Keene v. WCAB (Ogden Corp.), No. 1421 C.D. (Pa. Cmwlth. 2011)

Issue: *Whether Claimant's failure to look for a job during a two-year period because, "it was depressing" constituted a voluntary retirement, thus justifying a Suspension Petition?*

Answer: No.

Analysis: In this case, the Commonwealth Court overturned a WCAB decision granting Employer's Petition to Suspend Benefits. At the lower level, the WCAB relied upon Claimant's admission that she had not looked for work during a two-year period based solely on her negative feelings about the job seeking process.

In analyzing this issue, the Commonwealth Court looked to *City of Pittsburgh v. WCAB (Robinson), 4 A.3d 1130 (Pa. Cmwlth. 2010)* for guidance. The Court held that in cases of voluntary retirement, a claimant has no duty to seek work until the employer meets its initial burden. To meet its burden, the *Robinson* court established three elements: (1) there is no dispute that the claimant is retired; (2) the claimant has accepted a retirement pension; or (3) the claimant has accepted a pension and refused suitable employment. *Robinson*, 4 A.3d at 1138.

Here, the Commonwealth court found that the employer failed to meet its initial burden to establish a voluntary retirement. Claimant had at all times disputed that she was retired, had never accepted a pension, and had never refused suitable work. Because this burden was not met, Claimant had no duty to seek work. Thus, even though Claimant admitted that she stopped looking for work, and only because it was "depressing," the Court held that she had not voluntarily retired for Workers' Compensation purposes.

Conclusion and Practical Advice: In short, a voluntary retirement cannot be imputed upon a claimant. Even if they admit to ceasing all job searches, the burden remains on the Employer to demonstrate one of the three elements of *Robinson*. As seen above, this is a high standard.

Potere v. WCAB (Kemcorp), No. 1349 C.D. 2010 (Pa. Cmwlth. 2011)

Issue: *Whether an Employer's issuance of a Notice of Compensation Denial (NCD) after previously issuing a Notice of Temporary Compensation Payable (NTCP) constituted an illegal suspension?*

Answer: No.

Analysis: Generally, an employer must issue a Notice of Compensation Payable (NCP) or NCD within twenty-one days of notice of a work injury. Section 406.1(a) of the Act, 77 P.S. §717.1(a). When an employer is uncertain whether a claim is compensable or is uncertain of the extent of its liability under the Act, the employer may comply with the Act by initiating compensation payments without prejudice and without admitting liability by issuing a NTCP. Section 406.1(d)(1) of the Act, 77 P.S. §717.1(d)(1).

Although, an employer may controvert a claim at any time after issuing the NTCP, the employee is entitled to a maximum of ninety days of temporary compensation at the rate fixed in the notice until such time as the employer issues timely notices stopping and denying compensation as set forth in Section 406.1(d)(5) and (6) of the Act, 77 P.S. §717.1(d)(5), (6). An employer may properly file an NCD when it disputes a claimant's disability, even though it does not dispute that a work-related injury has occurred. Gereyes v. WCAB (New Knight, Inc.) 793 A.2d 1017 (Pa. Cmwlth. 2002).

In this case, Claimant worked as a tractor trailer driver for Employer. On January 22, 2005, he was involved in a motor-vehicle accident. Initially, Employer issued a NTCP on February 10, 2005 accepting liability for Claimant's medical expenses and indemnity benefits. However, on March 17, 2005, an IME determined that Claimant was objectively normal. Employer sent a notice of ability to return to work and a letter dated April 13, 2005, offering Claimant his pre-injury position. When Claimant refused this job offer, Employer issued a notice stopping temporary compensation, and an NCD. Importantly, the NCD cited good cause: a complete lack of medical documentation of any ongoing disability.

The medical evidence in this case heavily favored the employer. The diagnostic studies were all normal, Claimant's treating physician gave equivocal testimony, and Claimant's testimony was ultimately found incredible. Thus, Employer had a valid basis to issue the stop notice. Ultimately, the

Commonwealth Court found that Employer acted legally by filing an NCD, even though it issued NTCP initially accepting liability.

The Court distinguished its holding with Jordan v. WCAB (Philadelphia Newspapers, Inc.), 921 A.2d 27 (Pa. Cmwlth. 2007). In Jordan, the Employer also issued an NCD after initially issuing an NTCP. However, in Jordan, the Employer lacked 'good cause' on which to base his NCD. There, the only supporting evidence to deny compensation was a disingenuous statement that claimant did not suffer lost time because he continued to receive salary benefit. Furthermore, in Jordan, the employer never acknowledged that Claimant sustained a work injury. Thus, this case was distinguishable from the present matter.

Conclusion and Practical Advice: In conclusion, an Employer can legally deny a claim if it has a "good cause," even if it has initially accepted liability through a NTCP. If there is any question as to the disability status of Claimant, the safest route for an Employer is to timely accept the injury through an NTCP, use the ninety-day time period to gather more medical evidence, then proceed with a denial if Claimant is fully recovered and refuses available work.

Pike v. WCAB (Veseley Brothers Moving), No. 1227 C.D. 2010 (Pa. Cmwlth. 2011)

Issue 1: *Whether the average weekly wage (AWW) was properly calculated by averaging the three highest quarters of earnings when Claimant got a substantial increase in pay for the third quarter?*

Answer 1: Yes.

Analysis 1: Claimant worked as a driver for Veseley Brothers Moving and Storage. On October 28, 2004, he sustained a low back injury during the course and scope of his employment. After proceedings began, Claimant filed a Petition to Review Compensation Benefits in which he alleged that the employer had incorrectly calculated his average weekly wage. The issue arose because Claimant received a significant raise in the final quarter before his work injury. He was promoted from a warehouse laborer earning an hourly pay, to a certified commissioned driver earning a salary. Ultimately, the WCAB affirmed a WCJ Decision which averaged the three quarters together to calculate AWW, as opposed to using only the final – and highest – quarter.

On appeal to the Commonwealth Court, Claimant argued that the WCAB erred by failing to apply the principles of Hannaberry HVAC v. WCAB (Snyder Jr.), 575 Pa. 66, 834 A.2d 524 (2003) and calculate AWW based on the quarter most reflective of Claimant's new economic income. The Commonwealth Court disagreed.

The Act establishes statutory formulas to calculate a claimant's AWW. Claimant's employment history with Employer placed him within Section 309(d) of the Act. He worked for his employer for more than three consecutive 13-week periods in the year immediately preceding his injury. Thus, his AWW is calculated by averaging the total amounts earned during these periods. Section 309(d), 77 P.S. §582(d)-(d.2).

Claimant argued that Hannaberry should be applied to provide a more accurate reflection of his earnings. In Hannaberry, claimant worked part-time for employer while in high-school, then full-time for the same employer after graduation. He earned more than four times his pay as a full-time employee. Tragically, the claimant was rendered a quadriplegic following a work incident soon after this promotion to full-time work. There, the PA Supreme Court ultimately held that his AWW should be calculated using only the last quarter,

which reflected his higher, full-time salary. In reaching this conclusion, the Court held that the Act was designed to ensure an accurate calculation of wages, thus can be modified if it leads to a grossly inaccurate measure of a Claimant's AWW.

In the present matter, the Court did not apply Hannaberry for two reasons. First, the plain language of the Act matched Claimant's situation. He clearly fell under the 309(d) language. Second, Claimant did not provide sufficient evidence from which to conclude that his fourth quarter earnings were indicative of what he would have earned in the future. Claimant worked on a commission, and his job varied subject to availability and frequency of work. The Court noted that it is the Claimant's burden to establish a right to compensation. In this circumstance, he did not met this burden, and absent any other evidence, the Court was reluctant to rule against the plain language of the Act.

Conclusion and Practical Advice 1: When calculating AWW, the Act controls. If a claimant's economic situation is explicitly covered by a provision of the Act, the courts will be very reluctant to set it aside. Only in cases of gross and demonstrable unfairness will the Courts consider modifying an AWW outside of the plain language of the Act. Thus, even when a claimant receives a substantial raise, he must still average his earnings if he falls within Section 309(d).

Issue 2: *Whether the AWW was properly calculated using the business expenses and deductions as supplied on Claimant's tax return?*

Answer 2: Yes.

Analysis 2: Claimant also argued on appeal that the WCJ improperly subtracted Claimant's tax return deductions of $4200 in depreciation and $596.00 for home office business use, thereby artificially lowering his earnings.

The Act provides that the terms "average weekly wage" and "total wages" shall not include amounts such as deductions from wages due the employer for rent and supplies necessary for the employee's job. Section 309(e) of the Act, 77 P.S. § 582(e). The claimant must first establish his net business income from his commissions to determine "total wages" for purposes of AWW calculation. The Commonwealth Court has previously held that a claimant's business income is

limited to his net profits as shown on his tax return. Mullen v. WCAB (Mullen's Truck & Auto Repair), 945 A.2d 813 (Pa. Cmwlth. 2008).

In this case, Claimant did in fact produce his tax return. After expenses, Claimant's net taxable income was roughly $20,000.00. Furthermore, Claimant testified that he was paid on a commission, and incurred expenses for his jobs. He stated that after he paid these expenses, his income was left over. This evidence was considered important by the Court.

The Commonwealth Court concluded that Claimant's income should not be increased for AWW purposes. He stated in the record that his net income was around $20,000.00. He produced a tax return which confirmed this amount. And notably, he did not produce any other evidence, such as an amended tax return recanting his entitlement to any business expenses. He was held to the evidence in the record.

Conclusion and Practical Advice 2: For purposes of determining AWW and total income, a claimant's tax return filings will control. It seems that in this case, the Court would not allow Claimant to have his cake and eat it too. The Claimant was trying to lower his income for tax purposes, but increase it to raise his Workers' Compensation benefits. The Court was not biting.

Notably, the Employer did a very good job presenting his evidence. Not only did he elicit admissions from Claimant regarding his income, but he presented the deposition testimony of a forensic accountant to support his argument. The Court seemed to place great weight on this testimony, and it is recommended in the future for any situation dealing with complex questions of taxation and income.