

Workers' Compensation &
Social Security Disability Dept.

Shelley W. Elovitz 412.338.1114
Richard P. Gaitens 412.338.1107
Sandra R. Kushner 412. 338.1120
John W. Zatkos, Jr. 412.338.1132

Labor & Employment Dept.

Alan C. Blanco 412.338.1125
Stephen H. Jordan 412.338.1109
Louis B. Kushner 412. 338.1103

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

© 2008 Rothman Gordon, P.C.
The Workers' Compensation Newsletter is a periodic publication of Rothman Gordon, P.C. and should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only, and should not be relied upon as a substitute for obtaining legal advice applicable to your situation.

Commonwealth Court Defines Retirement Versus Disability for Workers Collecting Pensions and Workers' Compensation *by John W. Zatkos, Jr., Esq.*

In the spring of 2008, the Commonwealth Court issued two decisions in relation to retirement versus disability for workers collecting pensions and workers' compensation benefits. Both decisions involved claimants who are receiving workers' compensation benefits concurrently with pensions and/or Social Security retirement benefits. Specifically, in *Mason v. Workers' Compensation Appeal Board (Joy Mining Machinery)*, 944 A.2d 827 (Pa. Cmwlth. 2008), the Court held that a claimant who is receiving workers' compensation benefits and accepts a pension must establish (1) that he or she is seeking employment or (2) that the work-related injury forced him or her to retire. The Court explained that, under the second burden in this standard, a claimant must show that he or she *is incapable of working at any job in the entire labor market and not just from performing the pre-injury job.*

Three months later, the Court took the legal standard spelled out in the above case even further when it issued *Pennsylvania State University v. Workers' Compensation Appeal Board (Hensal)*, 948 A.2d 907 (Pa. Cmwlth. 2008). Again, the situation involved a claimant who had applied for and received a disability pension, but who testified during litigation that he did not seek employment for a period of time after receiving the pensions. The Commonwealth Court found that the claimant had temporarily retired during that time period and that the employer was entitled to a suspension of benefits during said time. Moreover, the Court described in detail what a claimant who is receiving such benefits must do to demonstrate that he or she is not retired. Specifically, the *Hensal* case stated:

Searching the internet and newspaper ads for jobs, without more, does not constitute a job search; it constitutes "surfing" the web and reading the newspaper – it is window shopping. To show that he was engaged in a good-faith effort, a claimant has to show that he applied for or sent applications for employment or other indicia that he was actively applying for employment.

What do these cases mean for claimants who are receiving pensions and/or Social Security retirement benefits concurrently with weekly workers' compensation benefits? *Essentially such claimants should be looking for employment on a monthly basis in a meaningful manner.* Specifically, a claimant who falls into this category should read classified advertisements in the newspaper and on the internet **and contact potential employers** about the advertised positions. Moreover, such individuals should actually apply for these positions when appropriate. If a job offer arises out of one of these searches, then the claimant should immediately contact his or her attorney to discuss the situation.

Additionally, to meet the *Mason-Hensal* standard, claimants should document in writing the various jobs about which they inquired and for which they applied. Moreover, lists of the names of employers, dates and telephone numbers should also be preserved in writing. The boxes of a calendar would be an easy way to record this information within an accurate time frame. *If a claimant makes a monthly effort to search for work in a meaningful manner, then the employer will not be entitled to a suspension of benefits.*

Lastly, in light of these court decisions, claimants should be very aware of the words they use to describe their conditions to physicians and vocational experts. Specifically, they should accurately describe themselves as **disabled** rather than **retired**.

Claimants need to follow this directive, or they risk losing their indemnity benefits. The standard is not difficult to meet, but simply requires reading classified advertisements, contacting potential employers, recording these efforts causally in writing and accurately describing their condition as disabled rather than retired. These efforts and use of words can make a very big difference in how the law is applied to them.

Selecting a Doctor for Workers' Compensation Injury Treatment

The Pennsylvania Workers' Compensation Act gives employers some control over your medical treatment for work-related injuries. Whether the employer can dictate where you obtain medical treatment for a work injury depends upon whether the employer has posted a list of six health care providers from which you can choose. If the employer has done so, you must be treated by one of the listed health care providers for a period of ninety (90) days after the injury. After ninety days has passed, you can receive treatment from any health care provider you choose.

If your employer has not posted a list of six health care providers to be seen in the event of a work-related injury, you may treat with the doctor of your choice and the employer remains liable for all treatment deemed necessary.

The employer must provide written notification to the employee, explaining these rights and duties. Notification to the employee must be evidenced only by a clear written acknowledgment signed by the employee that the employer has provided the information.

As mentioned above, after the ninety day period, an employee can choose a health care provider, but must notify his or her employer

within five days of their first visit. Failure to do so relieves the employer from payment of the medical bills.

When you have seen a doctor of your choice for treatment of a work injury, you must provide the employer with the name and address of the doctor or health care provider within the five days of your first visit in order to have the employer pay your doctor's bills. Your doctor will then have to provide the employer with periodic reports about the treatment you have received. The first report must be sent to your employer within ten days of your first treatment. Reports then must be provided on a monthly basis for as long as you treat with that doctor for your work injury.

Specific Loss Benefits: What They Are and What It Could Mean to Your Workers' Compensation Case

Medical and wage loss disability are the most well-known workers' compensation benefits in Pennsylvania. However, injuries resulting in a partial or total loss of a limb or body part, loss of vision or hearing, or a significant disfigurement to the head, face or neck are benefits that are compensated separately.

Such benefits are defined as specific loss benefits and workers with these types of injuries can receive a lump-sum payment that is calculated according to Section 306 (c) of the Pennsylvania Workers' Compensation Act. The Act provides for specific calculations for a variety of injuries based on a percentage of the injured worker's wages. The table below provides information for body parts, the number of weeks of compensation at which they are each valued, and the healing period for each.

Additionally, this payment is independent of other workers' compensation benefits. This means that any award received for a specific loss benefit will not diminish any of the other workers' compensation benefits to which you might be entitled. It is important for you to remember that you can claim specific loss of use benefits even if the injury does not cause you to miss significant work time.

Specific Loss Benefits Table

Body Part	Weeks of Compensation	Healing Period	Body Part	Weeks of Compensation	Healing Period
Index Finger	50	6	Arm/Leg	410	25
Middle Finger	40	6	Great Toe	40	12
Ring Finger	30	6	All other toes	16 each	6
Little Finger	28	6	Eye	275	10
Thumb	100	10	Loss of Hearing	Up to 260	10
Hand	335	20	(Total)	10% or above	% of weeks
Foot	250	25	One ear	60	10
Forearm	370	20	Disfigurement	Up to 275	