SUPREME COURT MAKES MAJOR CLARIFICATION ON CLAIMANT'S BURDEN TO REINSTATE AFTER SUSPENSION

PIEPER LANDMARK MODIFIED

Bufford v. WCAB (North American Telecom), 2 A.3d 548 (Pa. 2010).

~by David B. Torrey
WC Judge
Pittsburgh, PA

I. Summary

The Supreme Court has modified its landmark *Pieper* case (1990), which was the leading precedent setting forth the basic rule of how a claimant proceeds when he or she seeks reinstatement after suspension.

The burden on claimant has seemingly been lessened. Claimant still has the initial burden of moving forward. However, if employer believes that some "fault" is attendant to claimant's renewed loss of earnings, employer must prove the same. Importantly, "fault" does not include (a) discharge for unsatisfactory job performance; and (b) a voluntary quit of light duty, to accept better wages elsewhere, followed by later economic lay-off. The latter were the circumstances attendant to Mr. Bufford's case.

Important also: the court has seemingly disapproved other decisional law from Commonwealth Court which created "fault" circumstances not tied to (1) the traditional principles of job availability (good faith/bad faith issues); and (2) the conduct-based affirmative defenses of the Act.

II. The New Bufford Case

Claimant, Bufford, was employed in a skilled labor job with employer, North American Telecom (NAT). He suffered serious injuries in September 1998 when he was struck by a car. Employer paid TTD voluntarily under an NCP.

One month later, in October 1998, claimant returned to employer at light duty, with a loss of earning power. Employer reduced benefits to TPD.

Five months passed. Then, Bufford voluntarily left employer, and light duty, for a new job at Ronco Machine. He was now employed as an industrial electrician "for higher pay and less onerous physical job requirements." Employer filed a Notice of Suspension and legitimately suspended TPD.

Another four and one-half years passed. Then, in January 2003, Ronco laid claimant off, citing economic reasons. At this point, notably, NAT's facility, out of which claimant had worked, had permanently closed. NAT, indeed, no longer carried on business in claimant's geographic area.

Claimant promptly filed for reinstatement, but the WCJ denied the request. He concluded "that any loss of earnings … was caused by [claimant's] lay-off from Ronco, not by worsening of the work-related injury." Upon a second visitation of the claim (following a Board remand), the WCJ ratified his decision, but found further, specifically, that "claimant had left his light-duty job with [NAT] because of his desire to pursue higher wages and not because of physical disability." The WCJ also reiterated his finding that employer's expert was credible that claimant's condition had not worsened, and that claimant remained capable of performing the light-duty job that he had formerly held with NAT.

The Board and Commonwealth Court affirmed, but the Supreme Court reversed. Accordingly, the court remanded for a presumed reinstatement of disability checks.

The WCJ, Board, and Commonwealth Court had relied on the seminal Supreme Court precedent, *Pieper*, and held that claimant had not shown that his recurrent loss of earning power was caused "through no fault of his own." This is the first element of the *Pieper* test. *See Pieper v. Ametek Thermox Instruments Div.*, 584 A.2d 301 (Pa. 1990). The Commonwealth Court, in particular, had equated claimant's voluntary departure from light duty at the original employer as a volitional act, the consequences of which were to be attributable to him. That is, Commonwealth Court conceptualized the voluntary departure as an act of disqualifying "fault" under the *Pieper* analysis.

Indeed, Commonwealth Court had applied its own 1996 and 2004 precedents which were on point vis-à-vis these circumstances, holding that "an injured worker who leaves employment with the time-of-injury employer to take employment with another employer for reasons unrelated to the work injury assumes the risk that such subsequent employment may end in discharge." These cases were *Welsh v. WCAB (L.W. Miller Roofing Co.)*, 686 A.2d 59 (Pa. Commw. 1996); and *Horne v. WCAB (Chalmers & Kubeck)*, 840 A.2d 460 (Pa. Commw. 2004).

These cases, the Supreme Court explained, misinterpreted *Pieper* and were, in this new opinion, "specifically disapproved."

It was true, the court acknowledged, that the *Pieper* precedent specifically held that a claimant, to gain reinstatement after suspension, "must [first] prove that through no fault of his own his earning power is once again adversely affected by his disability." However, the court held, as noted above, that Commonwealth Court had in fact misinterpreted this concept, particularly when taking into account the Supreme Court's own 2000 precedent, *Stevens v. WCAB (Consolidation Coal)*, 760 A.2d 369 (Pa. 2000). There, a claimant who had returned to work on a suspension with a different employer, had been let go for "unsatisfactory job performance." The Supreme Court in that case rejected the idea that this circumstance constituted an act of disqualifying "fault" under the *Pieper* analysis. Thus, the claimant in *Stevens* was not disqualified from having benefits reinstated.

According to the court, under *Pieper* (as properly interpreted) and *Stevens*, the Commonwealth Court was not at liberty to cast voluntary departures from work (as in the *Bufford* case), and involuntary departures from work (as in the *Stevens* case), as "fault" for purposes of disqualifying injured workers from having benefits reinstated. According to the

court, the pivotal criterion of the "fault" circumstance is not "subject to the accretions of judicial interpretation," but instead is governed by the traditional "good faith/bad faith" job availability analysis of *Kachinski* – even though disqualifying circumstances as found in the Act and in the court's precedents may also constitute fault. *See Kachinski v. WCAB (Vepco Constr. Co.)*, 532 A.2d 374 (Pa. 1987).

The claimant in *Stevens* was allowed reinstatement in the discharge-for unsatisfactory-job performance context, as he had not committed a "fault" act under *Pieper*. Similarly, Bufford was to be allowed reinstatement in the economic layoff context, as his prior voluntary departure from light duty was likewise not disqualifying "fault." The court declared:

> [W]e hold that the Commonwealth Court erred by interpreting the concept of "fault" under the *Pieper* and *Stevens* standard to encompass matters other than job availability or those matters that specifically bar a claimant from reinstatement of benefits under the Act or our decisional law. Moreover, the Commonwealth Court erred in this case by divorcing the concept of "fault" from job availability.

In light of this analysis, the court concluded that a broad clarification was needed in the realm of its conceptualization of "fault," not only as to its definition (see above) but with regard to the *burden of proof*. The court undertook the following analysis (which the cynic would call "revisionism"); and, as this language is both critical to understanding the law, and resistant to easy summary, it is reproduced here in critical aspect:

> [In *Pieper* and *Stevens*, we] did not actually intend that the issue of "fault" be part of the claimant's burden. Rather, the *Pieper* and *Stevens* standard made clear that the claimant's bid for reinstatement of benefits was subject to rebuttal by the employer on proof that the claimant had acted in bad faith by refusing work within his or her capabilities, or was otherwise disqualified from reinstatement of benefits pursuant to specific provisions of the Act.
> ….
>
> [As to the burden of proof,] Section 413(a) places the burden on a claimant seeking reinstatement of benefits to establish that his or her disability has increased or recurred. However, Section 413(a) also provides that "where compensation has been suspended because the employe's earnings are equal to or in excess of his wage 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 injury." … [T]he last clause of this provision indicates that the burden of proof would shift to the party opposing the reinstatement petition to show "that the loss in earning does not result from the disability due to injury…."

Slip op. at 14-15.

The court then concluded as follow:

> Thus, in accordance with Section 413(a), we modify the *Pieper* and *Stevens* standard in the following manner. A claimant seeking reinstatement of suspended benefits must prove that his or her earning power is once again affected by his or her disability, and that such disability is a continuation of that which arose from his or her original claim. The claimant need not re-prove that the disability resulted from a work-related injury during his or her original employment.
>
> [O]nce the claimant meets this burden, the burden shifts to the party opposing the reinstatement petition. In order to prevail, the opposing party must show that the claimant's loss in earnings is not caused by the disability arising from the work-related injury. This burden may be met by showing that the claimant's loss of earnings is, in fact, caused by the claimant's bad faith rejection of available work within the relevant required medical restrictions or by some circumstance barring receipt of benefits that is specifically described under provisions of the Act or in this Court's decisional law.
>
> We hold that a claimant remains eligible for reinstatement of suspended benefits where the claimant's employment with a post-injury employer is terminated, even where the claimant had previously performed modified post-injury duties for the time-of-injury employer….

Slip op. at 15-16.

Editor's Note I (by Attorney Nariman Dastur): In reaching its decision, the court noted three unsatisfactory results that would ensue if it had upheld the Commonwealth Court's decision. First, to affirm would result in a rule that a claimant discharged from a time-of- injury employer would potentially be eligible for benefits, whereas an employee discharged from a subsequent employer, for identical reasons, would not. Second, the court noted that employers are conferred a benefit by the injured employee accepting higher paying work, by reducing or eliminating indemnity payments while employed. Third, the court referred to "basic considerations of our society, where workers should be encouraged to take opportunities to lawfully better their economic circumstances, not penalized for doing so." *Slip opinion* at 6.

Editor's Note II: The court, in a footnote, observes – without further comment – that Act 57 of 1996 "replaced this Court's *Kachinski* approach." (Quoting *Riddle v. WCAB (Allegheny City Elec., Inc.)*, 981 A.2d 1288 (Pa. 2009)). The court's acknowledgment of this fact is arguably at odds with its renewed, aggressive embrace of actual job availability, in the form of continuing modified duty availability at the time of injury employer, as the pivotal criterion of reinstated TTD entitlement.

I don't see this as too troubling. While the issue is, dismayingly, left hanging in the footnote, a dichotomy has, in fact, always existed between (1) the elements of job availability; and (2) *when* job availability must be shown. The *Kachinski* requirement of good faith job

availability at the time-of-injury employer when a claimant suffers renewed loss of earnings here *survives* the demise of *Kachinski*, to the extent that it mandated job placement when *employer* sought modification or suspension. In other words, *Kachinski* is not in fact displaced in this context.

Editor's Note III: The court, while engaging in remarkable revisionism, is candid in acknowledging that it is changing the law. We certainly now know:

> (1) the burden of showing a disqualifying fault act (my term) is on the employer; and that
>
> (2) (a) discharge for unsatisfactory job performance; and (b) a voluntary quit of light duty, to work elsewhere for better wages, followed by later economic lay-off, are not disqualifying fault acts.

The lawyer is left to research and infer the existence of other disqualifying fault acts, to wit, those that are "circumstance[s] barring receipt of benefits … specifically described under provisions of the Act or in this Court's decisional law."

The court gives two examples: self-inflicted injuries and injuries suffered by virtue of a violation of law. *Slip op.* at 9. Other circumstances in this statutory category are, of course, intoxication, "reasons personal," violation of positive orders, and incarceration after conviction. These are all conduct-based defenses to compensability. Thus, if the recurrent loss of earning power is attended by these circumstances, and employer proves the same, presumably reinstatement should be refused.

Editor's Note IV: Are Commonwealth Court cases that liberally applied the "fault" disqualifier superseded by this new decision? The leading example of precedents in this category is the memorable *St. Luke's Hospital v. WCAB (Ingle)*, 823 A.2d 277 (Pa. Commw. 2003).

There, claimant was on light duty, receiving partial disability, but was then terminated in the midst of such work upon her arrest for abuse of a minor in a situation *outside* of work. A judge and the Board awarded benefits, reasoning that the non-work-related conduct was not "fault" *vis-à-vis* her work duties. Commonwealth Court disagreed and reversed. It refused her attempt to reinstate to total disability, stating that this was a "bad faith" type of situation where the law requires an "allocation of the consequences of discharge" to the claimant.

According to the court, the claimant's injury was not the cause of her recurrent complete loss of earnings. In this regard, the WCJ had committed error in essentially applying the unemployment compensation standard of willful misconduct or fault. The court insisted that, under *Vista International* (a case ratified in *Bufford*), the critical determination is whether the recurrent loss of earnings "is attributable to the work-related injury and not to some other reason":

> Under *Vista*, then, availability of suitable work is the focus, and a reinstatement of total disability benefits will not be permitted where work was available "or would have been available *but for circumstances* which merit allocation of the

> consequences of the discharge to the claimant, *such as* claimant's lack of good faith ... ."
>
> [T]his allocation is not limited to the circumstance where a claimant acts in bad faith with respect to the "suitable work available." The Supreme Court identified bad faith as one example, of presumably many, of a circumstance that will warrant allocating the consequences of a discharge to the claimant.
>
> [F]urther, *Hertz–Penske* has not been overruled. It is still the obligation of a claimant to demonstrate that loss of earnings is attributable to the work-related injury and not to some other reason.

Saint Luke's Hospital v. WCAB (Ingle), 823 A.2d 277 (Pa. Commw. 2003) (discussing and harmonizing *Vista International Hotel v. Workmen's Compensation Appeal Board (Daniels)*, 742 A.2d 649 (Pa. 1999); and *Hertz–Penske Truck Leasing Company v. WCAB (Bowers)*, 684 A.2d 547 (Pa. 1996)).

"Claimant," according to the court, lost her job because of her criminal conduct .... However, Claimant's criminal conduct, which resulted in the termination of her employment, did not transform her into [a] totally disabled person .... One of the consequences of this conduct was her discharge from employment, and so Claimant, not Employer, is responsible for the lack of available suitable work. Employer showed that suitable work was available to Claimant 'but for circumstances which merit allocation of the consequences of the discharge' to Claimant ... ."

This case was, and is, noteworthy because it pointedly avoided using the *Pieper* criterion that, for a claimant to gain reinstatement, he or she must show that the recurrent loss of earnings is "through no fault of his own."

When this 2003 opinion was filed, I opined that "the critical criterion [of disqualification] may go beyond the familiar 'faults' normally thought of as having been committed in the work environment, to conduct which occurs *outside* the work environment." Is this not a common-law "accretion" that has been forbidden by the Supreme Court in *Bufford*?

Editor's Note V: Nothing in the opinion suggests that an employer cannot still defend a reinstatement petition with medical evidence. Thus, an employer should still be able to request an IME in the face of a reinstatement-after-suspension petition. The employer, in this regard, possesses affirmative defenses to reinstating compensation by (1) showing full recovery; (2) proving expanded job capabilities; and (3) demonstrating that the recurrent loss of earnings is attributable to a *new* injury for which a different employer is liable, *see*, *e.g*., *McNulty v. WCAB (McNulty Tool & Die)*, 804 A.2d 1260 (Pa. Commw. 2002); or is attributable to some intervening, superseding, non-work related ailment. *See Jones & Laughlin Steel Corp. v. WCAB (Cochran)*, 500 A.2d 1279 (Pa. Commw. 1985).