IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William DeWees,	:	
Petitioner	:	
	:	
v.	:	
	:	
Workers' Compensation Appeal	:	
Board (County of Delaware/Fair Acres	:	
Geriatric Center),	:	No. 671 C.D. 2007
Respondent	:	Submitted: September 14, 2007

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge*
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE COLINS **FILED: February 1, 2008**

William DeWees (Claimant) petitions for review of a decision of the Workers' Compensation Appeal Board (Board) which affirmed the decision of a Workers' Compensation Judge (WCJ) that addressed Claimant's claim petition as a reinstatement petition and granted it for a closed period, but suspended benefits, and also denied: (1) a termination petition filed by Fair Acres Geriatric Center (Employer); and, (2) a reinstatement petition filed by Claimant regarding an earlier work injury.

Claimant sustained an initial work injury in 1997, which Employer acknowledged by a Notice of Compensation Payable (NCP) as a sprain and strain of the right rotator cuff. In 1999, after Claimant returned to work with no wage

*The decision in this case was reached after the date that Judge Colins assumed the status of senior judge.

loss, his benefits from this injury were suspended by a Supplemental Agreement. On May 19, 2003, Claimant sustained another injury to his right shoulder during the course of his job duties with Employer, who issued a Notice of Temporary Compensation Payable on June 13, 2003, which converted to an NCP as a matter of law.

On August 22, 2003, Claimant returned to work and entered into a Supplemental Agreement with Employer on September 3, 2003, as a result of which Claimant's compensation was suspended. On September 18, 2004, Claimant again left work. On October 18, 2004, Claimant filed a claim petition for his 2003 work injury, and a reinstatement petition relating to his 1997 injury. On March 17, 2005, Employer filed a termination petition with regard to Claimant's 2003 work injury.

The WCJ treated Claimant's claim petition as a reinstatement petition and granted it for the period from September 19, 2004 to August 8, 2005. The WCJ concluded that Claimant had voluntarily removed himself from the entire labor market, and therefore suspended Claimant's benefits as of August 9, 2005. Additionally, the WCJ denied Employer's termination petition and Claimant's reinstatement petition for his 1997 work injury. Claimant appealed from the WCJ's decision, and Employer filed a cross-appeal to be considered only in the event that the WCJ's suspension of Claimant's benefits was reversed. On March 20, 2007, the Board affirmed the WCJ's determination, and therefore, did not address Employer's cross appeal. This appeal followed.[1]

[1] This court's appellate review over 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. *Republic Steel Corporation v. Workmen's Compensation Appeal Board (Petrisek)*, 537 Pa. 32, 640 A.2d 1266 (1994).

On appeal, Claimant contends that the Board erred in affirming the WCJ's finding that Claimant voluntarily retired from the job market and the WCJ's subsequent suspension of Claimant's benefits effective August 8, 2005, because Claimant, since retiring from his job with Employer, had not sought employment. In this regard, Claimant avers that the WCJ, acting *sua sponte*, erroneously suspended his benefits where no suspension or modification of his benefits had been sought by Employer. Claimant also argues that the WCJ erroneously found that he had failed to fulfill his obligation to "look for available employment," when, according to Claimant, this obligation arises only after Claimant receives an LIBC-757 Notice of Ability to Return to Work form advising that he has been cleared to return to work. Claimant avers that he never received this form. Finally, Claimant takes issue with the WCJ's rejection of what he avers was his uncontradicted testimony that he was amenable to and would accept modified work within his medical restrictions if such were made available to him.

Upon review, we conclude that substantial evidence of record supports the Board's affirmance of the WCJ's determination. First, we concur with the Board's rejection of Claimant's contention that the WCJ erroneously *sua sponte* suspended his benefits where Employer had not expressly sought either suspension or modification of benefits. Considering that Claimant's petition for benefits was before the WCJ for determination, the facts surrounding Claimant's retirement solely from his job with Employer, and Claimant's subsequent failure to seek other employment are appropriate subjects for the WCJ to address. As the Board notes, in *Hepler v. Workers' Compensation Appeal Board (Penn Champ/Bissel, Inc.)*, 890 A.2d 1126, 1129 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 588 Pa. 785, 906 A.2d 545 (2006), this Court quoted *County of*

Allegheny (Department of Public Works) v. Workers' Compensation Appeal Board (Weis), 872 A.2d 263, 265 (Pa. Cmwlth. 2005) as follows:

> In Henderson, the Court stated,
>
> > 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 913 (emphasis added).
>
> Here, it is undisputed Claimant retired and did not seek employment after retirement, Therefore, Claimant was required to prove he was forced into retirement because of his work-related injury.

In the present matter, as in *Hepler*, Claimant voluntarily left his job with Employer, and made no attempt to seek other employment. Moreover, Claimant failed to proffer any evidence that he discussed with Employer the possible availability of work within his medical restrictions. The following direct and

cross-examination testimony from Claimant's August 9, 2005 hearing before the WCJ is relevant:

> The Judge: Within those restrictions that you talked about placed on you by Dr. Sing, have you looked for any employment within those restrictions?
>
> [Claimant]: No.
>
> The Judge: Is there a reason you haven't looked for employment within those restrictions?
>
> [Claimant]: No, . . . I retired due to the fact I could no longer do that job, and . . . I haven't looked for work.
>
> . . . .
>
> The Judge: Well, let's assume for the sake of argument that the employer finds a job out there that you could do within your restrictions, would you accept such work?
>
> [Claimant]: I guess I would have to think it over.

(Hearing Notes of Testimony, 8/9/2005, pp. 29-29).

In *County of Allegheny*, 872 A.2d at 266, we stated:

> Our interpretation is consistent with our statement in Shannopin Mining Co. v. Workers' Comp. Appeal Bd. (Turner), 714 A.2d 1153 (Pa. Cmwlth. 1998):
>
> > We recognize that there may be circumstances where a claimant may be forced to retire from his or her time-of-injury job due to a work-related injury, but may not be disabled from other type of work. In that situation, the claimant must

> show that he or she has not voluntarily withdrawn from the entire *labor market* and is open to employment within his or her physical capabilities in order to be entitled to benefits under the [Act].

Id. at 1155 n.5 (emphasis in original).

Applying the rationales set forth in *Hepler* and *County of Allegheny* to the present matter, we concur with the Board's conclusion that Claimant unarguably failed to meet his burden of proving that he did not willingly retire from the entire labor market but was forced to retire from his job with Employer because of his work-related injuries, and that he is amenable to employment within his medical restrictions.

We next address Claimant's argument that the Board erred in affirming the WCJ's determination that Claimant had failed to pursue his obligation to "look for available employment," because allegedly Claimant never received the LIBC-757 Notice of Ability to Return to Work form, and therefore his obligation to look for employment never arose. The notes of testimony from Claimant's April 22, 2005 deposition indicate that he knew or should have known that he was released for work by Dr. Malumed to whom he was referred by Employer after his initial injury. (Deposition Notes of Testimony, 4/22/05,pp. 35-36). Additionally, Claimant never raised this issue either before the WCJ or in his appeal to the Board, and accordingly it is waived. *Brown v. Workers' Compensation Appeal Board (Knight Ridder, Inc./Philadelphia)*, 856 A.2d 302 (Pa. Cmwlth. 2004).

Finally, we concur with the Board's affirmance of the WCJ's determination that Claimant failed to establish that he was available for modified work within his medical restrictions. Contrary to Claimant's averment, his

testimony before the WCJ on this issue was equivocal as evinced when he responded to the WCJ that were he offered a job within his medical restrictions, he would "have to think it over." As a result, the WCJ found that Claimant failed to meet his burden of proof and found him lacking in credibility. Sufficient evidence of record supports this credibility determination. In *Kasper v. Workers' Compensation Appeal Board (Perloff Bros.)*, 769 A.2d 1243, 1246, (Pa. Cmwlth. 2001), this Court stated:

> Deciding credibility is the quintessential function of the fact-finder, particularly one who sees and hears the testimony. It is not an exact science, and the ultimate conclusion comprises far more than a tally sheet of its various components. . . .
>
> > As we have recently noted:
> >
> > > [T]he WCJ's prerogative to determine the credibility of witnesses and the weight to be accorded evidence has not been diminished by the amendments to Section 422(a). Such determinations are binding on appeal unless made arbitrarily and capriciously.
>
> Empire Steel Castings, Inc. v. Workers' Compensation Appeal Board (Cruceta), 749 A.2d 1021, 1027 (Pa.Cmwlth.2000). . . .

Accordingly, based upon the foregoing discussion, the order of the Workers' Compensation Appeal Board is affirmed.

JAMES GARDNER COLINS, Senior Judge

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O R D E R

AND NOW, this 1st day of February 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

JAMES GARDNER COLINS, Senior Judge