SEPTEMBER 2010 CASE LAW UPDATE

Diehl v. Workers' Comp. Appeal Bd. (I.A. Constr. & Liberty Mut. Ins.), 2010 Pa. LEXIS 2170 (Pa. Sept. 29, 2010)

Background: The Supreme Court reviewed the en banc panel decision of the Commonwealth Court which held that an employer did not have to establish job availability or earning power in order to accomplish a change in appellant's disability status. Diehl v. WCAB (I.A. Construction and Liberty Mutual Insurance), 972 A.2d 100 (Pa. Cmwlth. 2009).

Holding: The means by which an employer can establish that a claimant's disability status has changed from total disability to partial disability is through an IRE, regardless of whether the IRE is requested within the 60-day window. If the IRE is requested within the 60-day period and the claimant's impairment rating is less than 50 percent, then the change in disability status is automatic. If, however, the employer requests the IRE outside of the 60-day window and claims that the claimant's impairment rating is less than 50 percent, the IRE merely serves as evidence that the employer may use at a hearing before a WCJ on the employer's modification petition to establish that the claimant's disability status should be changed from total to partial. In that event, the IRE becomes an item of evidence just as would the results of any medical examination the claimant submitted to at the request of his employer. It is entitled to no more or less weight than the results of any other examination. The physician who performed the IRE is subject to cross-examination, and the WCJ must make appropriate credibility findings related to the IRE and the performing physician. The claimant, obviously, may introduce his own evidence regarding his degree of impairment to rebut the IRE findings.

Requiring an employer who has requested an IRE that results in an impairment rating of less than 50 percent to also produce evidence of earning power or job availability, as the Commonwealth Court noted, would essentially render the IRE process a nullity. If the employer must also prove earning power and job availability, there is simply no reason to avail itself of the streamlined, more efficient IRE process. The Court held that the Commonwealth Court on reargument correctly concluded that an employer seeking to reduce a claimant's disability status based upon an untimely IRE, and

without a change in the amount of compensation, need not present evidence of earning power or job availability. The results of the IRE, if found credible by a WCJ, may be sufficient evidence to support a change in the claimant's disability status.

City of Pittsburgh v. WCAB (Robinson), 2010 Pa. Commw. LEXIS 518 (Pa. Commw. Ct. Sept. 22, 2010)

Facts: Claimant, a police officer, sustained several work-related injuries and was paid pursuant to a converted Notice of Compensation Payable. Employer discontinued its transitional-duty program, under which Employer had previously provided Claimant with a modified-duty position. Claimant sought, and received, a disability pension from Employer. Following an IME, claimant was declared capable of light duty and sedentary work. Based on that opinion, Employer sent Claimant a Notice of Ability to Return to Work, and two weeks later, a Suspension Petition, arguing that Claimant voluntarily withdrew from the workforce because she failed to look for suitable work within her restrictions after retiring. After Employer filed its Suspension Petition, Claimant went to a local employment center and looked for jobs she believed she could perform, but did not apply for any. Claimant also searched the newspaper for jobs.

Procedural History:

The WCJ determined that, pursuant to Bethlehem Steel Corp. v. WCAB (Laubach), 563 Pa. 313, 760 A.2d 378 (2000), where an employer eliminates a claimant's modified-duty position, the employer must place the claimant on temporary total disability benefits and, if the employer later seeks to modify or suspend the claimant's benefits, the employer must show the availability of suitable work. The WCJ held that Employer failed to meet this burden. The WCJ determined that Employer forced Claimant into retirement by eliminating her modified-duty position. Citing the Supreme Court's decision in SEPTA v. WCAB (Henderson), 543 Pa. 74, 669 A.2d 911 (1995), the WCJ noted that a claimant may continue to receive workers' compensation benefits despite being retired where the claimant was forced into retirement by the work-related injury. The WCJ acknowledged the decision in County of Allegheny (Department of Public Works) v. WCAB (Weis), 872 A.2d 263, 265 (Pa. Cmwlth. 2005), which held that a claimant must

be forced by her work-related injury to retire from the entire workforce, not just from her pre-injury position, but held that this decision and similar decisions from this Court conflicted with the Supreme Court's decision in Henderson. The WCJ also, however, found Claimant to be credible and found, based on Claimant's testimony that Claimant had been looking for work. The WCJ concluded that Employer failed to meet its burden of proof and, therefore, denied the Suspension Petition.

Employer appealed to the Board, arguing that the WCJ erred in failing to apply Weis and that the WCJ's findings were not supported by substantial evidence. The Board upheld the WCJ's decision, noting that the WCJ's decision did not conflict with Weis because the WCJ found that Claimant had looked for work and, therefore, remained attached to the labor market. The Board also noted that the WCJ correctly found that Employer failed to offer evidence of available, suitable work for Claimant, which, in the Board's view, might have justified a denial of benefits pursuant to this Court's holding in Pennsylvania State University v. Workers' Compensation Appeal Board (Hensal), 948 A.2d 907 (Pa. Cmwlth. 2008). The Board, therefore, affirmed the WCJ's Decision.

Issues:

The employer filed a Petition to Review to the Commonwealth Court arguing:

1) There was no substantial evidence to establish that claimant remained attached to the workforce

(2) The claimant was not forced out of the entire workforce; and

(3) The employer had no obligation to present evidence of the availability of suitable work within Claimant's abilities in order to prevail on its Suspension Petition.

Holding:

The court acknowledged the in order to obtain a suspension of benefits, the Kachinski standard will generally apply. The court further acknowledged, however, that an employer has no obligation to present evidence of work availability when the employee has removed himself from the workforce. Indeed, under Henderson and its progeny, where a claimant voluntarily retires, it

is the claimant who bears the burden of showing either that her work-related injury has forced her out of the entire workforce or that she is looking for work after retirement.

In order to resolve what line of cases should apply here, the court inquired as to *when* the burden should shifts from an employer to show the availability of suitable work, under the Kachinski standard, to a claimant to show that she is still attached to the workforce or was forced out of the entire workforce by her work-related injury, under the Henderson standard. In the court's opinion, cases interpreting Henderson had failed to address the issue of *whether* a claimant was, in fact, retired.

Court held that, in this case, Employer did not provide sufficient evidence to show that, under the totality of the circumstances, claimant intended to terminate her career. The court noted that the claimant applied for, and received, a disability pension, which was conditioned on her inability to perform her time-of-injury position. The court further noted that claimant did not seek a disability pension that precluded her from working or an old-age pension. Although the claimant did not return to her modified-duty position after her accident, this was because the employer no longer made the position available to her. Therefore, the court found "no evidence that claimant intended to terminate her employment or her career," and the employer had failed to carry its burden under Henderson to show that claimant had retired. Because employer failed to show that claimant was retired, pursuant to Kachinski and Section 306(b)(2) of the Act, the employer was obligated to show the availability of suitable work within claimant's restrictions and abilities to sustain its burden on the Suspension Petition.

Justice Pellegrini authored a dissenting opinion, which was joined by Justice Leadbetter. The dissent notes that a claimant has the obligation from the date of retirement to seek employment or obtain medical evidence that he or she was medically unable to be employed. Under Hensal, a claimant always has the burden to show that the workforce injury forced him or her not to seek employment, and that this burden is never placed on employer. The evidence of record did not establish that claimant's medical condition prevented her from seeking work, which Justice Pellegrini felt would serve as a basis to reverse the Board.

Justice Leavitt filed a second dissent commenting that "there should be one legal standard for determining continued eligibility for workers' compensation where the claimant chooses to collect a pension, regardless of whether it is a retirement or a disability pension" and that the majority's method in this case was unnecessarily complex. In Justice Leavitt's opinion, any time a claimant accepts a pension, she should be presumed to have voluntarily left the labor market. Justice Leavitt would have also reversed the Board on the basis that the claimant did not present evidence that she was precluded from all work and because the evidence of record did not reveal that she maintained a "good faith" job search.

**The majority's opinion was subsequently distinguished in Day v. WCAB (City of Pittsburgh), No. 2495 C.D. 2009 (Pa. Cmwlth., October 18, 2010). There, once the claimant's unemployment benefits ran out, claimant stopped looking for work and applied for, and received, a pension from Employer and Social Security. The court employed a "totality of the circumstances" test, and held that claimant had retired; therefore, the burden shifted to him to prove that he was still seeking work or that his injury had forced him to retire from the entire workforce. Claimant admitted that he was not looking for work and presented no medical evidence to support a finding that he was not capable of any work. Benefits were, therefore, suspended.

PPL v. Workers' Comp. Appeal Bd. (Rebo), 2010 Pa. Commw. LEXIS 510 (Pa. Commw. Ct. Sept. 10, 2010)

Facts: Claimant, the widow of Decedent, testified that never remarried since the death of her husband. She acknowledged that she resided in a home with Gary McDonald. According to Claimant, she and Mr. McDonald split expenses; they do not currently engage in any sexual activity; but she acknowledged that she and Mr. McDonald did previously engage in sexual activity off and on through 2006. Claimant emphasized that she has no intention of marrying Mr. McDonald. She added that the two do not hold themselves out as husband and wife. At a subsequent hearing, Claimant agreed that she and Mr. McDonald represented to Mr. McDonald's employer that they were common law husband and wife. She agreed that the purpose of their statements was to get her placed on his health insurance. She further acknowledged she and Mr. McDonald have completed their federal income taxes as "married filing jointly." Nonetheless, Claimant stated she never engaged in an official marriage ceremony with Mr. McDonald. She added the two have never discussed that they were a married couple or agreed to being married.

Mr. McDonald also testified in this matter. He agreed he represented to his employer that he and Claimant were common law husband and wife for the purpose of having her placed on his health insurance. He further agreed that the two completed tax forms as "married filing jointly." According to Mr. McDonald, he also attempted to add Claimant to his union benefits as a common law spouse. Mr. McDonald has not represented to other parties that he is married to Claimant. He explained any statements regarding the two being husband and wife were for the sole purpose of saving money. They never agreed to be married.

Procedural History:

The WCJ denied Employer's Termination Petition, concluding that employer failed to meet its burden of proving claimant was involved in a meretricious relationship. The WCJ further determined that employer did not establish a right to any relief based upon claimant entering into a common law marriage. The WCJ acknowledged that, claimant and Mr. McDonald live together, that they engaged in sexual relations for a period of time, that they filed tax returns as a married couple, and that they represented to

Mr. McDonald's employer that they were a married couple for insurance purposes. Nonetheless, the WCJ determined that claimant and Mr. McDonald never formed any intent to enter into common law marriage. Instead, he determined "they have simply tried to 'game the system' by saying that they were common law married when that posture benefited them financially."

Issues:

Employer argued on appeal that the WCJ erred in determining it failed to satisfy its burden of establishing claimant and Mr. McDonald entered into a common law marriage.

Holding:

The burden to prove a common law marriage is on the party alleging the marriage. Staudenmayer v. Staudenmayer, 552 Pa. 253, 714 A.2d 1016 (1998). A common law marriage can only be created by an exchange of words in the present tense, spoken with the specific purpose of creating the legal relationship of husband and wife. Id. at 261-2, 714 A.2d at 1020. Bowden v. WCAB (G. & W.H. Corson Co.), 376 A.2d 1033 (Pa. Cmwlth. 1977). In order to succeed in its Termination Petition, Employer had the burden of establishing Claimant and Mr. McDonald had entered into a common law marriage before January 1, 2005 when such "marriages" were no longer legally valid. Because both parties were present and available to testify, evidence of words *in praesenti* sufficient to establish a definite agreement to marry were required in order for Employer to satisfy its burden. The WCJ had credited the testimony of Mr. McDonald that the two never agreed to be married and that any statements to the contrary were made for the sole purpose of financial gain. The "mere fact" that parties were known to a few people as man and wife was not sufficient evidence to establish marriage. The court also rejected the employer's request for equitable relief based upon claimant's unjust enrichment, because the court found the claimant was entitled to workers' compensation benefits based upon the death of her husband consistent with Section 307 of the Act, and that those benefits are to continue until she remarries.

Justice Leadbetter concurred "in result only" noting that had the employer raised the meretricious relationship issue on appeal, she

would have advocated distinguishing, or perhaps overruling prior cases and found a meretricious relationship here. She further commented that I recognize that, given the duplicitous conduct of the claimant and Mr. McDonald as described by the majority, the result was outrageous.