Susan Burks v. WCAB (City of Pittsburgh), 980 C.D. 2011 (Cmwlth. Ct., 1/13/2012)

Issue: Whether the WCJ erred in suspending benefits on the grounds that claimant voluntarily removed herself from the work force, when the judge's decision was based solely on claimant's testimony that she had not sought work in several years.

Answer: Yes the WCJ erred. A claimant does not have a duty to seek work unless employer meets its initial burden proving a voluntary retirement, therefore a decision based solely on claimant's testimony that she had not sought work is in error. However, the court affirms the suspension because the totality of the circumstances prove that claimant did voluntarily retire. One of the key circumstances leading to this decision is that claimant chooses to receive Social Security Disability (SSD) for non-work-related injuries, and a recipient of SSD cannot be working while collecting. Therefore, the evidence as a whole is sufficient to support a finding of voluntary retirement.

Analysis: When she was twelve years old, claimant was diagnosed with a hip disease called Leggs-Perthes. Her left leg was about two and one-half inches shorter than her right as a result of this disease. Claimant developed arthritis very young and underwent multiple surgeries including a hip fusion and hip replacement.

The work injury, a right knee sprain, occurred on April 12, 1984. The injury was recognized and claimant received workers' compensation benefits. Claimant subsequently underwent several right knee surgeries, including one to shorten her right leg to match the length of her left leg.

In 1985 claimant sustained back injuries in a car accident. The same year she underwent another hip surgery. Then in 1990, she was involved in another motor vehicle accident, this time injuring her left leg.

In 2008 Dr. Jon Tucker performed an IME and found claimant to be capable of full time, light duty work relative to her work injury. However, in light of claimant's several other medical conditions (unrelated to the work injury) she was only capable of full time sedentary work and probably some forms of light duty work. Employer then issued a Notice of Ability to Return to Work on April 24, 2008 advising claimant that she was released to work light duty and that she had an obligation to look for such work.

On August 27, 2008 employer filed the Suspension Petition alleging that claimant is physically capable of performing work but has voluntarily removed herself from the work force.

The WCJ found employer's expert to be credible and persuasive, thereby finding that claimant's disability is unrelated to her work injury and that she is capable of performing light duty or sedentary work. Claimant testified that she had been receiving Social Security Disability since 1984 and had not sought work since that time. The WCJ held that claimant did in fact voluntarily remove herself from the work force based solely on her testimony that she did not seek work.

Under Keene v. WCAB (Ogden Corporation), 21 A.3d 243 (Pa. Cmwlth. 2011), "a claimant has no duty to seek work until the employer meets its initial burden to show a voluntary retirement." Thus, employer cannot win a suspension without making job referrals unless employer proves a voluntary retirement. Therefore, the Commonwealth Court holds that the WCJ and WCAB erred in concluding claimant voluntarily withdrew from the work force *solely based on claimant's testimony that she had not sought work since 1984.*

However, an employer need not prove availability of suitable work when it can prove, by a totality of the circumstances, that a claimant has voluntarily retired. City of Pittsburgh v. Workers' Compensation Appeal Board (Robinson), 4 A.3d 1130 (Pa.Cmwlth.2010). In particular, Employer argues that claimant's receipt of Social Security Disability benefits, which is based on her inability to engage in substantial gainful activity, establishes that claimant has voluntarily withdrawn from the workforce. See id. at 1137 (stating that there are different types of disability pensions, including a disability pension that means the recipient is unable to engage in substantial gainful activity).

In fact, claimant's receipt of Social Security Disability is dependent on her inability to engage in gainful employment. In Keene, the court noted that the receipt of Social Security Disability benefits could be evidence that a work injury forced claimant out of the work force. However, in a case such as this one where the judge found claimant's disability to be unrelated to the work injury, the "receipt of Social Security Disability can only mean that the claimant is unattached to the workforce for reasons unrelated to the work injury."

Conclusion: When a claimant has been diagnosed with disabling conditions (unrelated to a work injury) and is a recipient of Social Security Disability benefits, this may be enough evidence to prove a voluntary removal from the work force, since receipt of SSD is contingent upon inability to work. Clearly this does not apply if a claimant is receiving Social Security Disability due to a work injury.

Karen Verity v. WCAB (The Malvern School), 356 C.D. 2011 (Cmwlth Ct.)

Issue: Whether the WCJ and WCAB erred in holding that claimant voluntarily left her light duty position when employer could not meet restrictions that claimant's expert and claimant admitted to be incorrect and unnecessary.

Answer: No, the WCJ and WCAB rulings are affirmed.

Analysis: On September 19, 2007, claimant sustained an accepted work injury described as a "left lower back and left hip strain." Claimant received total temporary disability benefits for a time before returning to work in a light duty capacity. Claimant worked light duty until June of 2008, at which time her doctor, Dr. Lam, issued a note restricting

her from ascending or descending stairs. Claimant then took this note to employer and was informed that this restriction could not be accommodated.

Claimant filed a Reinstatement Petition alleging a worsening of condition and that employer did not have work available within her capabilities. Employer filed a Termination Petition based on defense expert Dr. Greene opining claimant had fully recovered.

Dr. Lam testified that she did not intend to completely disallow claimant from climbing stairs; rather she only intended to limit her from using stairs more than once in an hour. She also testified that she encouraged claimant to continue working. Claimant testified that she was capable of walking up and down stairs, and in fact she did so regularly at her apartment complex. Dr. Greene testified that claimant had fully recovered from the work injury, but may be afflicted with unrelated rheumatology conditions. Dr. Greene also testified that claimant was capable of performing the same light duty she performed prior to Dr. Lam's increased restrictions.

The WCAB affirmed the judge's denial of the Reinstatement Petition and held that claimant was capable of performing light duty work and that she voluntarily left the work force in June of 2008. Claimant appealed on the grounds that the WCAB applied the incorrect standard of proof in denying the Reinstatement Petition.

Claimant argued that employer provided no evidence of a bad faith rejection of available work, as is required under Bufford v. WCAB (North American Telecom), 606 Pa. 621 (2010). Claimant contends that she actually did not remove herself from work; rather employer eliminated her light duty position.

The court affirms. The court states that the burden in a Reinstatement Petition is on the claimant to prove that her earning power is again adversely affected by her disability, and that such disability is a continuation of that from the original claim. The burden then shifts to the employer to prove that the claimant's earning impairment was not caused by the work-related disability. This burden may be met by showing that the claimant rejected a job offer in bad faith. Bufford at 558.

In applying this standard, the court found that claimant did not establish that her earning power was once again adversely affected by her work-related disability. The WCJ found that Dr. Lam did not intend for the "no stairs" restriction to actually mean "no stairs." In addition, Dr. Lam testified that she encouraged claimant to continue working the light duty position. The Board had determined that: 1.) claimant was aware that the stair restriction was incorrect; 2.) claimant could perform her light duty position; 3.) Dr. Lam was unaware of claimant's ability to ascend and descend stairs; 4.) Dr. Lam was unaware that claimant was required to climb stairs at work; and 5.) employer was honoring the previous restrictions.

Conclusion: In affirming the Board's opinion, the court notes that claimant would not have had to stop working if Dr. Lam's note was correct. Claimant's failure to secure a

correct note, knowing that the note was incorrect, caused her to lose the light duty position. The work did not become unavailable due to any change in her condition or adverse actions by employer, rather it was solely attributable to claimant's misrepresentations.

The practical point to take from this case is that the information provided to an expert is extremely important. The fact that Dr. Lam was unaware of claimant's ability to climb stairs, as well as the fact that it was a job requirement, were central to this decision.

Judith Caputo v. WCAB (Commonwealth of Pennsylvania), 191 C.D. 2010 (Pa. Cmwlth Ct. 1/5/2012).

Issue: Whether the offset provision of Section 204(a) of the Workers' Compensation Act violates the Equal Protection Clause of the Pennsylvania Constitution.

Answer: No. Claimant's argument that the Act violates the state Constitution is meritless.

Analysis: The WCAB affirmed the judge's decision to deny claimant's offset review petition. Claimant argues on appeal that the offset provision of Section 204(a) of the Act violates the Equal Protection Clause of the Pennsylvania Constitution.

In 2002, Claimant sustained a work-related injury and began receiving total disability benefits. In August 2006, she began receiving monthly Social Security Old Age benefits of $862.00. One month later she also began receiving a pension benefit in the amount of $405.47 per month. In December of that year, employer filed a Notice of Workers' Compensation Benefit Offset advising claimant that it was taking a credit against claimant's benefits. The credit was equal to 50% of her Social Security benefits ($99.31 weekly) and $74.56 weekly for her pension benefits. In addition, employer advised claimant that it was suspending payment of her disability benefits until March 14, 2007 in order to recoup its overpayment of $2,955.79. After that date she would receive the difference between the combined offset amount and her compensation rate.

Claimant filed a petition to review the offset, arguing that employer must prove an entitlement to the offset. The judge ruled in employer's favor, and claimant appealed to the WCAB on the grounds that the offset provision is unconstitutional. The Board affirmed the judge's decision.

Claimant now urges the court to follow the reasoning of the Utah Supreme Court in Merrill v. Utah Labor Commission, 223 P.3d 1089 (Utah 2009) which held that a similar provision in the Utah Workers' Compensation Act was unconstitutional. Employer argues in rebuttal that the vast majority of other states have declined to follow this interpretation and have in fact upheld a 100% offset for Social Security retirement benefits or outright termination of benefits at retirement.

Review under the Equal Protection Clause involves two steps. The court must determine whether the statute at issue creates a burdened class and then determine the type of class created. According to McCusker v. WCAB (Rushton Mining Company), 536 Pa. 380 (1994), there are three different possibilities:

1. Legislation implicating a suspect class or fundamental right must have a compelling governmental purpose;
2. Classifications implicating a sensitive class or an important, although not fundamental right, must serve an important governmental purpose;
3. Classifications which involve none of these classes or rights will be upheld as long as there is a rational basis for the classification.

The Pennsylvania Supreme Court has held that judicial review of governmental regulation of social welfare benefits, such as workers' compensation, should be deferential. Therefore, a statutory classification in the area of social welfare complies with the Equal Protection Clause if it meets the rational basis test. Classifications subjected to the rational basis test enjoy a strong presumption of validity. Under the rational basis test, the court must determine whether the challenged statute seeks to promote a legitimate state interest, and if so, whether the legislative classification is reasonably related to accomplishing the state's goal.

According to the Utah holding, the Act creates a class comprising persons 65 years of age and eligible to receive Social Security retirement benefits.

Conclusion: The court declines claimant's invitation to adopt the Utah holding for several reasons. First, the alleged classification is inaccurate. Attaining the age of 65 is not dispositive to determining whether a legislative classification was created. Some people are not eligible for Social Security benefits until reaching the age of 66, while those born after 1960 must wait until they reach 67 to become eligible. Individuals may also elect to delay receipt of benefits until reaching 70 years of age.

Of primary importance in the Utah decision was the premise that the purpose of workers' compensation benefits and Social Security benefits are not the same. The benefits are not duplicative, therefore an offset is not serving a valid governmental interest. However, the Pennsylvania Supreme Court has already rejected this premise in Kramer v. WCAB (Rite Aid Corp.), 584 Pa. 309 (2005).

In addition, the Pennsylvania Act contains an exception to the offset not included in Utah's Workers' Compensation Act. The Pennsylvania Act states that "the Social Security offset shall not apply if old age Social Security benefits were received prior to the compensable injury." Therefore, the Pennsylvania Act creates a much different classification. The class includes two groups: individuals to whom the offset does not apply because they already received Social Security retirement benefits at the time of injury, and 2.) individuals to whom the offset does apply because they sustained a work injury before commencing receipt of Social Security retirement benefits.

In applying the rational basis test, the court holds that the state has a legitimate government interest for allowing for offsets; namely that it provides for reasonable workers' compensation cost containment for employers. The court also cites another legitimate interest – it encourages individuals collecting Social Security benefits to remain in or reenter the workforce. The court goes on to find that imposition of the offset is reasonably related to achieving this goal, therefore it is not in violation of the Equal Protection Clause.

Andrew Cozzone v. WCAB (PA Municipal/East Golden Township), 664 C.D. 2011 (Cmlwth Ct., 1/5/12)

Issue: Whether employer's statute of repose defense is barred by collateral estoppel

Answer: No. Employer did not misrepresent any facts to claimant, therefore no detrimental reliance was evident and equitable estoppel does not apply.

Analysis: Claimant sustained serious back injuries on January 24, 1989 while in the course and scope of employment. The injuries were accepted and claimant received total temporary disability benefits until September 20, 1989 at which time claimant returned to his pre-injury job.

Claimant's benefits were reinstated and suspended several times up until November 27, 2007 at which time claimant began working modified duty for a different employer. The parties entered a supplemental agreement reducing claimant's benefits from total to partial disability. Claimant worked in this capacity until January 24, 2008 at which time he felt he could no longer perform the modified duty work. Claimant then filed a Reinstatement Petition seeking to have his benefits changed from partial to total disability. Claimant also filed a Penalty Petition alleging employer violated the Act by ceasing payment of partial disability benefits. Employer denied all allegations.

Employer argued that claimant's right to compensation extinguished when the statute of repose period expired. The judge granted claimant's petitions and found that employer was equitably estopped from raising a statute of repose defense because employer had lulled claimant into believing that his compensation rights were fully protected by executing various supplemental agreements.

Employer appealed to the WCAB on the grounds that the judge erred in determining that employer was equitably estopped from raising a statute of repose defense because claimant's right to compensation had extinguished by the time employer executed the supplemental agreements. Therefore, employer's actions could not have affected claimant's right to benefits as these actions occurred after the repose period expired.

Under Section 413(a) of the Act, where a claimant's benefits are suspended because of no loss of earnings, benefits may only be resumed if claimant files a reinstatement petition within 500 weeks from the effective date of the suspension. Unless circumstances justify

application of equitable estoppel, a Reinstatement Petition filed after 500 weeks will be time-barred.

In this case, claimant's benefits were suspended on September 20, 1989 when he returned to his pre-injury position. Thus, claimant had until April of 1999 to file a reinstatement petition. However, claimant did not file a Reinstatement Petition until 2008. Therefore, unless equitable estoppel applies, claimant's petitions will be time-barred.

Equitable estoppel applies when the following elements are met: 1.) a party negligently misrepresents material facts 2.) knowing that the other party will justifiably rely on this misrepresentation 3.) to the detriment of the reliant party 4.) and the party does in fact rely on this misrepresentation. Sharon Steel Corporation v. WCAB (Myers), 670 A.2d 1194 (Pa. Cmwlth. 1996). Accordingly, the primary issue in this case is whether employer convinced claimant not to pursue his claim within the statutory period.

Claimant argues that equitable estoppel should apply because employer suspended benefits without a supplemental agreement or judge' order, thereby lulling him into not pursuing a claim during the statutory period. The court disagrees.

Conclusion: Claimant did not suffer any detriment during the 500 week period; his benefits were suspended based on his return to full duty work and he performed this job for fourteen years. Therefore, even if employer had formally informed claimant of a suspension via a Notice of Suspension, the situation would have been the same. Claimant worked through the entire repose period. Claimant contends that employer's entering into several different supplemental agreements somehow affected claimant's rights. However, none of these events occurred until after the 500 week period expired.

The court also holds that claimant is not entitled to any payments pursuant to supplemental agreements executed *after* the statute of repose period. Claimant's right to compensation had expired; therefore these agreements are null and unenforceable.

This decision is informative regarding the interpretation of detrimental reliance. It will take more than failure to issue a Notice of Suspension to support an application of equitable estoppel. The court performed a fact-intensive analysis to determine whether any actual detriment occurred. The fact that claimant worked throughout the statutory period showed that claimant was not burdened in any way by the employer's failure to issue a notice.

Renee Zuchelli v. WCAB (Indiana University of Pennsylvania), 817 C.D. 2011 (Cmlwth. Ct., 1/18/11)

Issue: Whether claimant's new injuries, caused by surgery allegedly related to the work injury, are compensable when the judge found the surgery to be unrelated to the original work injury.

Answer: No, the ruling is affirmed as the judge clearly found the surgery to be unrelated to the initial work injury. The court differentiates between this situation and a situation where claimant in good faith seeks treatment related to the work injury and sustains additional injuries.

Analysis: Claimant sought indemnity benefits for a closed period of two and one-half months. Claimant, a secretary, sustained a work-related right shoulder sprain on July 23, 2008 when she was lifting a box. Employer issued a Notice of Compensation Denial acknowledging that an injury occurred but denying that claimant sustained any disability. Claimant then filed a Claim Petition. Employer filed an Answer denying that disability occurred and averring that claimant had prior right shoulder injuries, and that treatment following the work injury was unrelated to the alleged injury.

Claimant's expert testified that a right shoulder impingement and bursitis were caused or aggravated by the work injury. He performed arthroscopic surgery on the shoulder and he opined that this surgery was also related.

Employer's expert testified that claimant's treatment was unrelated to the work injury. Rather, the treatment was all connected to the pre-existing conditions. He went on to explain that claimant's diagnosed condition, bursitis, is a chronic, repetitive problem that occurs over an extended period of time. The isolated act of lifting a box could not cause this symptomatology. The WCJ found employer's expert credible and determined that claimant's treatment was in fact unrelated to the work injury.

Claimant sets forth two arguments on appeal. First, claimant argues that employer failed to promptly investigate the injury and issue a NTCP. Claimant asserts that, under the Act, employer is required to promptly investigate the cause of disability and accept the injury as compensable, or, if uncertain whether disability is compensable, to issue a NTCP. Therefore, claimant argues, issuance of an NCD was improper.

Claimant also argues that the judge erred in finding that her eventual surgery and treatment were unrelated to the work injury. Claimant relies on the precedent set forth in WCAB (Bartosevich) v. Ira Berger & Sons, 470 Pa. 239 (1977) which states that where a claimant seeks medical treatment, in good faith, for treatment of a work injury and this treatment aggravates the injury or causes a new injury, the aggravation or injury is causally related to the original work injury.

Conclusion: The court affirms the judge's decision to deny the claim. First, the court notes that an employer may issue an NCD accepting liability for medical benefits but disputing disability where employer asserts the cause of disability was a pre-existing condition. Gumm v. WCAB (Steel), 942 A.2d 222 (Pa. Cmwlth. 2008). The court holds that employer did exactly that in this case, and was justified in issuing the NCD.

Regarding the second argument, the court holds that claimant's assertions are off point. The WCJ and the WCAB both issued decisions finding that the treatment was *unrelated to the work injury*. Therefore, any aggravations or additional injuries sustained during

surgery are also unrelated to the work injury. In Berger & Sons, claimant was undergoing treatment by a chiropractor when he sustained additional injuries. In the decision, the WCJ clearly found that this treatment was related to the initial work injury thus the additional injuries were also tied to the initial injury. This case is clearly different. The judge in this case held that the surgery was unrelated, therefore Berger & Sons does not apply.

Under this decision, it is important to note that the judge may find the treatment unrelated to the work injury despite claimant's "seeking treatment in good faith" argument. Simply seeking treatment to the body part subject to the work injury is insufficient. The judge accepted employer's medical expert's testimony that the treatment was unrelated, and this is legally sufficient to support a finding of unrelatedness.

Richard Palaschak v. WCAB (US Airways), 1699 C.D. 2010 (Cmwlth Ct. 1/23/12)

Issue: Whether providing light duty work is a form of "compensation" as found in Section 413(a) of the Act. If the court does find the act of providing light duty work to be "compensation", then the provision barring Reinstatement Petitions more than three years after payment of the last wage loss benefit, and the provision time-barring reinstatement petitions filed more than 500 weeks after a suspension of benefits, would be interpreted much differently. Specifically, the period would not begin run until said light duty work became unavailable; rather than running from the date of the last wage loss check (in the case of claimant's whose benefits were not suspended) or running from the date of suspension, the period would not run until claimant ceased working modified duty.

Answer: No, "compensation" refers to wages only. A modified duty job offer is not included in the definition. Therefore, a light duty job offer does not stop the running of the 500 week period.

Analysis: Claimant sustained a work-related neck injury on January 28, 1992 while working as a mechanic. He received total temporary disability benefits until his return to his pre-injury job (with restrictions) on February 5, 1996. Claimant's benefits were suspended at this time.

Claimant worked in this capacity until March of 2006 when his doctor restricted him to performing only "bench work." Employer could not accommodate this restriction therefore claimant stopped working for employer at this time.

Claimant filed a Reinstatement Petition on April 21, 2006 alleging that his initial work injury caused a loss of earning power as of March 2006.

The pertinent part of Section 413(a) states:

"Provided, That, except in the case of eye injuries, no notice of compensation payable, agreement or award shall be reviewed, or modified, or reinstated, unless a petition is filed with the department within three years after the date of the most recent payment of compensation made prior to the filing of such petition. And provided further, That where compensation has been suspended because the employee's earnings are equal to or in excess of his wages prior to the injury that payments under the agreement or award may be resumed at any time during the period for which compensation for partial disability is payable, unless it be shown that the loss in earnings does not result from the disability due to the injury."

In sum, the general rule in Section 413(a) is that a reinstatement petition must be filed "within three years of the most recent payment of compensation." The "provided further" sentence establishes a different time limit for claimants whose benefits have been suspended. They may seek reinstatement "at any time during the period for which compensation for partial disability is payable." In other words, claimants whose benefits have been suspended have 9.6 years from the date of their last payment of compensation to seek reinstatement.

In this case, claimant's benefits had been suspended on February 6, 1996, therefore he had 500 weeks from that time to file a reinstatement petition. Clearly, the 500 week period had run. Therefore, claimant put forth a novel argument in support of his reinstatement. Claimant argued that he actually received "compensation" during the period that he worked light duty. The compensation claimant refers to is the light duty job; he could not perform full duty, therefore the employer compensated him by offering light duty. Thus, claimant argues, the 500 week period should not have run during the time he worked light duty.

The court discards claimant's arguments rather swiftly. The court cites Section 413(a) which refers to those "whose compensation has been suspended because the employee's earnings are equal to or in excess of his wages." The court states that, "It is obvious from this context that 'compensation' means payment for 'wage loss'." The court goes on to state that "there is no language in the Act to support claimant's theory that payment of real wages for doing a light duty job is a type of 'compensation'. The Act does not speak to the kind of job a claimant performs, but only his *earnings.*"

Conclusion: The court will not include any other creative definition of "compensation" for purposes of calculating the 500 week statute of repose of Section 413(a) of the Act. Only wage loss benefits are included in this definition.