

## How Does Governor Wolf's Shutdown of Non-Essential Businesses Affect Pending Workers' Compensation Claims?

On March 19, 2020, Governor Wolf ordered the shutdown of all non-essential businesses in light of the COVID-19 pandemic. How does this mandate affect Claim and Reinstatement Petitions that were already in the system? How does it affect employees who were back to work following a work injury and get laid off? Please accept the following as a brief summary.

**I. Claim and Reinstatement Petitions.** If an employee's vocation was not capable of being performed by anyone during the shutdown, employers could argue in response to these petitions that an employee is not entitled to wage loss benefits during the shutdown. For example, let's assume that the employer is in the business of residential building construction. As of 8 p.m. on Thursday, March 19, 2020, Governor Wolf ordered the majority of residential building construction (and nonresidential building construction) to halt. Should a maintenance worker who filed a claim petition for a back injury, and who was employed in the residential or commercial building sector for 20 years, be entitled to compensation from the employer or insurance company when no one in that industry can work, regardless of the employee's ability to work? There is no case law on this issue since we have never seen a government ordered shut down like this before. But it is an argument that employers and carriers can advance as a defense to these petitions in these uncertain times that lack statutory or case law guidance.

**II. Federal Benefits to Laid Off Workers.** The Federal Government is also talking about giving employees money during the COVID-19 pandemic to assist when income falls below a certain level. Assuming an employee receives this money, employers and carriers should liken these benefits to unemployment compensation benefits requiring an offset, or to actual wages. If the former, employers and carriers should argue for a dollar for dollar offset. If the latter, employers and carriers should argue that these federal benefits are "wages" and result in partial disability during the appropriate period of time if the Judge ultimately grants a claim or reinstatement petition.

**III. Employee is laid-off from light duty.** This one is a bit more complex but just as uncertain. If the employee is a union employee, the situation may be governed by the existing collective bargaining agreement (CBA). That is, the CBA may confirm that employees are paid wage replacement benefits during a forced shut down whether by government or otherwise. Obviously, if the employee is paid actual wages from the employer, whether due to a CBA or otherwise, then there is no need to reinstate total disability benefits. The bigger question is what happens if the employer does not have such a policy. The traditional Pennsylvania law in this context treats an employee who is back to work regular duty (but not yet fully recovered) differently from the employee who is back to work on light duty. That is, Pennsylvania law confirms that if an employee is back to work regular duty following a work injury and is laid-off, then he is not entitled to a reinstatement of total disability benefits. However, an employee who is laid off from light-duty is entitled to a presumption that the wage loss is related to the injury. Current case law suggests that the only way to rebut this presumption is to show that either the employee had actually fully recovered or that work was still available despite the layoff. The legal rationale in treating these classes of employees differently under the law is that the regular duty employee can obtain other work while the light-duty employee is not as capable because he is technically "not whole." In our current COVID-19 situation, the light-duty person and the full duty person are arguably in the same situation; that is, while the government shut down is in place, neither the full duty nor the light-duty employee can find work. As a result, it can be argued that the loss of earnings, even for the light-duty employee, has to do with the extraordinary, never been seen before situation in our lifetimes, and not due to the work injury. We, therefore, can make the

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argument that benefits should not be reinstated during the period of the forced shutdown.

**Comment:** Please keep in mind that while we believe the above arguments have merit, there is no guarantee that a Workers' Compensation Judge (WCJ) is going to agree. It's not a big deal in the claim petition /reinstatement petition context, but the light-duty layoff situation comes with some risks. Without controlling case law other than what is stated above, the WCJ may feel that the employer/insurance industry has to bear the burden of this work shutdown, because the Pennsylvania Workers' Compensation statute is remedial in nature. If the Judge feels that way, he or she not only has the right to reinstate benefits, but also technically has the right to award penalties and unreasonable contest attorney's fees. So, employers and carriers must consider each option carefully, not only in light of their immediate financial needs, but also in light of potential reaction and reputational consequences in the Judge community.

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