IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Indspec Chemical Corporation and Gallagher Bassett Services,	:	
Petitioners	:	
v.	:	No. 1753 C.D. 2007
Workers' Compensation Appeal Board (Whitmer),	:	Submitted: January 25, 2008
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: April 15, 2008**

Indspec Chemical Corporation (Employer), insured by Gallagher Bassett Services and A.I.G. Claim Services, Inc., petitions for review of an order of the Workers' Compensation Appeal Board (Board) that affirmed the Workers' Compensation Judge's (WCJ) decision granting Frank Whitmer's (Claimant) Challenge Petition, granting in part and denying in part Employer's Modification/Suspension Petition, and awarding counsel fees to Claimant for Employer's unreasonable contest. On appeal, Employer argues that the WCJ erred by denying Employer's request to suspend Claimant's benefits without making a finding

regarding the cause for Claimant's job change and resulting wage loss. Employer contends that Claimant's job change and resulting wage loss were not caused by his work injury, but rather by his personal decision to change jobs. Additionally, Employer argues that its contest was reasonable because the evidence that it presented, if accepted by the WCJ, would have supported a suspension of benefits.

Claimant sustained a work injury on June 7, 2005, when he fell off a trailer. Employer recognized Claimant's work injury by a Notice of Compensation Payable (NCP) dated July 6, 2005. Claimant returned to work in a different position on September 13, 2005. Employer issued a Notification of Suspension or Modification on September 15, 2005, based upon Claimant's return to work without a loss of wages. The WCJ partially granted supersedeas, which Claimant challenged by filing a Challenge Petition. On November 3, 2005, Employer filed a Petition to Modify or Suspend Compensation Benefits, effective November 1, 2005, based on Claimant's ability to return to unrestricted work and on the fact that Claimant had returned to work. Claimant answered, denying Employer's allegations.

The proceedings were consolidated, and the WCJ held several hearings at which the parties were given the opportunity to present evidence regarding Claimant's Challenge Petition and Employer's Modification/Suspension Petition. During these hearings, Claimant testified on his own behalf, and Employer presented the testimony of Valerian Szal, supervisor of Labor Relations for Employer. At the start of the last hearing, Employer stipulated that Claimant was disabled from performing the full duties of his pre-injury job as a liquid handler through January 24, 2006. (WCJ Decision, Findings of Fact (FOF) ¶ 5.)

Claimant testified that he had worked for Employer since 1979. (FOF ¶ 4.) At the time of injury, Claimant was a liquid handler, which involved loading and

unloading material from tankers and rail cars, lifting between fifty to sixty pounds, climbing up the sides of rail cars, and crawling on his hands and knees. (FOF ¶ 4.) Claimant testified that, on June 7, 2005, he was trying to take a sample of mixed liquids from a trailer when the pressurized cap came off faster than expected, throwing him off balance and off the trailer about ten feet to the cement ground. (FOF ¶ 4; WCJ Hr'g Tr. at 13-14, January 24, 2006.) Claimant was taken to the hospital where he was kept for three days and treated for injuries to his neck, right scapula, left hip, and left hamstring. (FOF ¶ 4.) Claimant returned to work in September 2005, under the care of Lloyd K. Richless, M.D., doctor for Employer, who had released Claimant with restrictions. (FOF ¶ 4.) Claimant testified that the restrictions from Dr. Richless precluded him from returning to his position as a liquid handler and that he, therefore, voluntarily bid on a job as a sulfonation operator, which involves monitoring computer reads, checking for leaks, climbing a few stairs, and lifting only the weight of a pipe wrench. (FOF ¶ 4.) While the job of sulfonation operator was less physically demanding, Claimant explained that he would not be able to get the same amount of overtime that he did in his pre-injury job as a liquid handler. (FOF ¶ 4.)

On cross-examination, Claimant admitted that he did not speak to management about modifying his pre-injury job to meet his physical restrictions. (FOF ¶ 4.) Claimant stated that there was not a place for him and that he knew he could not do the liquid handler job. (FOF ¶ 4.) Claimant did not agree that he was dissatisfied with the liquid handler position or that he was trying to get out of that position before his work injury. (FOF ¶ 4.) Claimant was then shown bid sheets and asked whether he was still asserting that he did not want to get out of the liquid handler job before his work injury. (FOF ¶ 4.) Claimant responded by indicating that just because he put his name on a bid sheet for another job does not mean that he was interested in taking the other job. (FOF ¶ 4.)

Mr. Szal testified as to why Employer believed that Claimant had wanted to leave his position as a liquid handler even before his injury. Mr. Szal stated that there are three full-time liquid handlers and one position as a fill-in. (FOF ¶ 5.) The liquid handlers' protective gear was changed for safety reasons, and some of the liquid handlers had bid off that position because the new gear was more restrictive, hot, and cumbersome. (FOF ¶ 5.) Mr. Szal testified that Claimant had bid on three positions before his work injury,[1] and on June 21, 2005, after the time of his work injury, Claimant bid on the sulfonation operator position, which paid the same as his pre-injury job but included less overtime. (FOF ¶ 5.) Mr. Szal explained that Claimant was successful in obtaining the position but that, because of the terms of a labor agreement, Claimant would be subject to a five percent reduction in pay for six months. (FOF ¶ 5.) Mr. Szal testified that Claimant bid on the job on his own volition and that the bid was not a result of Employer offering Claimant a position to meet physical restrictions. (FOF ¶ 5.) Mr. Szal also testified about the bidding process, explaining that those who have more senior status have the first chance to accept or deny the available positions. (FOF ¶ 5.)

After summarizing the testimony from both witnesses, the WCJ made factual findings and concluded that all of the evidence presented was credible and convincing. The WCJ found that "Claimant was not capable of returning to his time-of-injury job as a liquid handler as of any material time." (FOF ¶ 7(a).) The WCJ also found that "[w]hen . . . Claimant had sufficiently recovered so as to be capable of performing the sulfonation operator position, which fortunately had already been awarded to him, he returned to work for the Employer of his own volition rather than

[1] Claimant contends that at least one of the bid sheets incorrectly lists his name. (WCJ Hr'g Tr. at 31-32, January 24, 2006.)

sitting at home collecting total disability benefits." (FOF ¶ 7(c).) The WCJ also found that "Claimant's wages were reduced by five percent (5%) for the first six months that he performed the sulfonation operator position" and that "Claimant's weekly earnings as a sulfonation operator [were] also . . . less than his weekly earnings as a liquid handler because there's less overtime available in the sulfonation operator position."[2] (FOF ¶¶ 7(d)-(e).) The WCJ further found that "Employer has never extended a specific offer of a suitable job to . . . Claimant, let alone one that would pay the same or more than he was earning as a liquid handler." (FOF ¶ 7(f).) Based on these findings, the WCJ concluded that Employer failed to sustain its burden of proving that Claimant's benefits should be suspended. (WCJ Decision, Conclusions of Law (COL) ¶ 2.) The WCJ also concluded that Claimant is entitled to receive attorney's fees because Employer's contest was unreasonable. (COL ¶¶ 5, 6.) Employer appealed, and the Board affirmed the WCJ's decision. This appeal ensued.[3]

[2] Overtime pay may be taken into consideration when determining whether or not a claimant's post-injury wages are less than his pre-injury wages. Brennan v. Workmen's Compensation Appeal Board (Lane Constr. Corp.), 683 A.2d 337, 339 (Pa. Cmwlth. 1996) (citing Harper & Collins v. Workmen's Compensation Appeal Board (Brown), 543 Pa. 484, 490, 672 A.2d 1319, 1321-22 (1996)). Employer does not challenge the WCJ's consideration of Claimant's loss of overtime pay on appeal.

[3] This Court's review of the Board's decision is "limited by Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704, to determining whether constitutional rights have been violated, an error of law committed, or whether there is substantial evidence in the record to support the findings of fact." Werner v. Workmen's Compensation Appeal Board (Bernardi Bros., Inc.), 518 A.2d 892, 894 (Pa. Cmwlth. 1986). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Gibson v. Workers' Compensation Appeal Board (Armco Stainless & Alloy Prods.), 580 Pa. 470, 479, 861 A.2d 938, 943 (2004).

On appeal, Employer first argues that the WCJ committed an error of law by declining to suspend Claimant's benefits without making a finding as to the cause for Claimant's job change and resulting wage loss. Specifically, relying on Banic v. Workmen's Compensation Appeal Board (Trans-Bridge Lines, Inc.), 550 Pa. 276, 705 A.2d 432 (1997), Employer contends that the WCJ and the Board erred by analyzing this case under Kachinski v. Workers' Compensation Appeal Board (Vepco Const. Co.), 516 Pa. 240, 532 A.2d 375 (1987),[4] without first determining whether or not Claimant's wage loss is causally connected to his work injury. Employer further contends that, similar to the claimant in Banic, Claimant's change in jobs and resulting wage loss were not caused by his work injury but, rather, were caused by something unrelated—his own personal decision. Thus, Employer contends that Claimant's benefits should have been suspended. We disagree.

In Banic, the employer sought to suspend the claimant's benefits after he became incarcerated. Id. at 279, 705 A.2d at 434. The Supreme Court determined that, under those circumstances, the employer was entitled to a suspension of benefits

[4] Kachinski sets forth the following requirements:

> 1. The employer who seeks to modify a claimant's benefits on the basis that he has recovered some or all his ability must produce medical evidence of a change in condition.
> 2. The employer must then produce evidence of a referral (or referrals) to then open job (or jobs), which fits in the occupational category for which the claimant has been given medical clearance, e.g., light work, sedentary work, etc.
> 3. The claimant must then demonstrate that he has in good faith followed through on the job referral(s).
> 4. If the referral fails to result in a job the claimant's benefits should continue.

Kachinski, 516 Pa. at 251-52, 532 A.2d at 379-80.

because the claimant's incarceration, rather than his work injury, was the cause of his loss of earnings during his incarceration. Id. at 285-86, 705 A.2d at 436-37. In making that determination, the Supreme Court explained that "Kachinski is not to be rigidly applied to situations in which an employer seeks to suspend . . . a claimant's benefits because the claimant's loss of earning power is no longer caused by the work-related injury but rather by something unrelated to the work related injury." Id. at 283, 705 A.2d at 436.

Employer is correct that where a work injury is no longer the cause of Claimant's loss of earnings, it can seek a suspension of benefits. However, unlike the situation in Banic, here Employer did not prove that Claimant's wage loss was caused by something other than his work injury. While Mr. Szal testified that, in general, some liquid handlers were upset about the change in protective clothing and that Claimant had bid on other positions prior to his injury (WCJ Hr'g Tr. at 12-13, March 14, 2006), such testimony does not establish that Claimant's decision to move into the sulfonation operator position was based on a personal decision unrelated to his injury. In fact, Employer stipulated that Claimant was not capable of returning to his pre-injury job as a liquid handler, and Mr. Szal's testimony indicates that the sulfonation operator position was not posted and bid on until after Claimant sustained his injury. (WCJ Hr'g Tr. at 5, 13-14, March 14, 2006.) Moreover, when questioned as to whether he left the liquid handler job due to his work injury, Claimant agreed by testifying that he didn't feel that he could do the job. (WCJ Hr'g Tr. at 25, January 24, 2006.) Furthermore, when questioned as to whether or not he was dissatisfied with the liquid handler position, Claimant testified that he enjoyed the liquid handler position and that he probably would have stayed in that position, if not for his work injury. (WCJ Hr'g Tr. at 25, January 24, 2006.) Additionally, even after Claimant was shown bid sheets for positions that he had bid on prior to his work injury, Claimant did not retract his earlier testimony but instead testified that just

because he bid on another job did not mean that he was going to take that job. (WCJ Hr'g Tr. at 31-32, January 24, 2006.) Thus, the evidence presented does not establish that Claimant's change in jobs and resulting wage loss were caused by something other than his work injury. Because Employer failed to meets its burden of proving that Claimant's change in jobs and resulting wage loss were not related to his work injury, there was no need for the WCJ to make a finding as to the cause of Claimant's change in jobs and resulting wage loss.

Alternatively, Employer argues that, even if Kachinski is applicable to this case, it was precluded from satisfying the Kachinski requirements. Kachinski requires an employer to produce medical evidence of a change in a claimant's condition and evidence that it offered the claimant an available job within his restrictions. Kachinski, 516 Pa. at 251-52, 532 A.2d at 379-80. Employer contends that it customarily satisfies the Kachinski-type job offer by modifying an employee's pre-injury job to fit his medical restrictions. According to Employer, it was not given the opportunity to offer Claimant his pre-injury job with modifications because Claimant bid on the job as a sulfonation operator before Employer was notified of Claimant's restrictions. However, Employer did not present any evidence to establish that it was feasible to modify Claimant's pre-injury job in any way or that Employer had offered Claimant another job. Therefore, based upon our review of the record, we are unable to conclude that the WCJ erred in denying Employer's request to suspend Claimant's benefits.

Employer's second argument is that attorney's fees should not have been awarded to Claimant because Employer's contest was reasonable. Employer believed that Claimant's loss of wages was not caused by his work injury and that it presented

sufficient evidence which, if believed by the WCJ, would have supported a suspension of benefits. We disagree.

Section 440(a) of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, *as amended*, added by Section 3 of the Act of February 8, 1972, P.L. 25, 77 P.S. § 996(a), provides that a claimant who prevails, in whole or in part, is entitled to recover reasonable attorney's fees from the employer, unless the employer has satisfied its burden of showing a reasonable basis for contest. McGuire v. Workmen's Compensation Appeal Board (H. B. Deviney Co.), 591 A.2d 372, 374 (Pa. Cmwlth. 1991). "A reasonable contest is established where the evidence is conflicting or subject to contrary inferences." Lemansky v. Workers' Compensation Appeal Board (Hagan Ice Cream Co.), 738 A.2d 498, 501 (Pa. Cmwlth. 1999). This Court has held that "[t]he question of reasonableness of contest goes beyond the mere finding of facts. It is a legal conclusion that must be arrived at based on the facts as found by the [WCJ], if supported by substantial evidence, and the record." Hartman v. Workmen's Compensation Appeal Board (Firestone Tire & Rubber Co.), 333 A.2d 819, 822 (Pa. Cmwlth. 1975).

Here, as discussed above, Employer failed to provide sufficient evidence to meet its burden of proving that Claimant's change in jobs and resulting wage loss were caused by something other than his work injury. Thus, contrary to Employer's argument, the evidence presented would not support a suspension of benefits. Accordingly, the WCJ properly determined that Employer's contest was unreasonable and that Claimant is entitled to attorney's fees.

Based on the foregoing reasons, the Board's decision is affirmed.

RENÉE COHN JUBELIRER, Judge

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O R D E R

NOW, April 15, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **affirmed**.

RENÉE COHN JUBELIRER, Judge