140a.

When Imgrund confronted Claimant, "[s]he was clearly upset. Her hand was shaking. Her voice cracked a little bit. Her face was red." N.T. 6/9/06 at 16; R.R. at 143a. Claimant left, and "came back later with another [performance appraisal] form with the achieves expectations and a zero and explained that this is the form that should go down." Id. She also said that "she was on pain medication that was causing her to not think clearly and make mistakes." Id. When Imgrund showed Claimant the "taped together" document, Claimant was silent for 10-15 seconds and then she stated "Well, that was stupid of me." N.T. 6/9/09 at 17; R.R. at 144a. Claimant also stated that "she felt she knew better than the manager what the employee ought to get as far as a merit increase." N.T. 6/9/06 at 18; R.R. at 145a.

Imgrund explained that employees at Highmark receive extensive integrity training. Employer's training records demonstrated that Claimant received this training. Had Claimant not been discharged for this incident she would have been able to continue work in her position as a supervisor. He knew of no medical reason that prevented Claimant from working at that position. N.T. 6/9/06 at 20; R.R. at 147a.[2]

[2] Employer's Human Resources Consultant, Mackin, corroborated Imgrund's testimony, as did Gina Heckard, a Medical Claims Supervisor.

Employer also presented the expert medical deposition of Stanley Askin, M.D. (Dr. Askin), board-certified in orthopedic surgery. Dr. Askin examined Claimant on March 17, 2006, and obtained a history of the Claimant's work injury and subsequent treatment. He noted Claimant had four prior surgical procedures. Deposition of Stanley R. Askin, M.D. (Dr. Askin Deposition), July 14, 2006, at 7-8; R.R. at 300a-301a. Claimant was taking Advil, an over-the-counter medication and was not wearing any braces or splints. Dr. Askin found on physical exam that Claimant had scarring on her left upper extremity and some sensitivity to touch. He found that Claimant had a full range of motion in her neck, shoulders, elbows, wrists, forearms, fingers and thumbs. He performed nerve tests on Claimant and these were negative, as were tests for radial and ulnar nerve damage. Dr. Askin Deposition at 8-12; R.R. at 301a-305a.

Dr. Askin testified, according to Claimant's medical records, she was released to return to work without restrictions by her treating physicians in July 2005. He stated that she was not seen again until after her discharge. Dr. Askin reviewed Claimant's job description and stated to a reasonable degree of medical certainty that Claimant could perform her pre-injury position. Dr. Askin Deposition at 13; R.R. at 306a.

With regard to the Reinstatement Petition, the WCJ concluded as a matter of law that "Claimant failed to meet her burden of proving she was again disabled through no fault of her own." WCJ Decision, December 28, 2006, at 10. The WCJ found the evidence presented by Employer was more credible and persuasive than of the Claimant. With regard to the Review Petition, the WCJ found Dr. Culp's testimony was not credible because it was uninformed. The WCJ found Dr. Askin's testimony to be more credible and persuasive because it was

based upon normal objective diagnostic nerve studies and was consistent with the fact that Claimant had been released to work twice by her treating physicians.

The WCJ dismissed Claimant's Reinstatement and Review Petitions. The Suspension Petition was dismissed as moot. Claimant appealed to the Board which affirmed the WCJ by Order dated August 15, 2007.

On appeal[3], Claimant asserts that the order of the Board should be reversed because the WCJ erroneously placed the burden of proof on *her* to show that she had been fired for cause. She contends that where, as here, an employer alleges that the claimant's loss of earnings is the result of a post-injury involuntary discharge, the employer bears the burden of proof. Claimant also asserts that the WCJ erroneously denied her Review Petition.

1. Reinstatement Petition

A claimant seeking a reinstatement of benefits following a suspension of benefits must prove that, *through no fault of his or her own*, the (1) claimant's *earning power is once again adversely affected by the disability*, and (2) the disability that caused the original claim continues. Latta v. Workers'

[3] This Court's scope of review is limited to determining whether the WCJ's necessary findings of fact are supported by substantial evidence or whether an error of law or a constitutional violation occurred. Columbo v. Workmen's Compensation Appeal Board (Hofmann), 638 A.2d 477 (Pa. Cmwlth. 1994). The WCJ is the sole arbiter of the credibility and the weight of testimony and other evidence, and he or she is free to reject or accept the testimony of any witness in whole or in part. Id. So long as the findings of the WCJ are supported by substantial evidence, they must be accepted as conclusive on appeal. Dancison v. Workmen's Compensation Appeal Board (Penn Hills Senior High School Claims Management Services), 602 A.2d 423 (Pa. Cmwlth. 1992), *petition for allowance of appeal denied*, 532 Pa. 666, 616 A.2d 987 (1992).

Compensation Appeal Board (Latrobe Die Casting Co.), 537 Pa. 223, 642 A.2d 1083 (1994); Pieper v. Amtek-Thermox Instruments Div and Workmen's Compensation Appeal Board. 526 Pa. 25, 584 A.2d 301 (1990). The WCJ must thus determine whether the claimant established a continuation of his disability and loss of earnings. Pieper. As the burdened party, the claimant has to meet both her burden of production and burden of persuasion regarding the required elements. Osram Sylvania v. Workers' Compensation Appeal Board (Wilson), 893 A.2d 186 (Pa. Cmwlth. 2006).

An employer may rebut a claimant's proof of loss of earnings by establishing the availability of work that claimant is capable of performing. Cerny v. Schrader & Seyfried, Inc., 463 Pa. 20, 342 A.2d 384 (1975); Todloski v. Workmen's Compensation Appeal Board (Supermarket Service Corp.), 539 A.2d 517 (Pa. Cmwlth. 1988).

In Vista International Hotel v. Workmen's Compensation Appeal Board (Daniels), 560 Pa. 12, 742 A.2d 649 (1999), our Supreme Court addressed the issue of whether a partially disabled claimant, who is subsequently discharged from employment, is eligible for a reinstatement of total disability benefits. In Vista, the Supreme Court held "as a general rule, where a work-related disability is established, a post-injury involuntary discharge should be **considered in connection with the separate determination of job availability rather than as dispositive of loss of earnings capacity**." Id. at 27, 742 A.2d at 657. The Supreme Court explained "[u]nder this approach, 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.

In other words, where a claimant has been discharged while receiving workers' compensation benefits, whether the workers' compensation claimant may receive post-discharge total disability benefits depends upon whether the *employer* demonstrates that suitable *work was or would have been available* but for circumstances meriting allocation of the consequences of the discharge to the claimant, such as lack of good faith. Osram Sylvania. Whether a claimant is terminated for conduct amounting to bad faith is a factual determination to be made by the WCJ based on credibility determinations. Shop Vac Corp. v. Workers' Compensation Appeal Board (Thomas), 929 A.2d 1236 (Pa. Cmwlth. 2007).

Under this analysis, Claimant is correct to assert that it was Employer's burden to prove that she was fired for cause as part of its burden to prove that *suitable work was or would have been available* to Claimant but for her discharge. It was not Claimant's burden to prove on her Reinstatement Petition that she was unjustly terminated as proof of her *loss of earning capacity*. It was, however, Claimant's burden to prove at the outset that her loss of earning capacity was the result of her original disability. Latta. This she failed to do.

Claimant was on suspension status pursuant to a Supplemental Agreement at the time she was discharged by Employer on September 22, 2005. Again, at that point in time, Claimant had long since returned to work at her pre-injury job with no restrictions or loss of earnings. Contrary to this, Claimant introduced the testimony of Dr. Culp who testified that Claimant suffered from radial tunnel syndrome and ongoing neuroma and that she had a permanent impairment. Given the circumstances as a whole, the WCJ simply did not believe her or her doctor, as was his prerogative. Sun Oil Co. v. Workmen's

Compensation Appeal Board (Thompson), 631 A.2d 1084 (Pa. Cmwlth. 1993). The WCJ specifically accepted the opinion of Dr. Askin who testified that "there was no medical reason for the claimant not to continue to work after September 22, 2005." WCJ Decision, December 28, 2006, at 8. Claimant failed to show that her "disability" i.e., her earning power, was adversely affected by the work-related injury through no fault of her own.

Concerning whether Employer met its burden on rebuttal to show the availability of suitable work, this Court has reviewed the extensive record and agrees with Employer that it met its burden. The WCJ stated that Claimant failed to meet her burden on the Reinstatement Petition, but neglected to mention Employer's burden. Nevertheless, this Court is satisfied that subsumed in the WCJ's finding was the obvious ruling that Employer met its burden of showing suitable work was available, but for Claimant's own wrongful conduct.

This Court does not agree with Claimant that Employer "was never put to the test of shouldering the burden required by our case law." Claimant's Brief at 22. In opposition to the Reinstatement Petition, Employer maintained that Claimant was not entitled to benefits after September 22, 2005, because she was terminated for work-related misconduct, not her elbow injury. Employer presented three fact witnesses to establish the circumstances surrounding Claimant's termination. Claimant then gave her version of events. The WCJ specifically credited Employer's witnesses and its medical expert who testified that Claimant was medically capable of performing her pre-termination position and that she was fired for cause. Accordingly, the WCJ disbelieved Claimant that her loss of earnings was result of any lingering affects of her original injury. This did not amount to an improper shifting of any burden.

2. Review Petition

Next, Claimant contends that the WCJ ignored evidence of the parties' experts, both of whom testified that Claimant's "current condition," i.e., radial tunnel syndrome and neuroma, was the direct result of treatment she received for the work injury. Again, this Court must disagree.

A claimant seeking to review the description of an injury and to include additional injuries must file a review petition within three years of the date of the most recent payment of compensation. Westinghouse Electric Corp/CBS v. Workers' Compensation Appeal Board (Korach), 584 Pa. 411, 883 A.2d 579 (2005). A review petition is appropriate where the claimant seeks to amend an NCP to reflect further injuries and functions as a claim petition. Id. When such a petition is filed the WCJ must treat the respective burdens of the parties as if the review petition were an original claim petition. Id. Here, it was Claimant's burden to establish by substantial competent medical evidence that the radial tunnel syndrome and neuroma that affected her left elbow arose as a direct result of her work-related injury.

Dr. Askin did not concede, as Claimant contends, that her current condition was directly referable to her work injury. Dr. Askin actually did not believe that Claimant had any ongoing disability related to the original injury and he rejected the diagnosis of radial tunnel nerve syndrome based on normal objective diagnostic nerve studies. Dr. Askin believed "**the claimant could have performed her position at Highmark as described**" and that "claimant did not need any restrictions as far as repetitive movement of the left elbow or any type of typing restrictions." WCJ Decision, December 28, 2006, at 8, F.F. No. 62

(Emphasis added). The WCJ accepted Dr. Askin's opinion and disbelieved Dr. Culp.

Because there was no credible medical testimony to support Claimant's Review Petition, the Board did not err when it affirmed the WCJ.

The Order of the Board is affirmed.

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BERNARD L. McGINLEY, Judge

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O R D E R

AND NOW, this 11th day of February, 2008, the Order of the Workers' Compensation Appeal Board in the above-captioned case is hereby affirmed.

BERNARD L. McGINLEY, Judge