[J-3-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

GENERAL ELECTRIC COMPANY,	:	No. 47 WAP 2002
	:	
Appellant	:	Appeal from the Order of the
	:	Commonwealth Court entered March 8,
	:	2002 at No. 2116CD2001, affirming the
v.	:	Order of the Workers' Compensation
	:	Appeal Board entered August 17, 2001 at
	:	No. A00-1650.
WORKERS' COMPENSATION APPEAL	:	
BOARD (MYERS),	:	
	:	
Appellees	:	ARGUED: March 3, 2003

DISSENTING OPINION

MADAME JUSTICE NEWMAN **DECIDED: May 27, 2004**

Because I believe that the Workers' Compensation Judge (WCJ) erroneously concluded that the position offered to James Myers (Claimant) was akin to the provision of a temporary light-duty position by the employer, with a modification of Claimant's benefits for a period of ninety days to reflect his refusal of employment, I must respectfully dissent. This Court granted allowance of appeal to ascertain whether, as the WCJ found, subsidized employment is the functional equivalent of temporary light-duty employment. We further agreed to review whether an offer of a subsidized position commands the reinstatement of total disability benefits when the period of subsidization ends.

Where an employer presents a claimant with an offer of available work within the claimant's physical limitations, and the claimant refuses to accept such an offer, the claimant's

benefits may be modified. Kachinski v. Workers' Compensation Appeal Bd. (Vepco Constr. Co.), 532 A.2d 374 (Pa. 1987). This Court established the following four-pronged test to be applied in this type of case:

> 1. The employer who seeks to modify a claimant's benefits on the basis that he has recovered some or all of his ability must first produce medical evidence of a change in condition. [1]
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> 2. The employer must then produce evidence of a referral (or referrals) to a 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.
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> 3. The claimant must then demonstrate that he has in good faith followed through on the job referral(s).
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> 4. If the referral fails to result in a job then claimant's benefits should continue.

Id. at 380. We further emphasized that:

> Obviously, the viability of this system depends on the good faith of the participants. The referrals by the employer must be tailored to the claimant's abilities . . . and be made in a good faith attempt to return the injured employee to productive employment, rather than a mere attempt to avoid paying compensation. By the same token, employees must make a good faith effort to return to the work force when they are able, and their benefits can be modified for failure to follow up on referrals or for willfully sabotaging referrals. **If an employee refuses a valid job offer**[,] **his benefits can also be modified if it is**

[1] We have previously held, as recognized by the Majority, that the four-prong analysis of Kachinski is not to be rigidly applied to situations in which an employer seeks to suspend or terminate a claimant's benefits because the claimant's loss of earning power is no longer caused by the work-related injury. Banic v. Workmen's Compensation Appeal Bd. (Trans-Bridge Lines, Inc.), 705 A.2d 432 (Pa. 1997). That is to say, in such situations, we have allowed a modification of benefits without requiring proof of all of the Kachinski prongs. Id. at 436-37. Our decisions demonstrate that both the facts and the basis upon which the modification of benefits is sought determine which prong or prongs of Kachinski need not be met. See, e.g., Dillon v. Workmen's Compensation Appeal Bd. (Greenwich Collieries), 640 A.2d 386 (Pa. 1994) (recognizing that the first prong of Kachinski requiring medical evidence of a change in condition does not apply if a modification of benefits is not premised on the assertion that the injured employee has recovered some or all of his ability).

found he had no basis upon which to do so.

Id. (emphasis added). Notably, this Court did not limit the modification of an employee's benefits to those instances in which the employer offers the employee only permanent work. In the instant matter, General Electric Co. (Employer) met the first two Kachinski prongs, but the Claimant failed to meet the latter two prongs. Accordingly, I believe that Employer is entitled to an indefinite modification of benefits where Claimant failed to pursue the Smart position in good faith. This is also applicable on the basis that Claimant refused a valid offer of employment.

From the record evidence, the WCJ found that the telephone survey position offered to Claimant would have been available to him for only ninety days and, on that basis, concluded that the reduction of Claimant's workers' compensation benefits required by his refusal of the position without good cause must be limited in effect to the same period. Employer contends first, that the Commonwealth Court erred as a matter of law in equating a limited period of employer subsidization with temporary employment and, in any event, that each of the tribunals below misread the record as supporting such a limitation on the term of the position offered to Claimant. I believe that the Majority has subscribed to this same error.

I agree with Employer that this record contains inadequate evidentiary support for the necessary finding below that the position offered to Claimant would have been available for only ninety days. The testimonial evidence is of usual cases, common practices, and typical ranges of the term of subsidization. There is simply no evidence that a ninety-day period of subsidization was preset at the outset for the telephone survey position offered to Claimant. Evidence that a five-hundred hour or ninety-day subsidization period is "common"; that there is "usually" an end point to subsidization; that "typically" the Smart Telecommunication's job referrals from Expediter are subsidized for an "indefinite period of time," "anywhere from a week to three months," and that the longest period of subsidization in the experience of the witness

was "about six months" is, irrespective of the assessment of the credibility of the witnesses and the weight to be accorded to the evidence, simply inadequate to support the WCJ's pivotal finding: that the telephone survey "position was a funded position only guaranteed for a period of ninety (90) days."

The Majority discerns from the deposition testimony that, after the period of subsidization, the position, pay, and hours of Claimant would change rendering this a completely different job. However, just as there is no evidence that the subsidy was to end after five hundred hours or ninety days, there is also no evidence of record that the position, pay, and hours would change following the termination of the subsidy period.

In applying Kachinski, the Commonwealth Court imposed a fairly strict application of the good faith requirement. Where a claimant is offered suitable employment, the claimant cannot decide that he does not like the position,[2] resign and accept another position he cannot perform,[3] or remain in a lower paid position[4] to avoid a suspension of benefits because of bad faith. The rationale employed by the Commonwealth Court in these cases is that, unlike a claimant who has accepted employment that is terminated, the claimants in these cases are unemployed, not because of a medical disability, but because they chose not to accept employment made available by the employer. Thus, when an employer offers a claimant a position within his physical limitations, a claimant is obligated to accept that offer of available employment in good faith or

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[2] See, e.g., Korol v. Workmen's Compensation Appeal Bd. (Sewickley County Inn), 615 A.2d 916 (Pa. Cmwlth. 1992); Scheib v. Workmen's Compensation Appeal Bd. (Ames Dept. Store), 598 A.2d 1032 (Pa. Cmwlth. 1991); Hendry v. Workmen's Compensation Appeal Bd. (Miller & Norford, Inc.), 577 A.2d 933 (Pa. Cmwlth. 1990).

[3] See, e.g., Brooks v. Workers' Compensation Appeal Bd. (Brockway Glass), 770 A.2d 810 (Pa. Cmwlth. 2001).

[4] See, e.g., IGA Food Mart v. Workmen's Compensation Appeal Bd. (Kugler), 674 A.2d 359 (Pa. Cmwlth.), petition for allowance of appeal denied, 683 A.2d 886 (Pa. 1996).

suffer a suspension of his benefits. Further, the Commonwealth Court has concluded that, once a claimant has exhibited bad faith by refusing employment within his restrictions, the claimant cannot cure his bad faith by finding another job. See, e.g., Liggett v. Workmen's Compensation Appeal Bd. (SEPTA), 669 A.2d 513 (Pa. Cmwlth. 1996); Johnson v. Workmen's Compensation Appeal Bd. (McCarter Transit, Inc.), 650 A.2d 1178 (Pa. Cmwlth. 1994); Korol v. Workmen's Compensation Appeal Bd. (Sewickley Country Inn), 615 A.2d 916 (Pa. Cmwlth. 1992). This is the teaching of Kachinski, as applied by the Commonwealth Court in many opinions.

Employer here relies on Bennett v. Workmen's Compensation Appeal Bd. (Hartz Mountain Corp.), 632 A.2d 596 (Pa. Cmwlth. 1993). In Bennett, the claimant followed up on numerous referrals produced by the employer. However, when he was offered a permanent, light-duty position at a lower wage than his pre-injury job, he refused the offer, and sabotaged the interview by giving the interviewer three reports stating that he was totally disabled. Three months later, the light-duty position was eliminated for economic reasons. The employer sought a modification of benefits and the referee[5] reduced the claimant's benefits from total to partial, based upon the wages he would have earned had he accepted the position proffered. The claimant in that case argued that he was entitled to a reinstatement of total disability benefits as of the date when the job was eliminated. He contended that the employer was in the same position after the job was eliminated that he would have been had the claimant accepted the job. The referee rejected this argument and the Commonwealth Court affirmed finding that:

> [W]here a claimant acts in bad faith in refusing suitable and available work, permanent at the time it is offered, the claimant's benefits are reduced for an indefinite period by the amount of earnings the job would have produced. Where a claimant acts in bad faith in refusing a position[,] which is only a temporary job when offered, benefits will be modified for a period equal to the length of time the job was actually available. The determination of the duration of the position, either

[5] Prior to the 1993 amendments to the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1-1041.4; 2501 - 2626, the role now fulfilled by workers' compensation judges was performed by referees.

> temporary or permanent, is to be made at the time of the referral and is to be based upon the information available to the employer and claimant at the time of the referral.

Id. at 600 (footnote omitted) (emphasis added). In the instant matter, there is no evidence that the position offered was temporary; that it had an end date; and neither Claimant nor Employer considered it temporary.

This Court remanded Bennett for a decision in accordance with Dillon v. Workmen's Compensation Appeal Bd. (Greenwich Collieries), 640 A.2d 386 (Pa. 1994). I believe that our concern in Bennett was the requirement imposed by the Commonwealth Court that a finding of bad faith on the part of a claimant justifies a reduction of temporary total disability benefits for an indefinite period. Thus, we remanded Bennett so that the Commonwealth Court could consider whether Bennett's loss of earning capacity was due to a lack of available employment through no fault of his own. In Dillon, we addressed, inter alia, the issue of economic disability. There we said:

> Inasmuch as both capacity to work and availability of work affect the extent of an injured employee's disability (loss of earning power), it follows that disability, for compensation purposes, may change from partial to total or vice versa based on a change in one with or without a change in the other. [The] Commonwealth Court correctly recognized this in Lukens[, Inc. v. Workmen's Compensation Appeal Bd., 568 A.2d 981 (Pa. Cmwlth. 1989)] when it held that the "medical evidence of a change in condition" criterion recognized in Kachinski applies only when the employer "seeks to modify a claimant's benefits on the basis that he has recovered some or all of his ability, " and *such proof "is not required when that is not the basis for seeking a decrease in benefits*."

Dillon, 640 A.2d at 392 (emphasis added). In Dillon, a claimant sought modification of his award for partial disability to one for total disability on the basis that no jobs within his physical restrictions were available. Based on this showing, this Court found that his loss of earning power was not his fault and awarded total disability compensation. I believe that this was the examination that we directed the Commonwealth Court to undertake in the remand of Bennett.

We have said that, where an increase in existing benefits is sought, the inability to return to

light-duty work may be offered to establish the impact on earning power and the burden shifts to the employer to demonstrate that the claimant has the ability to generate earnings consistent with his physical limitations. Stanek v. Workers' Compensation Appeal Board (Greenwich Collieries), 756 A.2d 661 (Pa. 2000). Relying on Dillon, this Court went on to state in Stanek that:

> Where, however, as here, the claimant has not engaged in the light-duty work which was found to be available and consistent with his physical limitations in connection with the award of compensation for partial disability, his burden will be greater. First, depending upon the circumstances, the claim may be vulnerable to denial on the basis of voluntary retirement. Second, the claimant will not be afforded the benefit of the presumption of total disability from an inability to perform an existing light-duty job. Rather, the claimant is in the position of having to prove a negative (*i.e.*, *that there are no jobs available in which he could work consistent with his physical limitations*). In this setting, medical testimony which concedes that a claimant retains the physical ability to accomplish light-duty work, with no vocational or other form of assessment as to why such work is not available, *will be deemed fatal to the claim*.

Id. at 669 (internal citations omitted) (emphasis added and in original). In the matter *sub judice*, medical testimony was admitted to the effect that Claimant was cleared for the Smart position. Moreover, Claimant did not introduce any evidence that, despite his failure to accept this position, there were no other light-duty jobs available within his medical restrictions. After Employer adduced evidence that Claimant refused an offer of employment within his medical restrictions, the burden shifted to Claimant, pursuant to Stanek and Dillon, to demonstrate that there were no light-duty jobs available to him.

Critically, Bennett holds that the distinction between temporary and permanent employment is made at the time that the job is proffered. If a claimant rejects a position that is considered permanent at the time it is offered, then the claimant has exhibited bad faith. It is beyond cavil that Kachinski makes no distinction between temporary and permanent employment. Pursuant to Kachinski, within the context of bad faith and with certain exceptions not relevant to the instant

matter,[6] a claimant must at least attempt a position offered that complies with his medical restrictions, regardless of whether the position is temporary or permanent, or face modification of benefits. Where Bennett continues and holds that partial disability benefits may not be reinstated where a job essentially evolved into a temporary position -- one that is based on a showing of bad faith -- Dillon and Stanek hold that, for a reinstatement of benefits to occur, the claimant must demonstrate that there are no jobs available within his or her medical restrictions.

Further support for the proposition that benefits are suspended where a claimant exhibits bad faith in pursuing available work is provided by the decision of this Court in Harle v. Workmen's Compensation Appeal Bd. (Telegraph Press, Inc.), 658 A.2d 766 (Pa. 1995). In Harle, we determined that, when a claimant with a residual disability returned to work with a different employer without any loss in earning power, and subsequently lost that job due to the closing of the business, the claimant was not entitled to a reinstatement of total disability benefits because the loss of earning power was unrelated to the disability. As in the instant matter, Claimant's loss of earning power is not due to his physical limitations, but to his failure to pursue employment offered to him that fit within his medical and occupational restrictions. There was no discussion in Harle as to whether the employment became temporary because of the business closure.

In Inglis House v. Workmen's Compensation Appeal Bd. (Reedy), 634 A.2d 592 (Pa. 1993), a claimant filed a claim petition alleging an injury and entitlement to total disability benefits from her original employer, even after she returned to work with another employer without a loss of earning power but with some residual disability. She voluntarily quit that job and filed for reinstatement of total disability benefits because her original employer did not prove work was available to her within her limitations. This Court explained that the employer did not have to prove work availability because the claimant's loss of earning power was not related to her disability.

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[6] See, e.g., St. Joe Container Co. v. Workmen's Compensation Appeal Bd. (Staroschuck), 633 A.2d 128 (Pa. 1993).

In the instant matter, Employer made a position available to Claimant, which he refused. At the hearing before the WCJ, Claimant agreed that he had medical clearance and was capable of doing the job. The WCJ determined that Claimant could perform the duties of the position and modified Claimant's benefits. However, the WCJ also concluded that the position was an Employer-created, light-duty position that was temporary, not permanent. After making that finding, the WCJ defined the term of the temporary employment as the customary ninety-day period of subsidization, based on the testimony of Stacey Marchione, the owner of Smart. However, we must address whether a finding of subsidization equals a finding of temporary employment and whether that alters the analysis set forth in Kachinski. I believe that it does not.

I do believe that one viable principle emerged from the decision of the Commonwealth Court in Bennett, which is that the determination of the permanent or temporary nature of the position should be decided at the time that the position is offered. The Majority concludes that, even if Smart hired Claimant at the end of the subsidization period, that the job, the hours, and the pay would change, virtually rendering the position offered a temporary one. I believe that subsidized employment only becomes temporary employment where there is no intent on the part of the employer receiving the wage subsidies to assimilate the employee into its work force. In the instant matter, the testimony indicated that both Employer and Smart intended that Claimant be assimilated as a regular employee on Smart's payroll and, in fact, Smart had hired at least four such previous employees. Accordingly, I believe that the WCJ erred in concluding that subsidized employment and temporary employment were the same for purposes of determining that disability benefits should be awarded only for a closed period. It was further error on the part of the WCJ to reinstate total disability benefits after a finding of bad faith where the Claimant did not demonstrate that there were no jobs within his medical restrictions available to him.

Based on established workers' compensation jurisprudence in this Commonwealth, Claimant's benefits should be modified indefinitely, following a finding of bad faith, until Claimant demonstrates that there is no work available to him within his medical restrictions. If Claimant had

accepted the position and had been hired at the end of the subsidy period, he would be working today. If Claimant had accepted the position and been dismissed, he would have been entitled to a reinstatement of benefits.[7] If Claimant had accepted the position and his salary had been reduced at the close of the subsidy period when he was placed on the Smart payroll, Claimant would have been entitled to increased partial disability benefits.[8] Instead, Employer was deprived of the opportunity to have Claimant reenter the work force.

It is my belief that, on this record, Employer clearly demonstrated that work was available to Claimant within his medical restrictions and that Claimant acted in "bad faith" in refusing employment. Therefore, Claimant's loss of earning power resulted from his refusal to return to gainful employment. At that point, Claimant was required to show that the work was "unavailable" to him[9] or that there were no jobs available that he could perform within his work restrictions to effect a reinstatement. Claimant failed to carry his burden of proof that he was deserving of reinstatement by proving the negative required by Stanek, and the WCJ erred in reinstating Claimant's benefits at the end of a closed period. The fact that Employer was subsidizing the employment does not make it temporary in nature where the owner of Smart testified that, if Claimant met the qualifications for regular, full-time employment, Claimant would be placed on its regular payroll. Claimant should have attempted the position and, at the close of the subsidization period, if the position terminated through no fault of his own, he should have

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[7] See, e.g., Teledyne McKay v. Workmen's Compensation Appeal Bd. (Osmolinski), 688 A.2d 259 (Pa. Cmwlth. 1997).

[8] See 77 P.S. § 772. This section also states that "where compensation has been suspended because the employe's earnings are equal to or in excess of his wages prior to the injury that payments under the agreement or award *may be resumed at any time during the period for which compensation for partial disability is payable*, unless it be shown that the loss in earnings does not result from the disability due to the injury. Id. (Emphasis added.)

[9] See St. Joe Container Co. v. Workmen's Compensation Appeal Bd. (Staroschuck), 633 A.2d 128 (Pa. 1993).

pursued the options available to him pursuant to the Act. As observed by the Commonwealth Court in Bennett, "[i]t is eminently fair to require claimants who act in bad faith to live with the foreseeable consequences of their actions and a rule which would discourage bad faith on the part of claimants would further ensure the cooperation of efforts necessary to maintain the [equality] of the system." Bennett, 632 A.2d at 600. The decision reached by the Majority rewards the Claimant in this case for bad faith conduct and chills the viable attempt of an Employer to return an injured worker to gainful employment. The modification of Claimant's benefits should be effected, not according to the principles enunciated in Bennett, but consonant with Dillon and Stanek, until Claimant can demonstrate that there are no jobs available to him within his medical restrictions. Where there is no evidence that the subsidization period has a definite terminus, there can be no finding that subsidized employment is temporary employment for the purposes of benefit modification. Further, subsidized employment may only be considered temporary where there is a lack of intent on the part of the new employer to assimilate the employee into its workforce. In the instant matter, Claimant never gave the employment opportunity with Smart a chance to extend beyond the subsidy period. Accordingly, I believe that the decision of the Commonwealth Court must be reversed and that Employer's Petition requesting a modification of benefits should be granted.

Mr. Justice Eakin joins this dissenting opinion.