

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

James Keating, :
 :
 Petitioner :
 :
 v. : No. 83 C.D. 2014
 :
 : Submitted: July 11, 2014
 Workers' Compensation Appeal :
 Board (Commonwealth of :
 Pennsylvania/Department of :
 Transportation), :
 Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

FILED: September 12, 2014

James B. Keating (Claimant) petitions for review of the December 17, 2013 order of the Workers' Compensation Appeal Board (Board), which reversed the decision of a workers' compensation judge (WCJ) and held that Claimant was not entitled to a reinstatement of compensation following his resignation in lieu of discharge from a modified duty position. We affirm.

Claimant began working for the Commonwealth of Pennsylvania, Department of Transportation (Employer) in 1996 and most recently was classified as a transportation construction inspector. In April 2008, as he was going down stairs, Claimant slipped, caught his arm, and twisted his elbow. Employer issued a Notice of Compensation Payable accepting liability for a right elbow strain. On February

27, 2009, the parties filed a Supplemental Agreement agreeing to a suspension of benefits based on Claimant's return to work with no loss of wages. In September 2010, Claimant filed a petition seeking a reinstatement of benefits effective December 9, 2009, alleging that Employer terminated his employment on that date while Claimant was on modified duty. Employer filed a timely answer denying those allegations, and the matter was assigned to a WCJ.

Claimant first testified before the WCJ at a September 16, 2010 hearing on a utilization review petition. Claimant described the circumstances surrounding his injury and his subsequent medical treatment, which included two surgeries. Claimant stated that he missed some time from work and then returned to modified duty. (WCJ's Finding of Fact No. 3.)

Claimant testified before the same WCJ on October 19, 2010. Claimant stated that he returned to work at his pre-injury position during the winter; he explained that his job was not as busy during the winter months and involved mostly computer work rather than physical activity. Claimant testified that after his injury he used his left arm rather than his right and took a little longer to complete his work tasks. (WCJ's Finding of Fact No.4; Reproduced Record (R.R.) at 11a-12a, 18a-19a.)

Claimant testified that he was discharged on December 6, 2009, for removing aluminum scrap from Employer's premises over a five to six week period. Employer also filed criminal charges against Claimant, which were dropped at a hearing before a magisterial district justice. Claimant stated that he made no effort to hide his actions, adding that he believed that other employees also took scrap but were not prosecuted, discharged, or disciplined. Claimant acknowledged that he signed a letter of resignation; Claimant explained that, after talking with union representatives and Employer's human resources personnel, he understood that if he

resigned in lieu of termination he would not forfeit his pension. Claimant testified that he also was required to pay Employer \$660 in restitution.

Denise Levchak, Employer's human resources officer, testified that she suspended Claimant pending the outcome of an investigation into his sale of scrap material. Levchak said that a union representative contacted her after a pre-disciplinary conference and asked if Employer would allow Claimant to resign. Levchak was not involved with the criminal action against Claimant or the withdrawal of that action. She stated that theft of company property was a recognized cause for termination and that employees are made aware of that fact.

The WCJ accepted the testimony of Claimant and Levchak as credible and found that Claimant returned to modified duty and subsequently chose to resign to avoid being discharged. Based on these determinations, the WCJ concluded that Claimant met his burden of proving he was entitled to a reinstatement of benefits.

Employer appealed to the Board, which reversed. Citing *Shop Vac Corp. v. Workers' Compensation Appeal Board (Thomas)*, 929 A.2d 1236 (Pa. Cmwlth. 2007), and *Somerset Welding & Steel v. Workmen's Compensation Appeal Board (Lee)*, 650 A.2d 114 (Pa. Cmwlth. 1994), the Board explained that if a claimant commits misconduct following a work injury and is properly discharged for that misconduct, the claimant is precluded from receiving compensation for loss of earnings from the date of discharge. Claimant now appeals to this Court.¹

¹ Our scope of review is limited to determining whether findings of fact are supported by substantial evidence, whether an error of law has been committed, or whether constitutional rights have been violated. Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704.

In relevant part, section 413(a) of the Workers' Compensation Act (Act)² provides as follows:

A workers' compensation judge ... may, at any time, modify, reinstate, suspend, or terminate a notice of compensation payable, an original or supplemental agreement or an award of the department or its workers' compensation judge, upon petition filed by either party with the department, upon proof that the disability of an injured employe has increased, decreased, recurred, or has temporarily or finally ceased, or that the status of any dependent has changed ... [W]here compensation has been suspended because the employe's earnings are equal to or in excess of his wages prior to the injury[,] ... 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.*

77 P.S. §772 (emphasis added).

Generally, a claimant seeking reinstatement following a suspension of benefits must prove that his earning power is once again adversely affected by his work injury.³ *Bufford v. Workers' Compensation Appeal Board (North American Telecom)*, 2 A.3d 548 (Pa. 2010). Once the claimant meets this burden, the burden shifts to the employer to prove that the claimant's loss in earnings is due to a cause other than the work-related injury. *Id.* If the employer has provided work within the claimant's physical limitations at no loss of pay and has established that the claimant was discharged for conduct evidencing bad faith or a lack of good faith, the claimant

² Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §772.

³ In the context of workers' compensation law, "disability" is synonymous with loss of earning power. *Howze v. Workers' Compensation Appeal Board (General Electric Company)*, 714 A.2d 1140, 1142 (Pa. Cmwlth. 1998).

is not entitled to a reinstatement of benefits, regardless of whether the claimant has a physical disability caused by the work-related injury. *Sauer v. Workers' Compensation Appeal Board (Verizon Pennsylvania, Inc.)*, 26 A.3d 531, 533, 535-38 (Pa. Cmwlth. 2011). An employer can establish a lack of good faith, or bad faith, when the employer proves that it discharged the claimant for misconduct. *Somerset Welding & Steel*. Whether a claimant was discharged for conduct evidencing a lack of good faith is a factual determination for the WCJ. *Champion v. Workers' Compensation Appeal Board (Glasgow, Inc.)*, 753 A.2d 337 (Pa. Cmwlth. 2000).

In this case, the testimony credited by the WCJ establishes that: Claimant's benefits were suspended when he returned to work at a modified duty job with no loss of wages; Claimant was discharged for taking Employer's scrap metal; Employer's employees were aware that theft of company property was cause for termination; and, when confronted with disciplinary proceedings, Claimant opted to resign to avoid being discharged. (WCJ's Finding of Fact No. 6.)

In his analysis, the WCJ recognized that the determination of whether Claimant was entitled to reinstatement involved a two-prong inquiry: (1) whether Claimant met his burden to establish that his earning power is again affected by his work injury; and (2) whether Employer met its burden to show either that work was available within Claimant's restrictions or that Claimant's wage loss was caused by something other than his work injury. (WCJ's opinion, pp. 6-7.) The WCJ concluded that Claimant's credible testimony was sufficient to satisfy his burden of proof. However, the WCJ ended his analysis prematurely and failed to consider whether the witnesses' credible testimony was sufficient to meet Employer's burden.

Nonetheless, the WCJ issued sufficient findings for the Board to undertake the necessary legal analysis. Based on the WCJ's findings, the Board

properly concluded that, because Claimant's unauthorized removal of scrap from Employer's premises constituted misconduct resulting in Claimant's resignation in lieu of discharge, Claimant's loss of earnings is due to his misconduct, rather than the work injury. We agree with the Board that, under these circumstances, Claimant is not entitled to a reinstatement of benefits. *Somerset Welding & Steel*.

Citing *Howze v. Workers' Compensation Appeal Board (General Electric Co.)*, 714 A.2d 1440 (Pa. Cmwlth. 1998), Claimant argues that an employee who returns to light duty work at a wage loss and is subsequently discharged for willful misconduct is entitled to compensation. However, *Howze* is factually distinguishable from the matter before us. The claimant in *Howze* returned to light duty work at a wage loss and was receiving partial disability benefits at the time he was discharged for misconduct. We held that because the claimant was receiving partial disability benefits when he was discharged, not all of his loss of earning power was due to his discharge. The analysis in *Howze* is inapplicable in this case, because Claimant returned to modified duty with no loss of earnings; therefore all of his loss of income was due to his misconduct.

Accordingly, we affirm.

PATRICIA A. McCULLOUGH, Judge

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Board (Commonwealth of	:	
Pennsylvania/Department of	:	
Transportation),	:	
	:	
Respondent	:	

ORDER

AND NOW, this 12th day of September, 2014, the order of the Workers' Compensation Appeal Board, dated December 17, 2013, is affirmed.

PATRICIA A. McCULLOUGH, Judge