IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Pittsburgh and UPMC Benefits Management Services, Inc., Petitioners	:	
v.	:	No. 278 C.D. 2010
	:	Submitted: October 1, 2010
Workers' Compensation Appeal Board (Sabina), Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** December 30, 2010

Petitioner, the City of Pittsburgh (Employer), petitions for review of an order of the Workers' Compensation Appeal Board (Board) which affirmed, with modification, a decision of a Workers' Compensation Judge (WCJ). The WCJ denied Employer's petition for suspension of compensation benefits of Louis Sabina (Claimant), and awarded counsel fees and costs to Claimant after determining that Employer's contest was not reasonable. We affirm.

Claimant injured his back in September 1997, while working for Employer. Claimant began to receive workers' compensation benefits based upon an unexecuted agreement. In October 1999, Employer terminated Claimant's

employment. Following his termination, Claimant did not apply for, or receive, any pension or retirement benefits, and he has not actively sought employment.

Dr. Patrick N. Smith, M.D., conducted an independent medical examination (IME) of Claimant on April 4, 2008. Following that examination, Dr. Smith issued a report indicating that Claimant had not fully recovered from his work-related injury and was not capable of performing his pre-injury job, but that he was capable of performing "medium-level" work. Employer sent Claimant a notice of ability to return to work dated April 30, 2008. On June 19, 2008, Employer filed a petition for suspension of benefits with the Bureau of Workers' Compensation.

The WCJ conducted a hearing at which only Claimant testified. The only evidence Employer offered was Dr. Smith's medical report and the notice of ability to return to work. Employer offered no evidence regarding work availability within Claimant's limitations. The WCJ concluded that, because there was no evidence that Claimant had retired or voluntarily left the work force, Employer, in addition to demonstrating a change of Claimant's medical condition, also had the burden to show that it had referred Claimant to suitable and available jobs. The WCJ concluded that Employer failed to offer any evidence of job availability and denied Employer's suspension petition. The WCJ also determined

that Employer's contest was not reasonable and awarded quantum meruit attorney's fees and costs to Claimant.

Employer appealed to the Board, which agreed with the WCJ's decision on the merits of the suspension petition. Employer and Claimant both appealed the part of the WCJ's order relating to the award of fees and costs. The Board agreed with the WCJ that the contest was not reasonable.

Employer petitioned this Court for review, raising the following issues: (1) whether the Board erred in concluding that Employer had failed to establish that Claimant had either retired or voluntarily left the workforce; and (2) whether the Board erred in affirming the WCJ's order awarding fees and costs for an unreasonable contest.[1]

An employer seeking a suspension of benefits always bears the burden to establish that a claimant's medical condition has changed. *Kachinski v. Workmen's Comp. Appeal Bd. (Vepco Const. Co.)*, 516 Pa. 240, 532 A.2d 374 (1987). Employers generally must also establish a claimant's earning power by demonstrating that suitable employment was made available to a claimant. *Kachinski*. This latter requirement, however, does not apply if a claimant has voluntarily left the workforce with the intention not to return. *Southeastern*

[1] This Court's standard of review of an order of the Board is limited to determining whether constitutional rights were violated, an error of law was committed, or necessary factual findings of the WCJ are not supported by substantial evidence. 2 Pa. C.S. § 704.

Transp. Auth. v. Workmen's Comp. Appeal Bd. (Henderson), 543 Pa. 74, 669 A.2d 911 (1995).

Employer asserts that the WCJ erred by concluding that, because Employer did not offer evidence of job availability, Employer was not entitled to the suspension of Claimant's benefits. Employer contends that the WCJ erred in concluding that, in order to establish that Claimant had voluntarily left the workforce, and thus not be required to show job availability, Employer had to prove that Claimant was receiving some type of work-related pension benefit or Social Security indicating that Claimant had retired.

Employer relies upon our Supreme Court's decision in *Henderson*. In *Henderson*, a claimant, Henderson, testified that he was receiving Social Security retirement benefits and that he had applied for a pension from his employer, SEPTA. During the course of the workers' compensation proceedings, Henderson began to receive his pension benefits. Henderson also testified that he was not looking for work. In resolving the question of whether Henderson was forced into retirement because of a loss of earning power resulting from his injury or whether the claimant had voluntarily withdrawn from the workforce, our Supreme Court stated as follows:

> It is clear that disability benefits must be suspended when a claimant voluntarily leaves the labor market upon retirement. The mere possibility that a retired worker may, at some future time, seek employment does not

> transform a voluntary retirement from the labor market into a continuing compensable disability. An employer should not be required to show that a claimant has no intention of continuing to work; such a burden of proof would be prohibitive. For disability compensation to continue following retirement, a claimant must show that he is seeking employment after retirement or that he was forced into retirement because of his work-related injury.

Henderson, 543 Pa. at 79, 669 A.2d at 914.

Employer argues that although *Henderson* involved a claimant whose "retirement" included his application for, and receipt of, Social Security and pension benefits, and who, additionally, testified that he was not looking for work, the WCJ in this case also should have concluded that Claimant had "retired" based solely upon Claimant's failure to look for work while he was receiving total disability benefits and after Employer issued its notice of ability to return to work.

Employer, observing that the term "retirement" may encompass more than the receipt of retirement benefits, asks this Court to interpret the Supreme Court's holding in *Henderson* by referring to the dictionary definition of that word. We do not believe reference to definitional guidance is necessary. We can draw no more from the Supreme Court's holding in *Henderson* than the proposition that, when facts indicate that a claimant is receiving pension and/or Social Security benefits, and a claimant states that he is not seeking work, a employer may be entitled to a presumption that a claimant has retired or voluntary withdrawn from the workforce.

In *City of Pittsburgh v. Workers' Compensation Appeal Board (Robinson)*, 4 A.3d 1130 (Pa. Cmwlth. 2010), this Court considered whether a claimant's receipt of a disability pension created a presumption that the claimant had voluntarily left the workforce. The Court reasoned that the specific disability pension the claimant was receiving had required that employee only to demonstrate that she could not perform her time-of-injury job, pertinently observing that a claimant similarly must prove that she cannot perform time-of-injury duties as part of her claim petition seeking workers' compensation benefits. The Court stated that "accepting this type of disability pension by itself, would not, without more, indicate that the claimant has voluntarily left the entire workforce. Rather, it is merely an acknowledgment that the claimant cannot perform her time-of-injury job, which has already been determined through a claim petition or notice of compensation payable." *Id.*, 4 A.3d at 1137.

In *Robinson*, we held that when an employer asserts that it is entitled to a presumption that a claimant has voluntarily left the workforce based upon the claimant's receipt of a pension, an adjudicator must first consider the nature of the particular pension before concluding that an employer is entitled to a presumption that a claimant has voluntarily left the workforce. In this case, Claimant has not applied for or received any such benefit.

In its statement of the case, Employer refers to Claimant's testimony concerning his medical condition following his injury, observing that "[Claimant] offered no medical evidence to suggest that he was or had ever been completely physically incapable of performing any level of work." (Employer's Br. at 7.) Employer appears to suggest that a disabled employee must look for work notwithstanding the lack of any formal indication that his medical condition has changed. In this case, the notice of ability to return to work indicates that, as of the date of the notice, Claimant was able to perform some type of work, but Employer cannot rely upon evidence of Claimant's failure to look for work before the issuance of the notice as support for its position that Claimant voluntarily left the workforce. The notice in no way indicates that Claimant was able to work in any capacity before that date. The only evidence Employer could possibly rely upon would be actions, or inaction, on the part of Claimant during the brief period between the issuance of the notice of ability to return to work (April 30, 2008) and the date Employer filed its petition (June 19, 2008).

In accordance with *Henderson* and *Robinson*, Employer did not offer any evidence to establish that, under the totality of the circumstances, Claimant intended to retire or otherwise voluntarily removed himself from the workforce.[2]

[2] In *Robinson*, we held that "[i]n order to show that efforts to return a claimant to the workforce would be unavailing because a claimant retired, an employer must show, by the totality of the circumstances, that a claimant has chosen not to return to the workforce.

Although the WCJ, in part, based his conclusion that Claimant had not voluntarily left the workforce on the fact that Claimant was not receiving a pension, it is clear that the WCJ also determined that Employer simply failed to offer any evidence to create a presumption that Claimant had voluntarily left the workforce. Therefore, the Board did not err in affirming the WCJ's ultimate conclusion that Employer had a burden under *Kachinski* to demonstrate the availability of suitable work for Claimant, and that Employer failed to satisfy that burden.

Employer also argues that the Board erred in affirming the WCJ's award of attorney's fees and costs. When a claimant prevails over an employer who has sought to alter a claimant's benefits, generally an award of attorney's fees is the rule, and an Employer seeking to avoid such an award must demonstrate that its contest was reasonable. *Yespelkis v. Workers' Comp. Appeal Bd. (Pulmonology Assocs.)*, 986 A.2d 194, 196 (Pa. Cmwlth. 2009). The question of whether a contest was reasonable is a question of law subject to this Court's review, and the primary focus in this inquiry is whether an employer sought to resolve a factual issue of genuine dispute rather than to harass a claimant. *Id*.

While the courts have concluded that a contest is reasonable where an employer correctly perceives a legitimate legal issue that the courts have not

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Circumstances that could support a holding that a claimant has retired include: (1) where there is no dispute that the claimant retired; (2) the claimant's acceptance of a retirement pension; or (3) the claimant's acceptance of a pension and refusal of suitable employment within her restrictions." *Robinson*, 4 A.3d at 1138.

addressed, *Rutherford v. Workmen's Compensation Appeal Board (Philadelphia Electric)*, 649 A.2d 166 (Pa. Cmwlth. 1994), if a legal issue lacks any merit, the contest is not reasonable. Thus, if the law provides no support for an employer's novel legal argument, the courts may reject such a claim as frivolous and conclude as a matter of law that the employer did not bring a reasonable contest.

Employer suggests that its attempt to create new law renders the contest reasonable. Employer asserts that the issue of whether Claimant had retired and/or removed himself from the workforce could have been decided in its favor, notwithstanding the fact that Claimant was not receiving a pension or other retirement benefit. Employer argues that Claimant's testimony that he had not worked in ten years could have resulted in a factual finding that he had retired. Further, Employer contends that its interpretation of the Supreme Court's language in *Henderson* presented a reasonable legal argument.

We agree with the Board that the WCJ did not err in concluding that Employer's contest was not reasonable. As suggested above, Employer's position is not reasonable under the law. Even though some of the decisions rendered by this Court do not explicitly state that a particular claimant's "retirement" resulted from the payment of a disability or other pension benefit alone, Employer's suggestion that the Supreme Court's decision in *Henderson* can be stretched to accommodate Employer's reasoning is not well-founded in the law. Further, in

this case, Claimant never testified that he intended to "retire," and, therefore, his testimony alone could not have supported a finding that he had retired. Based upon Employer's ongoing payment of compensation to Claimant, we must presume that Claimant remained totally disabled up until the time of Dr. Smith's report and the Employer's issuance of the notice of ability to return to work.

Accordingly, we affirm the Board's order.

P. KEVIN BROBSON, Judge

Judge Pellegrini dissents.

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O R D E R

AND NOW, this 30th day of December, 2010, the order of the Workers' Compensation Appeal Board is AFFIRMED.

P. KEVIN BROBSON, Judge