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Weber Gallagher

Pennsylvania Workers' Compensation Quarterly Update - First Quarter 2013

PA SUPREME COURT CASE

City of Pittsburgh and UPMC Benefit Management Services, Inc. vs. WCAB (Robinson), No. 18 WAP 2011 (Decided March 25, 2013)

Issue: Whether the employer bears the burden of showing by the "totality of the circumstances" that the claimant has chosen to retire and not return to the workforce when seeking a suspension of benefits?

Answer: Yes.

Analysis: Claimant suffered a work injury in 1997 but returned to modified duty. While traveling for treatment for her work injury, she was involved in an accident and suffered additional injuries that were accepted as part of the work injury. Claimant did not return to her modified duty position and was not offered further modified duty work. She received a disability pension that required a showing that she could not return to her time of injury position. Three years later, an IME found that claimant could work in a modified duty position. Employer issued a Notice of Ability to Return to Work and filed a Suspension Petition alleging claimant had voluntarily withdrawn from the workforce. The WCJ denied the Suspension Petition and the WCAB and Commonwealth Court affirmed.

The Supreme Court affirmed and noted that the totality of circumstances standard used by the Commonwealth Court was appropriate in determining whether a claimant has retired and removed themselves from the workforce. The Court also made clear that the employer has the burden of proving that a claimant has retired from the workforce. Once employer establishes this fact, the claimant has the burden of proving that she continued to look for work or that the work injury prevents her from performing any work. In the present case, the employer did not meet this burden as claimant credibly testified that she was seeking employment and her disability pension only required a showing that she could not return to her time of injury position.

In reality, the employer and claimant will submit all relevant evidence on the issue of whether a claimant has retired and whether she has removed herself from the workforce.

Conclusion: Employer bears the ultimate burden of proof in a petition to suspend benefits based upon an allegation of voluntary withdrawal from the workforce. Employer must show by the totality of the circumstances that claimant has retired and chosen not to return to the workforce. The fact that claimant is receiving a pension or is on SS Retirement is important, statements from a supervisor or co-workers, who can recount claimant's intention to retire at a certain age, regardless of the injury, is typically the most compelling evidence.

COMMONWEALTH COURT CASES

John P. Glass v. WCAB (The City of Philadelphia), No. 1274 C.D. 2012 (Filed January 10, 2013)

Issue: Whether defendant's subrogation rights under the Act can be forfeited through deliberate bad faith conduct on the part of the defendant?

Answer: Yes.

Analysis: Claimant, a police officer, was injured when he lost control of the motorcycle he was operating. Claimant pursued a third party claim alleging that the motorcycle had malfunctioned due to improper maintenance and requested that the employer not permit repairs to the motorcycle pending his expert's

evaluation. The motorcycle was repaired and claimant argued that this spoilage of evidence for the third party suit constituted deliberate bad faith conduct on the part of the employer sufficient to extinguish the employer's subrogation rights under the Act. The WCJ found that the spoilage of evidence was the result of miscommunication and not bad faith conduct. Claimant appealed and the Board Affirmed.

The Commonwealth Court affirmed the Board but re-affirmed that deliberate bad faith conduct on the part of the employer would permit a finding that the subrogation rights under the Act had been forfeited.

Conclusion: Bad faith conduct on the part of the employer with regard to claimant's third party claim does permit the court to extinguish the employer's subrogation rights under the Act. Care should be made to retain any property that may be the subject of a third party lawsuit.

Eleazar Ortiz v. WCAB (Raul Rodriguez d/b/a Rodriguez General Contractors and UEGF), No. 446 CD 2012 (Filed January 15, 2013)

Issue: Whether an employer is entitled to a suspension of benefits when an unauthorized alien is found capable of working in any capacity regardless of whether claimant is still suffering a wage loss?

Answer: Yes.

Analysis: Claimant suffered a work injury while working for an employer who did not have workers' compensation coverage; therefore, payment was made by the PA UEGF. During the litigation of the Claim Petition, claimant was released to modified duty work and returned to work with a new employer at a wage loss. He was awarded total disability benefits up to the date of his return to work with the new employer, and then awarded partial benefits based on his wage loss. No appeals were taken. Employer subsequently filed a suspension petition alleging that claimant was not authorized to work in the United States so that he should not be entitled to partial disability despite the wage loss. Claimant admitted he was not authorized to work in the United States, but argued that the employer needed to establish a change in medical condition to avoid the payment of partial disability. The WCJ denied the petition on the basis that employer had failed to show a change in claimant's condition.

The WCAB reversed, finding that claimant was not entitled to benefits after his return to work with the new employer because of his unauthorized alien status. The Court affirmed, finding that the claimant's prior clearance to return to work and his return to work with the new employer, coupled with his status as an unauthorized alien, was sufficient to suspend his benefits. The Court reasoned that his loss of earning power was now the result of his unauthorized status rather than his work injury.

Conclusion: Once a claimant who is not authorized to work in the United States is released to return to work in any capacity, the employer is entitled to a suspension of benefits. A Notice of Ability to Return to Work is a prerequisite to this relief. This case was successfully litigated by our partner, Carl J. Smith, Jr. Esq.

Michael DePue v. WCAB (N. Paone Construction, Inc.), No. 1113 C.D. 2012 (Filed January 30, 2013)

Issue: Whether claimant was precluded from adding an injury that was known prior to an indemnity only compromise and release agreement but was specifically omitted from the description of injury contained within the agreement?

Answer: Yes.

Analysis: Claimant suffered a work injury that was accepted. The parties ultimately entered into an indemnity only compromise and release agreement that described the work injuries subject to the agreement as "any and all injuries suffered at North Paone Construction Company, including but not limited

to the accepted injuries of a severe closed head injury with seizure disorder and short term memory loss." Claimant subsequently filed a penalty petition alleging that employer had failed to pay reasonable and necessary medical expenses and filed a review petition seeking to expand the injury description to include a left shoulder injury. The WCJ denied both petitions on the basis they were barred by the prior decision approving the C&R. The Board affirmed.

The Commonwealth Court affirmed. The Court noted that a valid compromise and release agreement, once approved, is final, conclusive and binding on the parties. The Court found no evidence of fraud or mistake in the description of injury contained in the compromise and release agreement. The Court further found that because the claimant failed to expressly reserve his right to add new injuries in the compromise and release agreement he was precluded from doing so after the agreement was approved. The Court rejected claimant's argument that the inclusion of "any and all injuries" in the agreement justified adding the claimed shoulder injury when the injury was never specifically accepted or adjudicated as part of the work injury and the documentation produced in the negotiation of the compromise and release agreement demonstrated that the employer specifically rejected inclusion of the alleged injury.

Conclusion: A valid, judicially approved, compromise and release agreement is final, conclusive and binding on the parties. Therefore, it is imperative that the injury description be precise, particularly in situations in which the employer assumes responsibility for payment of ongoing reasonable and necessary medical treatment related to the work injury. In this case language in the C&R agreement that the left shoulder was being excluded as part of the work injury would have avoided the subsequent litigation.

WCAIS UPDATE

Based upon information received from the Bureau the NCP, NOD and TNCP will continue to be used instead of the Second Report of Injury as previously announced. These Forms will be filed with the Bureau who will then upload them into WCAIS. This will be a temporary measure until a satisfactory alternative can be created within WCAIS. We will continue to provide updates on the impending implementation of this new computer system.

MEDICARE UPDATE

COMING SOON - The Weber Gallagher Simpson Stapleton Fires & Newby, LLP, QUARTERLY MEDICARE UPDATE.

ANNOUNCEMENT

Weber Gallaher is pleased to announce that Christian Davis, partner in the PA Workers' Compensation Department, has been certified as Workers' Compensation Law Specialists in Pennsylvania. The Certification acknowledges that he has demonstrated the required level of skill, expertise and years of practice to be certified as a specialist in the practice of workers' compensation law by the Pennsylvania Bar Association's Section on Workers' Compensation Law as authorized by the Pennsylvania Supreme Court.

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