

Case Update

In *Keene v WCAB (Ogden Corporation)*, decided June 4, 2014, the Commonwealth Court relying on the Supreme Court's recent decision in *Robinson*, determined that in order for the employer to establish a suspension based on a voluntary removal from the workforce (retirement), the employer must show, through a totality of the circumstances that the claimant has removed herself from the workforce. The Court explained that with the facts of this particular case, (the claimant's efforts to work, no pension and no statements that claimant intended to retire) the employer could not satisfy this burden.

The Supreme Court in *Robinson* has clarified the employer's burden of proof in this type of case. A petition for suspension based on retirement remains an important weapon in the employer's arsenal to attempt to manage risks in difficult cases. In a perfect world, the employer would have the following to present into evidence:

- Statements made by the claimant that she intended to retire at a certain age
- Lack of efforts to return to work
- Receipt of Pension

In this matter, the claimant suffered a 1989 knee injury and ultimately had a total knee replacement (TKR) in 1995. She didn't respond well to the TKR and by all accounts was only permitted to return to sedentary work. She only had a high school education and was not skilled with computers. After the 1995 surgery, she looked for work in the newspaper, applied for various jobs, but was not hired. She returned to work for the pre-injury employer at some point in 2001 or 2002 (unclear from the decision), worked for about two years, but then that job was eliminated. She applied for various jobs thereafter, but there was a two year period where she admitted she didn't apply for anything, allegedly due to her being frustrated with her job search. She was not receiving a pension, but was receiving social security disability. Again, it was held that with these facts, the employer did not satisfy its burden.

Without the statements from the employee, a lack of effort to return to work and the receipt of pension, it may be tough to succeed but sometimes the petition, in and of itself, can help bring a difficult case to the settlement table. Finally, don't forget to send the notice of ability to return to work. This is a prerequisite to relief in this type of petition.

For more information please contact David Greene at dgreene@wglaw.com or 215.972.7910.