

[J-107-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, EAKIN, BAER, BALDWIN, JJ.

PITT OHIO EXPRESS	:	No. 54 WAP 2005
	:	
	:	Appeal from the Order of the
	:	Commonwealth Court entered May 4,
	:	2005 at No. 2430 CD 2004, reversing the
v.	:	Order of the Workers' Compensation
	:	Appeal Board entered October 14, 2004 at
	:	A04-0275.
WORKERS' COMPENSATION APPEAL	:	
BOARD (WOLFF)	:	
	:	
APPEAL OF: DUANE WOLFF	:	ARGUED: September 11, 2006

OPINION

MR. JUSTICE EAKIN

DECIDED: DECEMBER 27, 2006

On April 3, 1996, claimant Duane Wolff suffered a back injury while working as a truck driver for Pitt Ohio Express. He received total disability compensation benefits until November 4, 1997, when a Workers' Compensation Judge (WCJ) granted employer's petition to suspend benefits, concluding Wolff failed to pursue in good faith a modified position offered to him by employer. When Wolff later underwent back surgery, in September, 2000, the parties executed a supplemental agreement to reinstate his total disability benefits as of the surgery date.

In October, 2001, employer filed a new petition to suspend benefits, arguing Wolff had recovered sufficiently to perform the modified position. During a hearing before the WCJ, Wolff acknowledged he was physically capable of performing the modified position. The WCJ suspended his benefits. The Workers' Compensation Appeal Board reversed,

concluding claimant's benefits could not be suspended because employer failed to show the modified position was still available.

The Commonwealth Court reversed the Board and reinstated the WCJ's order suspending benefits, holding employer did not have to again prove job availability when the disability did not continue and claimant was able to perform the modified position he previously rejected in bad faith. Pitt Ohio Express v. Workers' Compensation Appeal Board (Wolff), 2430 C.D. 2004, unpublished memorandum at 9-10 (Pa. Cmwlth. filed May 4, 2005). We granted allowance of appeal to review this holding. Our standard of review for such a question of law is de novo, and our scope of review is plenary. Craley v. State Farm Fire and Casualty Company, 895 A.2d 530, 539 n.14 (Pa. 2006).

This Court set forth the general test when an employer seeks to suspend benefits:

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.
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.
3. The claimant must then demonstrate that he has in good faith followed through on the job referral(s).
4. If the referral fails to result in a job then claimant's benefits should continue.

Kachinski v. Workmen's Compensation Appeal Board (Vepeco Construction Co.), 532 A.2d 374, 380 (Pa. 1987).

The claimant in J.A. Jones Construction Company v. Workers' Compensation Appeal Board (Nelson), 784 A.2d 280, 283 (Pa. Cmwlth. 2001), rejected suitable, available employment in bad faith; as a result, the WCJ granted the employer's petition to reduce the

claimant's benefits. Thereafter, the claimant's condition worsened, but by the time he sought to have full benefits reinstated, he recovered sufficiently to be able to perform the modified position. The Commonwealth Court agreed with the WCJ's decision to grant the claimant full benefits retroactively for the period of his worsened condition, but affirmed the WCAB's decision to reinstate reduced benefits from that point forward.

Significant to the present case, it did so without requiring the employer to reestablish job availability. Id., at 282. The court reasoned the claimant's "total disability was not continuing, and, in fact, he is able to perform the job previously offered and rejected." Id., at 283. The court held an employer is not required to again show the previously offered position remains available if the claimant initially rejected it in bad faith. Id. See also Spinabelli v. Workmen's Compensation Appeal Board (Massey Buick, Inc.), 614 A.2d 779, 780 (Pa. Cmwlth. 1992) ("Where we have a finding that a claimant has failed to pursue jobs in good faith, we do not believe the employer has the responsibility of keeping a job open indefinitely, waiting for the claimant to decide when he wants to work.").

This Court has not addressed this question. However, claimant argues that General Electric Company v. Workers' Compensation Appeal Board (Myers), 849 A.2d 1166, 1171 (Pa. 2004) (plurality), requires the deciding factor to be the reason for the subsequent unavailability of the rejected position, rather than a claimant's prior bad faith. In General Electric, we considered whether benefits were properly modified only for the period a rejected temporary position was available. The plurality stated "the claimant's benefits should only be modified for that period of time that the job was available regardless of whether or not the claimant accepts the position or improperly refuses it." Id., at 1173 (Nigro, J., joined by Cappy, C.J., and Castille, J.).

The claimant in General Electric was offered and rejected what the plurality determined to be a temporary, 90-day position; the plurality found the bad faith rejection of the temporary position permitted modification of benefits for that period only. Here,

claimant contends, like General Electric, the modified position has become unavailable through no fault of his own, and consequently, employer is not entitled to suspend his benefits without demonstrating job availability.

Reliance on General Electric is problematic, as it was a plurality decision and is not binding precedent. See Interest of O.A., 717 A.2d 490, 496 n.4 (Pa. 1998) (plurality, Cappy, J. joined by Flaherty, C.J., and Zappala, J.) (“While the ultimate order of a plurality opinion; i.e. an affirmance or reversal, is binding on the parties in that particular case, legal conclusions and/or reasoning employed by a plurality certainly do not constitute binding authority.”). Moreover, claimant’s efforts to apply it here are unpersuasive. In General Electric, the offered position was never more than temporary; claimant’s acceptance would have caused a modification for only 90 days, hence his bad faith affected only a temporary modification. Here, the position offered to claimant was permanent. As it was rejected in bad faith, it is inaccurate to state claimant is blameless or is now in the same position as he would have been had he never been offered the modified position. What was temporary in General Electric was the reduction in benefits; what was temporary here was the reinstatement of benefits.

Claimant argues the Court must apply Dillon v. Workmen’s Compensation Appeal Board (Greenwich Collieries), 640 A.2d 386 (Pa. 1994), and assign the burden of proof to the party seeking modification. The claimant in Dillon never acted in bad faith by rejecting a position. Dillon states a claimant must show “through no fault of his own his earning power is once again adversely affected” Id., at 393. Again, claimant is at fault because of his bad faith rejection and cannot attempt to hide from that by misrepresenting this situation as a change in job availability. Moreover, claimant admitted he was able to perform the position he previously rejected. Pitt Ohio Express, at 3 n.1.

Claimant’s bad faith relieved employer of the requirement to again demonstrate a continued suitable position was available. An employer cannot be given a never-ending

duty to keep a job available for a claimant who rejects it in bad faith. If we allowed a claimant to reject a job in bad faith and then place a burden on the employer to provide the claimant another job whenever he chooses, we would reward bad faith conduct and circumvent the purpose of the Workers' Compensation Act. As Madam Justice Newman's dissenting opinion in General Electric stated, rewarding bad faith conduct "chills the viable attempt of an Employer to return an injured worker to gainful employment." General Electric, at 1185 (Newman, J., dissenting).

Accordingly, we hold an employer will not be forced to prove job availability following a period of total disability after an employee has made a bad faith rejection of an available modified position.

Order affirmed. Jurisdiction relinquished.

Mr. Chief Justice Cappy, Mr. Justice Castille and Mesdames Newman and Baldwin join the opinion.

Mr. Justice Saylor files a concurring opinion.

Mr. Justice Baer files a dissenting opinion.