IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gwendolyn Holland, Petitioner	:	
v.	:	No. 615 C.D. 2008
Workers' Compensation Appeal Board (SEPTA), Respondent	:	Submitted: July 11, 2008

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: September 24, 2008

Gwendolyn Holland (Claimant) petitions for review of the order of the Workers' Compensation Appeal Board (Board) affirming the decision of a workers' compensation judge (WCJ) that denied her petition to reinstate compensation benefits pursuant to the provisions of the Pennsylvania Workers' Compensation Act (Act).[1] We affirm.

On October 13, 2003, Claimant filed a claim petition for compensation benefits in which she alleged that she suffered injuries due to repetitive motion while in the course and scope of her employment as a bus driver for SEPTA (Employer). On October 28, 2005, a WCJ issued a decision and order

[1] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1 – 1041.4; 2501 – 2708.

granting Claimant's claim petition, concluding that Claimant suffered work-related injuries in the nature of bilateral carpal tunnel syndrome and flexor tenosynovitis in both elbows. As a result, the WCJ ordered Employer to pay Claimant $465.59 per week in total disability benefits for the periods of July 16, 2003 to October 6, 2003, and November 24, 2003 to December 3, 2004. The WCJ suspended Claimant's compensation benefits as of December 3, 2004, based upon Claimant's return to her position of bus driver with Employer at the same or greater wages.

On December 30, 2005, Claimant filed a petition to reinstate her compensation benefits as of November 20, 2005. In the petition, Claimant alleged, inter alia, that she had suffered a recurrence of her work-related injury, that her condition had worsened, and that she had suffered a loss of earnings as a result of her condition. On January 5, 2006, Employer filed an answer to the petition denying all of the material allegations raised therein. Hearings before a WCJ ensued.

At the hearings, in support of the petition, Claimant testified and presented the deposition testimony of Todd Kelman, D.O., a physician board certified in orthopedic surgery. In opposition to the petition, Employer presented the deposition testimony of Pedro Beredjiklian, M.D., a physician board certified in orthopedic surgeon.

On July 25, 2007, the WCJ issued a decision disposing of Claimant's petition in which he made the following relevant findings of fact:

> 6. Dr. Beredjiklian concluded that Claimant had bilateral carpal tunnel syndrome, and was status post carpal tunnel release, and possibly had left trigger thumb. Dr. Beredjiklian opined that both the carpal tunnel syndrome and the left trigger thumb were chronic in nature. Dr. Beredjiklian agreed that Claimant had not fully recovered from her July 16, 2003 work injuries. Dr. Beredjiklian stated that he tended to give surgical

> patients the benefit of the doubt, as it was difficult to fully recover after surgery. Dr. Beredjiklian stressed that there was no clinical evidence of carpal tunnel syndrome on either hand or of a left trigger thumb at his examination. Dr. Beredjiklian testified that Claimant's condition did not worsen in 2005. Dr. Beredjiklian based this conclusion on the history obtained from Claimant, as she informed him that her symptoms of pain, numbness and tingling had not changed significantly in the last several months to several years. Dr. Beredjiklian added that his physical examination did not produce findings that explained why Claimant stopped working in November of 2005 approximately six weeks prior to his exam. Dr. Beredjiklian opined that, as of his December 21, 2005 exam, Claimant was capable of continuing to work in any capacity, including medium to heavy-duty work. Dr. Beredjiklian disagreed with Dr. Kelman's opinion that Claimant's alleged trigger thumb was a consequence of her left carpal tunnel surgery, adding that it was the first time that he had heard such an opinion.
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> 7. Claimant's testimony did not credibly or persuasively establish that she stopped working as a bus driver for Employer on November 10, 2005 due to a worsening of her July 16, 2003 work injuries….
>
> 8. Dr. Kelman's testimony did not credibly or persuasively establish that Claimant stopped working on November 10, 2005 due to a worsening of her July 16, 2003 work injuries….
>
> 9. Dr. Beredjiklian's testimony credibly and persuasively established that Claimant's stopping work on November 10, 2005 was not due to a worsening of her July 16, 2003 work injuries. In accepting this opinion, this Judge notes that Dr. Beredjiklian's opinion was supported by the history he obtained from Claimant, his examination findings and his review of Claimant's pertinent post-injury medical records. Accordingly, this Judge accepts Dr. Beredjiklian's testimony on this issue.

WCJ Decision at 3-5.

Based on the foregoing, the WCJ concluded, inter alia, that Claimant had not satisfied her burden of proving that she was entitled to the reinstatement of her compensation benefits. Id. at 5. Accordingly, the WCJ issued an order denying Claimant's reinstatement petition. Id.

On August 6, 2007, Claimant appealed the WCJ's decision to the Board. On March 17, 2008, the Board issued an opinion and order affirming the WCJ's decision. Claimant then filed the instant petition for review.[2]

In this appeal, Claimant contends that the Board erred in affirming the WCJ's decision denying her reinstatement petition because the WCJ's decision did not comport with the Pennsylvania Supreme Court's opinion in Latta v. Workmen's Compensation Appeal Board (Latrobe Die Casting Co.), 537 Pa. 223, 642 A.2d 1083 (1994). More specifically, Claimant contends that the WCJ erred in failing to shift the burden of proof to Employer to show that Claimant's work-related disability had ceased, as required by Latta, and that the evidence presented by Employer did not satisfy its burden of proof in this regard.

Generally, a claimant seeking the reinstatement of compensation benefits, following the suspension of those benefits, must prove that: (1) through no fault of her own, the claimant's disability, i.e., earning power, is again adversely affected by the work-related injury, and (2) the disability which gave rise to the original claim, in fact, continues. Bethlehem Steel Corp. v. Workers' Compensation Appeal Board (Laubach), 563 Pa. 313, 760 A.2d 378 (2000);

[2] This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, a violation of Board procedures, and whether necessary findings of fact are supported by substantial evidence. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

Stevens v. Workers' Compensation Appeal Board (Consolidation Coal Co.), 563 Pa. 297, 760 A.2d 369 (2000); Pieper v. Ametek-Thermox Instruments, 526 Pa. 25, 584 A.2d 301 (1990). Where a claimant seeks the reinstatement of suspended benefits, no causal connection between his current condition and the work-related injury must be established because the causal connection is presumed, and the claimant must only show that while her disability has continued, her loss of earnings has recurred. Bethlehem Steel Corp.; Stevens.

Indeed, as the Pennsylvania Supreme Court has recognized:

> Given the nature of suspension status, which actually *acknowledges* a continuing medical injury, and suspends benefits only because the claimant's earning power is currently not affected by the injury, the testimony of the claimant alone could easily satisfy his burden of establishing that his work-related injury continues. To hold otherwise would improperly require a claimant re-establish that which has already been agreed to and acknowledged. Therefore, we hold that expert medical evidence is not necessary to establish that the prior work-related injury continues. Rather, once a claimant testifies that his prior work-related injury continues, the burden shifts to his employer to prove the contrary. Where an employer fails to present evidence to the contrary, the claimant's testimony, ***if believed by the*** [***WCJ***], is sufficient to support the reinstatement of the suspended benefits.

Latta, 537 Pa. at 227, 642 A.2d at 1085. Thus, even though a claimant is not required to produce expert medical evidence or to re-prove the original work-related injury in reinstatement proceedings, the WCJ is empowered to reject the claimant's testimony as not credible and as not supported by the medical evidence in the record. Harding v. Workers' Compensation Appeal Board (Arrowhead Industrial), 706 A.2d 896 (Pa. Cmwlth. 1998).

In addition, in a workers' compensation proceeding, the WCJ is the ultimate finder of fact. Hayden v. Workmen's Compensation Appeal Board (Wheeling Pittsburgh Steel Corp.), 479 A.2d 631 (Pa. Cmwlth. 1984). As the fact finder, the WCJ is entitled to accept or reject the testimony of any witness, including a medical witness, in whole or in part. General Electric Co. v. Workmen's Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), petition for allowance of appeal denied, 529 Pa. 626, 600 A.2d 541 (1991). Questions of credibility and the resolution of conflicting testimony are within the exclusive province of the fact finder. American Refrigerator Equipment Co. v. Workmen's Compensation Appeal Board (Jakel), 377 A.2d 1007 (Pa. Cmwlth. 1977). Thus, determinations as to witness credibility and evidentiary weight are within the exclusive province of the WCJ and are not subject to appellate review. Hayden.

As noted above, in this case, the WCJ concluded that Claimant had failed to sustain her burden of proof with respect to her reinstatement petition because her testimony and the deposition testimony of Dr. Kelman offered in support thereof were deemed to be not credible. See WCJ Decision at 3-5. Although Claimant cites to portions of her testimony which support her burden of proof in this case, we will not accede to Claimant's request to review the WCJ's credibility determinations as they are patently not subject to our review. General Electric Co.; Hayden; American Refrigerator Equipment Co.

Moreover, contrary to Claimant's assertion, the WCJ's rejection of the evidence presented in support of her petition does not violate the dictates of our Supreme Court's opinion in Latta. See Harding, 706 A.2d at 900 ("Even though Claimant was not required under *Latta* to produce expert medical evidence or to re-prove the 1983 injury, the WCJ was nonetheless empowered to reject Claimant's

testimony as not credible and as unsupported by the medical evidence in the record. While Claimant's actual burden under *Pieper* was to prove that his initial disability continued, or that it had not ceased over time, the WCJ correctly concluded that Claimant failed to satisfy his burden of proof….") (footnote omitted).

Because Claimant failed to sustain her burden of proof in the first instance, the WCJ did not err in ultimately denying her reinstatement petition in this case. See, e.g., Hinton v. Workers' Compensation Appeal Board (City of Philadelphia), 787 A.2d 453, 456 (Pa. Cmwlth. 2001) ("Once a claimant testifies that his or her prior work-related injury continues, the burden then shifts to employer to prove the contrary. 'Where an employer fails to present evidence to the contrary, the claimant's testimony, if believed by the [WCJ], is sufficient to support reinstatement of the suspended benefits.' Moreover, a claimant does not have to re-establish the causal relationship, i.e., the job relatedness of the injury. Nevertheless, the burden does remain with claimant to affirmatively establish that it is the work-related injury which is causing his or her present disability.") (citations and footnote omitted). In short, Claimant's allegations of error in this regard are patently without merit.

Accordingly, the order of the Board is affirmed.

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JAMES R. KELLEY, Senior Judge

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O R D E R

AND NOW, this 24th day of September, 2008, the order of the Workers' Compensation Appeal Board, dated March 17, 2008 at No. A07-1689, is AFFIRMED.

JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gwendolyn Holland,	:	
Petitioner	:	
	:	
v.	:	No. 615 C.D. 2008
	:	SUBMITTED: July 11, 2008
Workers' Compensation Appeal	:	
Board (SEPTA),	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

CONCURRING OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** September 24, 2008

I fully concur in the result reached by the majority, and in its conclusion that the claimant simply failed in her burden of persuasion. I write separately, however, to state my disagreement with the majority's reliance on the line of cases beginning with *Pieper v. Ametek-Thermox Instruments Division*, 526 Pa. 25, 584 A.2d 301 (1990), and the statement derived therefrom that, in a reinstatement petition, "no causal connection between [claimant's] current condition and the work-related injury must be established because the causal connection is presumed[.]" Majority op. at 5. I believe this statement is overbroad and does not apply in a case such as this. *Pieper*, et al., hold that where a claimant returns to work under a suspension or modification of benefits and subsequently *loses his employment*, in a reinstatement petition claimant must show only that,

while his previously established medical disability has *continued*, his loss of earnings has recurred through no fault of his own. *See, e.g.*, *Latta v. Workmen's Comp. Appeal Bd. (Latrobe Die Casting Co.)*, 537 Pa. 223, 226-27, 642 A.2d 1083, 1084-85 (1994); *Stevens v. Workers' Comp. Appeal Bd. (Consolidation Coal Co.)*, 563 Pa. 297, 303-05, 760 A.2d 369, 373-74 (2000). Put another way, after the loss of his post-injury job, the claimant's continuing medical impairment is presumed to have the same negative impact upon his earning power as it had originally. The presumption puts claimant back in the position he was in after his claim for compensation was accepted or proven, but before benefits were modified or suspended, *i.e.*, claimant is entitled to total disability benefits unless or until employer establishes that work is available within claimant's restrictions. Properly understood, the *Pieper* line of cases simply serves to allocate the burden of proving job availability in a consistent fashion under procedurally distinct but substantively identical circumstances.

This, of course, has little application where, as here, reinstatement is sought on the basis that claimant's medical condition has *changed*. First, job availability is not the issue, as claimant stopped working on her own, claiming that her condition had worsened. More significant, the new medical condition and its causal connection to claimant's work-related injury have not been previously established. Thus, the current medical condition must be affirmatively demonstrated.[1] *Reed v. Workmen's Comp. Appeal Bd. (McClure Co.)*, 630 A.2d

[1] I acknowledge reference to the *Pieper* standard in certain cases wherein this court is faced with a claim based upon a change in claimant's medical condition. However, in these cases, unlike those involving loss of a job for economic reasons, we have consistently required affirmative proof of a causal connection between the job-related injury and the worsened medical state, contrary to the presumption *Pieper* would command in the job loss cases.

961, 963-64 (Pa. Cmwlth. 1993). In addition, where the causal connection between this new condition and the work-related injury is not obvious, it must be proven by unequivocal medical evidence. *See Sacred Heart Hosp. v. Workers' Comp. Appeal Bd. (Mutis),* 703 A.2d 577, 579 (Pa. Cmwlth. 1997); *Hinton v. Workers' Comp. Appeal Bd. (City of Philadelphia),* 787 A.2d 453, 456 (Pa. Cmwlth. 2001) ("the burden [remains] with claimant to affirmatively establish that it is the work-related injury which is causing his or her present disability"). Specifically, with respect to a worsened condition resulting from medical treatment, we have recently noted our Supreme Court's decision in *Baur v. Mesta Machine Co*., 393 Pa. 380, 143 A.2d 12 (1958), and reiterated that "in such a situation, the plaintiff has been allowed to recover uniformly *based upon proof of a causal connection between the initial work injury, the subsequent medical treatment and the resulting injury or illness suffered by the employee*." *Brockway v. Workers' Comp. Appeal Bd. (Collins),* 792 A.2d 631, 635 (Pa. Cmwlth. 2002).

I believe this is the proper analytical paradigm and that, given the WCJ's findings of fact, the Board properly concluded that Ms. Holland failed to meet her burden.

BONNIE BRIGANCE LEADBETTER,
President Judge