IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Alice Saar,	:	
Petitioner	:	
	:	
v.	:	No. 1734 C.D. 2009
	:	SUBMITTED: December 11, 2009
Workers' Compensation Appeal	:	
Board (Shop Vac Corporation),	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** February 17, 2010

Claimant Alice Saar petitions for review of the order of the Workers' Compensation Appeal Board (Board), affirming the denial of reinstatement of her total disability benefits. Claimant's benefits were suspended when she returned to light-duty work, but she was terminated from that position, and is now asking for reinstatement, arguing that her termination was not due to bad faith. We affirm.[1]

Claimant was a long-time employee of Employer Shop Vac Corporation, who was diagnosed with work-related ulnar neuropathy in her left

[1] There is also pending before this court respondent's petition for leave to file a reply to petitioner's reply brief. The issue respondent seeks to address is sufficiently covered in the briefs already submitted. The petition has been denied by separate order.

elbow on October 26, 2005. She began receiving benefits on December 8, 2005, and underwent two elbow surgeries. In early 2007, Claimant was able to return to a modified light-duty job at Shop Vac. Because she had returned to work at a wage greater or equal to her pre-injury earnings, her benefits were suspended on January 16, 2007. However, she was involved in an incident with a coworker, Gail Price, on June 29, 2007, and was terminated from her job with Shop Vac on July 3, 2007. Claimant filed the Reinstatement Petition at issue in this case on September 4, 2007. Both the Worker's Compensation Judge (WCJ) and the Board denied the petition, and the Claimant filed a timely appeal with this court. There is no controversy in this case about Claimant's medical status; the parties agree that she has an ongoing elbow condition, but is physically able to perform modified light-duty work. The sole issue is if, considering the circumstances surrounding Claimant's dismissal from employment, reinstatement of benefits is appropriate.

The circumstances leading to Claimant's dismissal began on the morning of June 29, 2007, when Claimant and Gail Price were manning workstations at adjacent tables between five and ten feet apart. Price was looking for a place to plug in an industrial fan, and suggested she would plug it into Claimant's mouth. Claimant responded in kind, making a somewhat cruder suggestion as to where Price could plug in the cord, and Price, using the cord, mimed the suggested action. By all accounts, the tone of this interaction was not hostile, but jocular. At this point, Price stated she did not know how to start the machine at her workstation, and Claimant went over to help her. Claimant testified that after showing Price how to work the machine, "I lightly took my hand and swiped it across her face and I went back to work." Reproduced Record (R.R.) at 32a. In contrast, Price testified that "[Claimant] came over and said to me, 'You

know something that I haven't done to you in a long time?' and she just slapped me in the face. And I had parts in my hand and I didn't even push her away, I was just dumbfounded." *Id*. at 54a. The parties dispute the intensity of the blow, but the WCJ found it to be more than a slight swipe, but less than a slap or smack. *Id*. at 124a. The WCJ also found the contact was "intentional[] and without license or permission." *Id*. The WCJ found that Price "did nothing to provoke or warrant" the blow, and that she reasonably found it offensive. *Id*. at 125a. Finally, the WCJ found that "Employer considered the circumstances of this interaction and in good faith exercised its discretion in discharging Claimant for this action of causing an unwanted and unconsented to and offensive physical contact with Ms. Price." *Id*. Accordingly, the WCJ denied the reinstatement petition, finding that work was available for Claimant, but that she was discharged from that work not because of her injury, but because of misconduct.

A claimant seeking reinstatement of disability benefits must establish two elements: first, the claimant must prove that through no fault of her own, her earning power is once again adversely affected by her disability and, second, that the disability which gave rise to the original claim continues. Section 413 of the Workers' Compensation Act,[2] 77 P.S. § 772; *Pieper v. Ametex-Thermox Instruments Div.*, 526 Pa. 25, 584 A.2d 301 (1990); *Virgo v. Workers' Comp. Appeal Bd. (County of Lehigh-Cedarbrook)*, 890 A.2d 13 **(**Pa. Cmwlth. 2005). In this case, there is no question that Claimant's disability continues and that the second element is thus met, but the first element is vigorously disputed. In a case such as this, where the claimant returned to a modified position, and then was terminated, the employer must show "that suitable work was available or would

[2] Act of June 2, 1915, P.L. 736, *as amended*.

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." *Virgo*, 890 A.2d at 18, quoting *Stevens v. Workers' Comp. Appeal Bd. (Consolidation Coal Co.)*, 563 Pa. 297, 310, 760 A.2d 369, 377 (2000).

Claimant urges us to adopt a definition of bad faith which would require intent to do harm or malice the part of claimant. She argues that she lacked that requisite intent because she touched Price not out of anger or malice, but in the same jocular spirit of the immediately proceeding exchange about the plug. She testified that "we were just horsin' around." R.R. at 109a.

This argument is without merit. Even under the standard for determining willful misconduct in Unemployment Compensation cases, malice or intent to harm is not required. *Callaghan v. Workers' Comp. Appeal Bd. (City of Philadelphia)*, 750 A.2d 408, 412 n. 3 (Pa. Cmwlth. 2000). As we noted in *Virgo*, bad faith under workers' compensation law is an easier standard for an employer to meet than willful misconduct for Unemployment Compensation purposes. 890 A.2d at 19; *Hertz-Penske Truck Leasing Co. v. Workers' Comp. Appeal Bd. (Bowers)*, 546 Pa. 257, 684 A.2d 547 (1996). Bad faith was found in *Virgo* where "Claimant failed to follow specific instructions at work, took longer than permitted lunch breaks, used her cell phone while on-duty, argued with co-workers, and failed to offer them assistance when needed." 890 A.2d at 19.

Here, regardless of the force of the contact or the atmosphere in which it occurred, the fact remains that Claimant swiped/slapped a coworker. The Board and the WCJ both described the swipe/slap as intentional, unpermitted, unconsented to, unwarranted and unprovoked, all descriptors justified by the record. In the end, it is irrelevant whether Claimant was acting maliciously or "just

horsin' around;" she engaged in inappropriate workplace behavior and was fired for doing so. Thus, the WCJ and the Board properly allocated the consequences of her discharge to Claimant.

BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 17th day of February, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge