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

#### **Termination of Benefits Must Be Supported By Medical Evidence That the Worker Has Recovered From His or Her Injury**

In *Elberson v. WCAB (Elwyn)*, the Commonwealth Court reversed the Workers' Compensation Judge's (WCJ) decision to terminate the injured worker's benefits because the Employer did not prove the worker had recovered from her work injury.

Denise Elberson suffered a herniated nucleus pulposus (HNP) at L4-5 when she hurt her back on the job. The Employer used the testimony of Dr. Howard Steel, M.D. to establish that Ms. Elberson had completely recovered from her injury. However, when Dr. Steel testified, he never mentioned the Claimant's HNP at L4-5. He simply stated he could not find evidence of a herniated disc. Furthermore, when asked by the Court, "What did you understand her injury to be?" he replied, "I didn't know what her work injury was. But I would infer from what I saw her, when I saw her, that she had a sprain or strain of her back." The Court felt that if the physician did not recognize the specific work-related injury, then he could then not claim it was cured.

**What does this mean?** In order to terminate benefits, there must be medical evidence that the worker has recovered from the work injury, not just a general assessment of good health. For example, a medical expert must address the specific work injury that is at issue.

#### **Modified Job Cannot Jeopardize Union Benefits**

In *J.A. Jones Construction v. WCAB (Cunzolo)*, the Workers Compensation Appeals Board (WCAB) reversed the decision of the WCJ to modify benefits of

Douglas Cunzolo. Mr. Cunzolo suffered a hernia at work. A general/vascular surgeon opined that Mr. Cunzolo had sustained enough injury that he could not return to his pre-injury job as a journeyman carpenter. The Employer identified three alternate jobs, all of which were non union and non carpentry positions. The pivotal issue was if Mr. Cunzolo took a non union, non-carpentry job, would he would lose or delay his health insurance and disability pension, which were part of his union benefits?

The WCAB found that if Mr. Cunzolo went from disability retirement to early retirement and worked for more than two years, he would not meet the recent participation requirement to rejoin the health insurance group at the lower, disabled retiree rate. The difference in the premiums he would pay was about \$500. The WCAB found that this was a clearly definable qualitative benefit and therefore, the three positions proposed by the Employer could not be considered available to Mr. Cunzolo.

**What does this mean?** When an Employer offers a modified job, not only must it be comparable in pay, but it cannot strip the Claimant of clearly definable qualitative benefits of union employment. However, be aware if the Claimant will only temporarily forego union benefits, the modified job is considered available to him or her. Only if it results in permanent loss of benefits will the modified job be considered unavailable.

#### **Benefits Modifications Can Be Submitted Even With a 50% Impairment Rating If Earning Power Can Be Demonstrated**

Under the Workers' Compensation Act, a 50 per cent impairment means that the Claimant is presumed to be totally disabled and his or her status as totally disabled cannot be

changed unilaterally by the Employer. However, in *Sign Innovation v. WCAB (Ayers)*, the Commonwealth Court overturned the WCJ's denial of the Employers modification petition for an injured worker who was found to have a 50 per cent impairment rate.

Ron Ayers suffered an arm and wrist fracture and collected 104 weeks of total disability benefits. At the Employer's request, Mr. Ayers underwent an IRE and the examining physician found Mr. Ayers to have a whole person impairment of 50 per cent. The Employer filed a modification petition, based on a labor market survey, on the basis that the Employer believed work was available to Mr. Ayers. Mr. Ayers moved to dismiss the modification petition based on the 50 percent impairment finding. While the WCJ agreed with Mr. Ayers, the Commonwealth Court overturned the WCJ's denial of the modification petition. The Court reasoned, "In providing that the disability benefit amount is unaffected by a 'change in disability status,' the legislature left open the possibility that the claimant's actual earning power remains an issue that can be adjudicated under clause (b)(2). Clause (b)(2) states that earning power "shall be determined by the work the employee is capable of performing and shall be based upon expert opinion evidence which includes job listing with agencies of the department, private job placement agencies, and advertisements in the usual employment area."

**What does this mean?** If an Employer can provide evidence of a Claimant's earning power, even if the Claimant has a total disability, the Employer can submit a modification petition.

### **Proof of an Employment Relationship Is Necessary to Collect Workers' Compensation Benefits**

In *Buccieri v. Air Quality Control Agency*, the WCAB reversed the WCJ's ruling that no employment relationship existed between the injured worker and the Employer. Peter Buccieri testified that a week before the injury, he had a telephone conversation with the Employer where salary and schedule were discussed. He also received a fax with two assignments and was told to report between 7:00 and 8:00 for his "first job" and "second job." He was also given a time sheet at the end of his first day and received two more assignments for the next day. Mr. Buccieri was injured carrying a box.

The Employer claimed that Mr. Buccieri was brought in for potential employment and had faxed him job site information to see if he was capable of doing the job. The Employer further testified that a firm pay schedule was not discussed, an employment agreement was not signed and that he never intended Mr. Buccieri to work but to simply observe. Because Mr. Buccieri could not produce a contract or paystub, the WCJ determined he was unable to meet the burden of proof that he was indeed employed by the Employer.

However, upon appeal, the WCAB ruled that the Employer controlled the work assigned, the manner in which it was to be performed, and the injured worker performed those duties during the regular course of business, thus a contract of employment for wages is implied.

**What does this mean?** An employment relationship exists where there is 1) an express or implied contract of employment for wages and 2) an alleged employer that has the right to control the work to be done and the manner of its performance.

#### **Disability Benefits for "Wounded Warriors"**

The Social Security Administration provides expedited processing of disability claims for military service members who became disabled while on active military service on or after October 21, 2001, regardless of where the disability occurs. SSA has created a "Wounded Warriors" website at [www.ssa.gov/woundedwarriors](http://www.ssa.gov/woundedwarriors). This site includes explanations of the types of benefits available, how to apply, what can be done to speed the decision, and benefits for family members.

### **National Labor Relations Act Protects Employee's Rights During Interrogation Interviews**

Under the National Labor Relations Act (NLRA), union employees have a right to have a union representative present during investigatory interviews. Although employees have this right under the NLRA, it is not expressly declared in the body of the Act. However, in a 1975 Supreme Court decision, *NLRB v. J. Weingarten, Inc.*, the Court declared that union employees have an express right to union representation during this type of interview. Similar rights apply to employees in public sector unions.

Under the *Weingarten* rule, an employee may request union representation before or during an investigatory interview. An investigatory interview is defined as an interview where "management questions an employee to obtain information and the employee has a reasonable belief that discipline or other adverse consequence may result from what he or she says." The important point is that the employee must request the presence of the union representative. Management is not required to advise the employee of this right.

Once the employee requests union representation, the employer can either grant the request and delay further questioning until the union representative arrives, deny the request and end the interview immediately, conducting the investigation without the interview, or give the employee the choice of having the interview without representation or of ending the interview. If the employer ignores the employee's request for representation and continues the interview, he has committed an unfair labor practice.

Once the union representative arrives at the interview, both the union representative and the employee should be informed of the subject matter of the interview and be granted a pre-interview counseling session if requested by either the union representative or the employee.