IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kenneth Jason,	:	
Petitioner	:	
	:	
v.	:	No. 2248 C.D. 2010
	:	Submitted: February 4, 2011
Workers' Compensation Appeal Board	:	
(Walbridge RB, LLC.),	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: September 21, 2011

Kenneth Jason (Claimant) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) granting Claimant's claim petition for ongoing partial disability benefits but refusing to award total disability benefits as of the date Claimant was laid off by Walbridge RB, LLC (Employer). In doing so, the Board affirmed the decision of the Workers' Compensation Judge (WCJ) that because Claimant was laid off at his own request, he was not entitled to total disability. Finding no error, we affirm.

Claimant began working for Employer in January 2006 on construction of a power plant. On March 3, 2006, Claimant slipped on ice and fell, sustaining an injury to his neck, right shoulder and back. Claimant sought medical treatment and returned to work at a light-duty job. On March 22, 2006, Claimant filed a claim petition seeking partial disability because his light-duty job paid less

than his pre-injury wages. Employer acknowledged that a work injury occurred, but disputed the injury description and the duration of disability.[1] The matter was assigned to the WCJ, who held a series of evidentiary hearings.

Claimant testified in support of his petition. He explained that he was injured on a Friday, and on Monday morning he reported for work. However, he soon went to the emergency room because of pain in his neck, his right arm and in his back, extending down both legs. Claimant was given medical restrictions, and Employer gave Claimant a light-duty job sweeping and mopping work trailers and emptying trash cans. Claimant stated that he overextended himself at work on June 2, 2006, and went back to the emergency room. He was treated by Dr. Stuart Hartman, who allowed him to return to his light-duty job on June 9, 2006.

Claimant continued to work light-duty until Employer laid him off on August 14, 2006. Claimant testified that Employer simply "sent me on my way" with no explanation of why. Notes of Testimony, October 2, 2006, at 7 (N.T. ___).[2] Claimant denied that he asked to be laid off. He testified that Employer's safety supervisor, Michael Wales, was harassing him and treating him badly, and he so informed his supervisor, John Levelle. When asked if he ever said anything that Levelle could have construed as asking for a layoff, Claimant replied: "To be honest, I don't recall." N.T., January 12, 2007, at 11. Claimant testified that he continues to have problems with his neck and back.

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[1] Employer later filed a termination petition based on the opinion of its medical expert, Willie Thompson, M.D., that Claimant had fully recovered from his work injury as of June 26, 2006. The WCJ denied the termination, and it is not at issue on appeal.

[2] Although Claimant submitted a reproduced record, he included only selected pages from the various hearing transcripts. Therefore, we must cite to the certified record.

Claimant presented the testimony of Dr. Hartman, who is board certified in physical medicine and rehabilitation. Dr. Hartman first saw Claimant on June 6, 2006, and diagnosed him with the following work-related conditions: aggravation of pre-existing degenerative disc disease in the cervical and lumbar spine; cervicothoracic and lumbosacral strains; right sacroiliac syndrome and right shoulder bursitis. Dr. Hartman initially took Claimant off of work; however, he released Claimant to perform light-duty work on June 8, 2006, after Employer called Dr. Hartman and informed him that it had light work for Claimant. Dr. Hartman saw Claimant again on August 15, 2006, at which time his condition had improved. Dr. Hartman opined that Claimant could have continued working light-duty at that time.

Employer presented the testimony of John Levelle, its project superintendent. Claimant reported to Levelle on at least three occasions that he wanted to be laid off because of his disagreements with Employer's safety supervisor. The final request occurred on Friday, August 11, 2006, when Claimant asked Levelle to be laid off because "he just couldn't take it anymore." N.T., December 8, 2006, at 18. Levelle replied that he would think about it, and when he came back on Monday morning he told Claimant, "I'll do what you asked for. I'll lay you off." *Id*. Levelle helped Claimant gather his things and Claimant left.

Employer also presented the testimony of safety supervisor Michael Wales, who testified about his problems with Claimant. He testified that on one occasion, Claimant became rude and disrespectful, muttered obscenities and walked away when Wales instructed him to provide a doctor's note so that Claimant could be paid for time he spent at the doctor's appointment. On another occasion, Wales attempted to talk to Claimant about a work assignment, but

Claimant ignored Wales. In yet another incident, Wales accompanied Claimant on June 2, 2006, to the emergency room. When Wales told the medical staff that Employer had light-duty work available, Claimant "erupted" at Wales and "had a small tirade." N.T., December 8, 2006, at 37.

The WCJ accepted as credible the testimony of Dr. Hartman.[3] The WCJ credited Claimant's testimony that he sustained a work injury causing impairment, but he rejected Claimant's testimony that Employer laid him off without an explanation. Instead, the WCJ accepted as credible the testimony of Michael Wales regarding the conflict between Claimant and himself. The WCJ also credited John Levelle's testimony that Claimant asked for a layoff because of his disaffection for Wales.

Based on his credibility determinations, the WCJ found that Claimant sustained a work-related injury and that Employer provided him with light-duty work he was capable of performing, at a loss of earnings. However, the WCJ found that Claimant's loss of earnings after August 14, 2006, was not related to the work injury or inability to do the light-duty job. Rather, the WCJ found that Claimant asked to be laid off because he was unhappy with Wales, and that Employer laid him off solely because he requested it. The WCJ awarded Claimant partial disability benefits from the date of his work injury on March 3, 2006, until the cessation of his employment on August 14, 2006, and suspended benefits thereafter.

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[3] The WCJ has complete authority over questions of credibility, conflicting medical evidence and evidentiary weight. *Sherrod v. Workmen's Compensation Appeal Board (Thoroughgood, Inc.)*, 666 A.2d 383, 385 (Pa. Cmwlth. 1995).

Claimant appealed, arguing that the WCJ erred in suspending his benefits. Claimant argued that he was entitled to total disability benefits or, at a minimum, ongoing partial disability benefits because he was laid off. The Board held that Claimant was not entitled to total disability benefits, but was entitled to ongoing partial disability benefits because he remains unable to return to his pre-injury job and, as such, continues to experience a loss of earning capacity due to his work injury. The Board remanded for specific findings about Claimant's exact earning capacity and his partial disability rate. On remand, the WCJ adopted the parties' stipulation resolving those issues. Claimant renewed his appeal, and the Board reaffirmed its prior adjudication. Claimant then petitioned for this Court's review.[4]

On appeal, Claimant argues that the Board erred in not awarding him total disability benefits upon his layoff. Claimant urges this Court to adopt a "bright-line rule" that a layoff, regardless of the reason for it, will automatically result in total disability benefits, because it is a unilateral action by the employer. Claimant contends that a layoff must be viewed differently than a Claimant's voluntary resignation or a termination for cause, both of which preclude receipt of total disability benefits. We disagree.

A claimant is entitled to workers' compensation benefits if his work-related injury causes a disability, *i.e.*, a loss of earning power. *Curtis v. Workers' Compensation Appeal Board (Berley Electric Company)*, 730 A.2d 528, 533 (Pa.

[4] This Court's review of an order of the Board is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether Board procedures were violated, whether constitutional rights were violated or an error of law was committed. *City of Philadelphia v. Workers' Compensation Appeal Board (Brown)*, 830 A.2d 649, 653 n.2 (Pa. Cmwlth. 2003).

Cmwlth. 1999). Where an injured claimant returns to a light-duty job and is subsequently laid off, he is entitled to a presumption that his loss of earnings resulted from his work injury. *Weber v. Workers' Compensation Appeal Board (Shenango, Inc.)*, 729 A.2d 1249, 1252 (Pa. Cmwlth. 1999). Once the claimant has established a loss of earning capacity, the claimant should generally be entitled to total disability benefits unless the employer proves that suitable work within the claimant's medical restrictions was available or "would have been available but for circumstances which merit allocation of the consequences of the discharge to the claimant, such as the claimant's lack of good faith." *Vista International Hotel v. Workmen's Compensation Appeal Board (Daniels)*, 560 Pa. 12, 29, 742 A.2d 649, 658 (1999).

Because Claimant was laid off from a light-duty job, he was entitled to a presumption that his loss of earnings resulted from his work injury. However, this presumption was rebutted by Employer's evidence that Claimant asked to be laid off because he did not get along with the safety supervisor. It was Claimant's personal choice to leave his job. The work injury did not prevent him from performing the work Employer had provided him.[5]

A layoff, a resignation and a firing all involve a separation from employment. The key inquiry is why the separation occurred. If the separation is attributable to the work injury, then total disability benefits are payable. On the other hand, if the separation is attributable to the claimant, they are not payable. Here, even though Employer laid off Claimant, it was done at Claimant's request.

[5] In his brief, Claimant states that he asked to be laid off because of his difficulties with Wales, which occurred "[d]ue to circumstances arising out of his work injury." Claimant's brief at 9. To the extent Claimant is attempting to link his layoff to the work injury, we reject that premise. Claimant's work injury did not cause a problem. Claimant's conduct towards Wales did.

Thus, Claimant's increased loss of earnings was not attributable to the work injury but to his own action. The Board correctly refused to award total disability benefits as of the layoff date.[6]

Accordingly, the order of the Board is affirmed.

MARY HANNAH LEAVITT, Judge

[6] *EMI Company v. Workers' Compensation Appeal Board (Rathman)*, 738 A.2d 33 (Pa. Cmwlth. 1999), which Claimant relies on, does not compel a different result. In *EMI*, the claimant returned to work against his doctor's orders, could not fully perform his job and then was laid off for economic reasons. This Court upheld an award of benefits because the claimant's loss of earnings was actually due to his work injury. The Court did *not* hold that an injured claimant who is laid off is always entitled to benefits. Because Claimant was provided with light-duty work that he could perform, this case is distinguishable from *EMI* and is more akin to *Shenango, Inc. v. Workmen's Compensation Appeal Board (Weber)*, 646 A.2d 669 (Pa Cmwlth. 1994). There, the claimant was deemed not entitled to benefits where he was given a modified job within his restrictions and he then experienced a loss of wages because he voluntarily decided to bid on a different job.

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ORDER

AND NOW, this 21st day of September, 2011, the order of the Workers' Compensation Appeal Board dated September 21, 2010, in the above captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge