

Strategies for Dealing with Attempts for Reinstatement

In the matter of Dougherty v. WCAB (QVC, Inc.), the Commonwealth Court addressed a reinstatement petition when an employee returns to work with restrictions which require modification of his pre-injury job duties.

The pre-injury job of a video producer required some heavy lifting and periods of standing which exceeded the restrictions imposed by the treating physician. As a result, the supervisor would assist the employee when the restrictions were exceeded. Eventually, the video producer job was eliminated and the employee was assigned to a desk job as a writer producer. Both positions paid the same.

The employer eventually discharged the employee for poor work performance and the WCJ found that the employee did not have the skills to perform the writer producer job. The WCJ also determined that the employee did not prove that his work related disability caused his wage loss because the writing position was a desk job and within the work restrictions. The Commonwealth Court agreed and remanded the case back to the WCJ.

The WCJ on remand may reinstate benefits since the employee gets the advantage of the presumption that the current wage loss is related to the work injury. Although the employee was fired from the second job as a writer producer for poor work performance, the WCJ had already determined that the employee did not have the necessary skills to perform this job. The employee's discharge was not due to his bad faith or misconduct. When an employer offers a job that the employee is not equipped to perform, the employer, when firing the employee for poor performance, remains responsible to pay wage loss or to offer a new position unless it can rebut the presumption.

In further explanation, the Court noted that if the employee had returned to his pre-injury job with restrictions that did not require a modification of the job duties, the presumption would not apply if there was an elimination of the job or economic lay off. In this situation, the employee would have the burden of proving his subsequent wage loss was causally related to his work injury.

In summary, Dougherty provides examples of two scenarios when an employee returns to work without wage loss resulting in a suspension status with a later claim for reinstatement:

1. The employee returns to the pre-injury job, with no wage loss, but with restrictions that require a modification of job duties. Since there is no wage loss benefits are suspended. If the job is eliminated due to corporate restructuring or for economic reasons the employee's wage loss is presumed to be related to his work injury.
2. The employee returns to the pre-injury job but with restrictions that do not require modification of the job duties. Again benefits are suspended since there is no wage loss. If the job is eliminated or the employee is laid off, there is no presumption that the resulting wage loss is related to the work injury and the employee must prove the wage loss is caused by the work related disability. This is accomplished by the presentation of unequivocal medical evidence linking the current wage loss with the work related disability.

Comment:

Whenever an employee returns to work, regardless of whether a wage loss is involved, it is imperative that the proper closing document be in place and filed with the Bureau. If this is not done and the employee seeks reinstatement, you will likely be required to reinstate benefits automatically and the employee will not

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have to prove entitlement to the reinstatement.

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