

[J-51-1998]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

VISTA INTERNATIONAL HOTEL,	:	43 W.D. Appeal Docket 1997
	:	
Appellant	:	Appeal from the Order of the
	:	Commonwealth Court entered September
	:	25, 1996, at No. 2481 C.D. 1995, affirming
v.	:	the Order of the Workmen's
	:	Compensation Appeal Board at No. A94-
	:	3004 entered on August 31, 1995
WORKMEN'S COMPENSATION APPEAL:	:	
BOARD, (DANIELS)	:	683 A.2d 349 (1996)
	:	
Appellee	:	
	:	ARGUED: March 9, 1998

CONCURRING AND DISSENTING OPINION

MR. JUSTICE ZAPPALA

DECIDED: DECEMBER 23, 1999

I agree with the majority's conclusion that the Board erred by granting rehearing on Employer's termination petition relating to the 1989 injury, without assessing the adequacy of Claimant's proffered excuse for failing to appear. I respectfully disagree, however, that Claimant is entitled to total disability benefits for her 1991 injury, for the period subsequent to her discharge from employment. Any loss of earnings in this regard is attributable to Claimant's discharge from employment and is not a result of her work injury.

The majority's finding to the contrary is based on the fact that "Employer failed to establish the availability of suitable employment, that such employment is available but for Claimant's lack of good faith, or a change in medical condition." Slip op. at 16. Employer bore no such burden as the instant case involves a claim petition, rather than a petition to suspend or terminate benefits. Under these circumstances, Claimant is not entitled to a

presumption of continued disability and bears the burden of establishing that her loss of earnings is attributable to the work injury.

Although the majority appears to recognize that this case involves a claim petition, it fails to appreciate the significance of this procedural status. The majority asserts that “Claimant’s continuing disability is uncontested in this appeal; Employer seeks a suspension of benefits,” Slip op.at 15 n.11 (emphasis supplied). Employer’s argument concerning the suspension of benefits upon Claimant’s discharge from employment, however, arose while defending Claimant’s claim petition alleging the 1991 work-injury. Thus, Employer was not attempting to suspend benefits relating to the 1991 injury *as no benefits had yet been granted*.^{1 2} This distinction is critical and renders the instant case distinguishable from Howze v. Workers’ Compensation Appeal Board, 714 A.2d 1140 (Pa. Cmwlth. 1998), upon which the majority relies, and more akin to Somerset Welding & Steel v. Workers’ Compensation Appeal Board, 650 A.2d 114 (Pa. Cmwlth. 1994), *alloc. denied*, 659 A.2d 990 (Pa. 1995).

The issue in Howze was whether an employer is entitled to a suspension of benefits when a claimant, who is receiving partial disability benefits as a result of returning to light duty work at a wage loss, is discharged for willful misconduct. In holding that a suspension of benefits was improper, the Commonwealth Court reasoned that “[b]ecause Claimant was receiving partial disability benefits at the time of his discharge, there is a presumption that his disability from the work injury continues.” Id. at 1142.

¹ We cannot view the WCJ’s finding of residual disability as creating a *presumption* of continued disability in this case because whether Claimant’s loss of earnings are attributable to her work injury is the very subject of this appeal.

² Moreover, Employer asserts that “Commonwealth Court *erroneously* stated, ‘Employer does not challenge the WCJ’s finding that Claimant’s work-related injuries of February 21, 1989, and February 5, 1991, continue.’” Appellant’s Brief at 32-33 n. 2.

Unlike the claimant in Howze, Claimant was not receiving any disability benefits for his 1991 injury at the time of her discharge. Thus, she is not entitled to any presumption of continued disability. The Howze court recognized this very distinction when it stated:

This presumption [that the disability from the work injury continues] is what makes Employer's reliance on Somerset Welding & Steel v. Workmen's Compensation Appeal Board (Lee), 168 Pa. Commw. 78, 650 A.2d 114, 119 (Pa. Cmwlth. 1994), *appeal denied*, 540 Pa. 652, 659 A.2d 990 (1995) misplaced. Somerset Welding involved a claim petition proceeding; thus, the claimant had the burden of proof and there was no presumption that the claimant had sustained any loss of earning power from a work-related injury.

714 A.2d at 1143 n.7.

The facts of Somerset Welding are virtually identical to those in the instant case. There, the claimant incurred a work-related injury on March 26, 1991. On March 28, 1991, the claimant's employment was terminated as a result of his continual disregard of company policy concerning procedures for reporting off work. The claimant subsequently filed a claim petition and was awarded total disability benefits.³ The Board affirmed.

On appeal to Commonwealth Court, the employer argued that the Board erred in affirming the referee's award of benefits because the claimant's loss of earnings after March 28, 1991, resulted from the claimant's justifiable discharge for disregarding company policy and was not the result of a work-related injury. The Commonwealth Court agreed and suspended the claimant's benefits as of the date of his discharge. It held that "[i]f a claimant commits misconduct after the injury and is properly discharged for that conduct, then he is precluded from receiving compensation for loss of earnings from the date of his termination." Id. at 119. The same is true in the instant case.

³ At that time, the referee also terminated benefits effective February 7, 1992, because the claimant's medical experts could not unequivocally establish a continuing disability after that date.

In relying on Howze, the majority makes much of the fact that Claimant continues to have residual effects of the work-injury. We have held, however, that suspension is the appropriate remedy when the loss of earnings is not attributable to the work injury, but effects of the work injury remain. See Harle v. Workers' Compensation Appeal Board, 658 A.2d 766 (Pa. 1995) (suspension rather than termination of benefits appropriate when claimant continues to experience residual physical impairment from work injury, but incurs no loss of earnings therefrom). This allows for the possibility that if Claimant's earning power at some time in the future is affected by her residual impairment from the 1991 work injury, she may seek reinstatement of partial benefits by proving only that the injury giving rise to the original claim continues and that her earning power is once again adversely affected by the injury. Id., citing, Pieper v. Ametek-Thermox Instruments, 584 A.2d 301 (Pa. 1991).

Accordingly, I would hold that under the circumstances of this case, the Commonwealth Court erred in failing to suspend benefits as of the date Claimant was discharged from employment.

Mr. Chief Justice Flaherty and Mr. Justice Castille join this Concurring and Dissenting Opinion.