

Workers' Compensation &  
Social Security Disability Dept.

Shelley W. Elovitz 412.338.1114  
Sandra R. Kushner 412. 338.1120  
Anthony G. Mistretta 412.338.1130  
John W. Zatkos, Jr. 412.338.1132

Rothman Gordon P.C.  
Attorneys At Law  
Third Floor, Grant Building  
Pittsburgh, PA 15219  
412.338.1100  
412.281.7304  
www.rothmangordon.com

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### Recent Cases in Pennsylvania *by John W. Zaktos, Jr., Esq.*

#### **Claimant Entitled to Benefits Requested**

The Pennsylvania Workers' Compensation Appeal Board ("the Board") determined in the matter of *Cordero v. McDonald's* that when an injured worker only asked for 52 weeks of compensation cash, her benefits award is limited to 52 weeks. The Board reviewed the Judge's decision, which found a right to ongoing benefits beyond the 52 week request, but upon applying the regulations, the Board determined that the injured worker was limited to her request.

***What does this mean?*** Injured employees are entitled to disability benefits for the amount of time requested.

#### **Worker's Employment Aggravates Pre-Existing Condition**

The Board made another important decision for injured union workers with collective bargaining agreements and accrued sick and vacation time which applies when litigating a claim petition for compensation cash benefits.

In *Powell v. PA Board of Probation & Parole*, the Board determined that a claimant who suffered from a preexisting disease, diagnosed prior to her employment with the PA Board of Probation, was compensable and therefore had a right to compensation cash benefits. The Board affirmed the determination by the Judge that, even though she suffered from a disease prior to her employment, her job duties aggravated the disease and therefore was a "work injury" under the Pennsylvania Workers' Compensation Act.

The Board also found that the Employer was required to restore the sick and vacation time that she used during the litigation. The Board referred to prior case law in which an employee is entitled to a return of accrued benefits. The Claimant in this case testified to depleting her accrued benefits because she was not receiving workers' compensation cash benefits.

***What does this mean?*** An injured employee must understand that simply because he or she has a preexisting back or shoulder impairment or disease, that does not mean he or she is automatically allowed to recover benefits under

the Pennsylvania Workers Compensation Act. A careful review of the worker's medical records and pre-employment examination are very important especially when considering job duties and whether they will aggravate the impairment or disease.

Insurance carriers routinely attempt to frighten injured workers into thinking that all of their current impairments or diseases are preexisting and not compensable in the hopes that the injured worker will be scared into returning to work without proper medical treatment and payment of cash benefits.

#### **Onus on Worker to Prove Additional Medication May Affect Ability to Perform Job**

The Board determined in the matter of *Mychak v. J. H. Zerby Newspapers, Inc.* that the Employer had a right to suspend the benefits of an injured employee because he could not prove that, due to additional medication prescribed by his physician, he was unable to perform the tasks of the job offered. The Board noted that although the Employer has the burden of proving there is work available for the employee that accommodates his or her restrictions, the burden will then shift to the employee to prove that he or she is incapable of performing the assigned work due to his or her injury.

***What does this mean?*** An injured employee must ensure that his or her physician understands the extent of his or her job duties and considers the effects prescribed medications may have on performing them.

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### **Court Defines Procedure for Proving Modification Based on Surveillance Evidence**

The Commonwealth Court determined in *J. Burrell v. WCAB (Philadelphia Gas Works, et al.)* that the Employer met its burden of proving “imputed” income of \$9.93 per hour for an eight hour week, based on evidence that the injured employee was working at least that much as a shoe shiner in his mother’s shop. The Workers’ Compensation Judge ruled against the injured employee and modified his compensation benefits based on that “imputed” income.

The first issue was whether modification of benefits could be granted without a Notice of Ability to Return to Work being provided to the injured employee by the Employer, as surveillance found the injured employee was working while collecting compensation benefits.

The Commonwealth Court noted that a receipt of medical information documenting a change in condition required the employer to send a Notice of Ability to Return to Work. The purpose of the statute is to place the injured employee on notice of the medical information and is commonly called the injured employee’s “Miranda Warning,” indicating the need to look for employment or begin his or her own job development. However, in this case, as the injured employee was already working as a shoe shiner, he was clearly already aware of a change in his medical condition which made it possible for him to work eight hours per week. As a result, the Court reasoned that the employer had no notice of the change in condition, but only learned of it after surveillance revealed the employee was working as a shoe shiner

and had not reported this to the employer previously.

The Employer met its burden to modify benefits through a vocational expert, who testified that, based on the Dictionary of Occupational Titles, a shoe shiner in the Philadelphia area would earn \$9.93 per hour. The WCJ relied on this testimony, rejecting the injured employee’s testimony that he was not very good at shining shoes, and modified his benefits.

***What does this mean?*** The injured employee must be aware of surveillance and the requirement to report any employment to the insurance company of the Employer. Further, the injured employee must be aware that if he or she receives any Bureau documents from the Employer requesting information as to whether he or she is working or earning wages, he or she must respond honestly and should consult an attorney to avoid the significant mistake made by the injured employee in *Burrell*.

### **Victory for Individuals Seeking Long-Term Disability Benefits: Treating for Symptoms Does Not Prove a PreExisting Condition**

The United States Third Circuit Court of Appeals recently determined in the matter of *McLeod v. Hartford Life and Accident Insurance*, that an insurance company cannot deny long-term disability benefits based on its determination that the individual had a preexisting condition if the individual was being treated for symptoms but had not been formally diagnosed by a physician.

***What does this mean?*** Individuals should have their medical information carefully reviewed by an attorney to ensure that he or she receives his disability benefits.



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Pittsburgh, PA 15219