

Discipline and the Light Duty Employee

Employer has an employee who suffered a work injury, but who is now working in a light duty capacity. She is missing work, not reporting in a timely fashion and is otherwise disruptive and troublesome to the employer. Employer would like to discipline the employee, but is concerned about doing so due to her workers' compensation status.

An employee who is on light duty due to a work injury does not become immune from discipline for misconduct in the workplace. So long as the employee is treated 1) fair, 2) consistent with established employer policies and 3) consistent with the treatment of other employees, the employer has every right to discipline her for workplace misconduct. That being said, the employer should be careful in the process. The employer should make certain to document all violations for which it intends to discipline the employee, and to make certain that the employee is being treated consistently with other employees. In other words, she should be disciplined in the same manner as any other employee who has committed the same or similar infractions. The employer should also be certain to meticulously follow all steps of its disciplinary process.

The courts have consistently held that a claimant who is partially disabled and working (and thus in a suspended or modified status) is only entitled to a reinstatement of

total disability benefits where wage loss recurs through no fault of his/her own. *Pieper v. Ametek-Thermox Instruments Division*, 584 A.2d 301 (Pa 1990). The courts have interpreted this seminal case to mean that a reinstatement in these cases is analyzed on a fault basis, i.e., if the claimant's wage loss is his/her own fault, then a reinstatement of total disability benefits is not appropriate. What constitutes fault is analyzed on a case-by-case basis. Clearly, if the claimant's conduct (for which she is discharged) rises to the level of "willful misconduct" for which unemployment compensation benefits would be denied, then workers' compensation benefits will also be denied. However, willful misconduct is not required to establish fault, as the standard is merely that the claimant's conduct be in bad faith so that fault for the employee's loss of wages can be allocated to the employee. *Hertz-Penske Truck Leasing Co. v. WCAB (Bowers)*, 684 A.2d 547 (Pa. 1996). Examples of when fault can be allocated to the claimant, and therefore benefits are denied, include: 1) **Claimant leaves work to go out on strike**, *Carbaugh v. WCAB (T.B. Wood's Sons Co.)*, 639 A.2d 853 (Pa.Cmwlt. 1994); 2) **Claimant is fired for criminal activity (child abuse which occurred outside the workplace) which resulted in a violation of established policies regarding moral standards applicable to all employees**, *St. Luke's Hospital v. WCAB (Ingle)*, 823

(Continued on page 7)

Inside This Issue...

Commonwealth Court
Case Reviews.....page 2

COMMONWEALTH COURT CASE REVIEWS

Delaware County v. Workers' Compensation Appeal Board (Browne), No. 788 C.D. 2008, Filed December 22, 2008.

(Termination—Where there has been a prior adjudication addressing the claimant's physical condition, the employer's burden in a termination petition is to prove not only that the claimant has fully recovered but that there has been a change in the claimant's condition since the prior adjudication.)

A Notice of Compensation Payable acknowledged claimant's work injuries as a low back strain and a strain to the right side of the neck.

Employer subsequently filed a termination petition alleging that claimant had fully recovered as of March 13, 2003. By decision and order circulated on April 13, 2004, the Workers' Compensation Judge denied employer's petition and amended the description of claimant's injury to include a cervical disc herniation, cervical radiculopathy and bilateral carpal tunnel syndrome.

On June 6, 2005, employer filed a second termination petition alleging claimant had fully recovered as of October 14, 2004. Based on the evidence presented, the WCJ granted employer's petition.

Claimant appealed to the Workers' Compensation Appeal Board, which reversed the decision terminating claimant's benefits. The WCAB based its decision on the Supreme Court's opinion in Lewis v. WCAB (Giles & Ransome,

Inc.), 591 Pa. 490, 919 A.2d 922 (2007). Under Lewis, an employer's burden of proof in a subsequent termination petition is to present medical evidence to establish an actual change in the claimant's physical condition since the last termination proceeding. A medical opinion of full recovery is insufficient.

Employer then sought review by the Commonwealth Court arguing that the WCAB's determination that the Supreme Court's decision in Lewis does not allow a change in condition to be satisfied by a medical opinion of full recovery is both internally inconsistent and a mischaracterization of the holding in Lewis.

The Court was somewhat persuaded. Under Lewis, "[i]n order to terminate benefits on the theory that a claimant's disability has reduced or ceased due to an improvement of physical ability, it is first necessary that the employer's petition be based upon medical proof of a change in the claimant's physical condition." The Court in Lewis defined "change of condition" as "any change in the claimant's well being that affects his ability to work" and "[i]t can be the total recovery from an illness or merely that the symptoms subside."

Thus, if an employer presents credible evidence that the claimant's current physical condition is differed than it was at the time of the last disability adjudication due to a total recovery from the recognized work-injury, such medical evidence would satisfy the employer's burden of proof. But, the WCJ must make that factual finding.

As such, the WCAB was correct. A simple finding of full recovery is not sufficient. There must be a factual finding that the

claimant's physical condition changed from the time of the last disability adjudication.

Here, employer had the burden of proving a change in claimant's physical condition between March 13, 2003, the date of full recovery alleged in its first termination petition, and October 14, 2004, the date of full recovery alleged in its second termination petition. While the WCJ found that claimant had fully recovered, the WCJ based her decision on medical records that pre-dated March 13, 2003. Moreover, the WCJ disregarded the prior adjudication amending the description of claimant's work injuries.

The case was remanded to the WCJ for reconsideration of the existing record in accordance with Lewis.

Department of Labor & Industry Bureau of Workers' Compensation v. Workers' Compensation Appeal Board (Crawford & Company), No. 2211 C.D. 2007, Filed February 2, 2009.

(Supersedeas Fund Reimbursement—Even though medical treatment precedes request for supersedeas, if the bill for that treatment was submitted to and paid for by the insurer after supersedeas was requested and denied, then reimbursement by the Fund is appropriate.)

Claimant suffered a work injury in July of 1995.

On June 1, 2004, he received medical care for his injury.

On July 19, 2004, employer filed a petition to terminate benefits as of March 16, 2004.

On August 30, 2004, a Workers' Compensation Judge denied employer's request for supersedeas.

On October 11, 2004, a

medical bill for the treatment rendered on June 1, 2004 in the amount of \$35,405.45 was presented to insurer. Insurer paid the bill on January 25, 2005.

On June 28, 2005, the WCJ granted employer's termination petition.

Thereafter, employer filed an Application for Supersedeas Fund Reimbursement requesting reimbursement from the Fund in the amount of \$34,504.45. The Bureau denied the application, arguing that the treatment was rendered to claimant prior to the request for supersedeas and, thus, payment for such treatment is not subject to reimbursement from the Fund.

The employer sought a hearing before a WCJ, who ultimately granted employer's application noting that it is not the date of service that causes the compensation to be due; but rather, it is the date when the bill is properly presented. Here, the obligation to pay did not arise until after supersedeas had been requested and denied. On appeal, the Workers' Compensation Appeal Board affirmed.

The Bureau, which is charged with the responsibility for maintenance and conservation of the Fund, petitioned the Commonwealth Court for review. The Bureau argued that the WCJ and WCAB erred in that reimbursement from the Fund can only be granted for those payments made that are attributable to the period of disability *after* the date that the request for supersedeas was filed. Because the medical service in question was rendered *before* employer requested supersedeas, reimbursement from the Fund is not permitted.

The Court disagreed. The Court reviewed the relevant case law and, consistent with the decision in Mark v. WCAB

(McCurdy), 894 A.2d 229 (Pa.Cmwlth.), held that reimbursement may be had for all payments actually made after supersedeas denial, including payment of benefits awarded retroactively for earlier periods of disability. It does not matter that the date of service of the medical expenses in question preceded the request for supersedeas—what matters is that the treatment was submitted to and paid by employer after supersedeas was requested and denied. The Court agreed with the WCAB that employer was eligible for reimbursement from the Fund.

The order of the WCAB was affirmed.

Philadelphia Gas Works v. Workers' Compensation Appeal Board (Amodei), No. 350 C.D. 2008, Filed February 4, 2009.

(Offset—Employer is entitled to a credit only for the *net* amount of unemployment, old age Social Security, severance or pension benefits that the employee receives.)

Claimant received benefits of \$542 per week for a work-related injury. Thereafter, claimant retired and began receiving pension benefits. Employer fully funds the pension plan in question.

Pursuant to §204(a) of the Act, employer issued a Notice of Compensation Benefit Offset (NCBO) notifying claimant that it would be taking a weekly offset against claimant's benefits in the amount of \$264.10, representing the net amount of pension benefits received by claimant. Thereafter, employer issued a second NCBO, setting forth a weekly offset of \$334.83 based upon the gross amount of claimant's pension benefits.

Claimant challenged the second NCBO and alleged employer was entitled to a credit only for the net amount of pension benefits received by claimant. The Workers' Compensation Judge concluded that employer properly calculated the offset in its first NCBO by utilizing the net amount of claimant's pension benefits. The claimant's petition was granted and the second NCBO was set aside.

Employer appealed to the Workers' Compensation Appeal Board, which affirmed the WCJ's decision. The WCAB relied upon the regulation at 34 Pa. Code §123.8(a), which directs that benefits "shall be offset by the *net* amount an employe receives in pension benefits."

Employer then sought review by the Commonwealth Court, arguing that the regulation at 34 Pa. Code §123.8(a) was inconsistent with §204(a) of the Act.

Section 204(a) provides, in pertinent part, that: "...*the benefits from a pension plan to the extent funded by the employer directly liable for the payment of compensation which are received by an employe shall also be credited against the amount of the [workers' compensation] award...*"

The Court noted that the statutory language does not specify whether the credit allowed is to be calculated on the gross or net amount received by the employee. The regulation, however, specifies that the benefits shall be offset by the *net* amount an employee receives.

The Court further observed that allowing a credit for the gross amount of other benefits an injured employee may receive would result in a loss of workers' compensation benefits to which a claimant is statutorily entitled. There is no tax reduction of workers' compensation benefits.

Employers may not receive a credit for the gross amount of taxable benefits received by the employee.

The Court determined that the legislative intent in enacting §204(a) was to reduce an employee's entitlement to workers' compensation beyond the post-tax amount of other benefits actually received by the employee and available for his or her use. The legislative intent was to combat the rising cost of workers' compensation and prevent a double recovery by employees, while at the same time protecting the right of employees to be adequately compensated for their work-related injuries.

The Court held that an employer is entitled to a credit only for the net amount of unemployment compensation, Social Security (old age), severance or pension benefits that the employee receives.

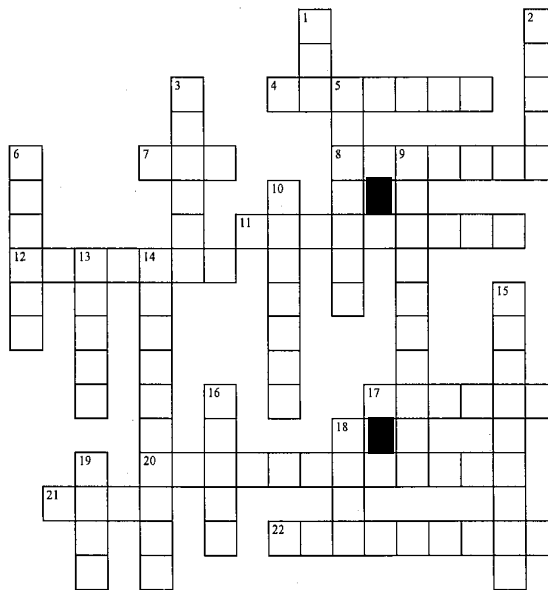
The decision of the WCAB was affirmed.

Channelock, Inc. v. Workers' Compensation Appeal Board (Reynolds), No. 884 C.D. 2008, Filed December 11, 2008, Reported February 17, 2009.

(Modification/Suspension—Where claimant is offered “no-duty” position which requires him to stay awake, medication that causes drowsiness renders the position unavailable such that benefits must be reinstated.)

Claimant suffered a work injury in July of 2001. In May 2002, he returned to a modified-duty position in a different part of employer's plant. That portion of the plant subsequently closed and claimant was moved back to his pre-injury work area. Upon his return to that portion of the plant, he was not required to

CROSSWORD PUZZLE



ACROSS

- 4 Proceeding before WCJ
- 7 Impairment Rating Evaluation
- 8 Workers' Compensation Carrier
- 11 Settlement Conference
- 12 Cease Payment of Indemnity Benefits
- 17 Utilization _____ Organization
- 20 Reduction in Indemnity Benefits
- 21 Average Weekly _____
- 22 Cease Payment of All Benefits

DOWN

- 1 Defense Medical Examination
- 2 Earning _____ Assessment
- 3 _____ of Proof
- 5 Notice of _____ to Return to Work
- 6 Credit
- 9 Compromise and Release Agreement
- 10 Consequence of Act Violation
- 13 Course and _____ of Employment
- 14 Master-Servant Relationship
- 15 Wage Loss Benefit
- 16 Arbitrator of Credibility
- 18 Disfigurement
- 19 Subjective Complaint

SOLUTION ON PAGE 6

do any work, but was required to stay awake. He basically sat and read novels and did crossword puzzles and was not permitted to speak with any of the other employees.

In December 2003, claimant fell asleep at work and was disciplined. Claimant requested a transfer to a position that would keep him mentally alert. Employer then transferred claimant to a position where he cleaned pliers. Claimant believed that the job requirements exceeded his medical restrictions. His treating physician agreed and took him off work.

Claimant filed a reinstatement petition averring that he

had a recurrence of total disability. Claimant testified on his own behalf, indicating that his pain medications make him drowsy. Employer presented testimony that both regular and light duty jobs were available for the claimant.

The Workers' Compensation Judge granted claimant's petition and entered an order reinstating benefits from March 24, 2004 onward. The WCJ concluded that claimant was not physically capable of performing the jobs offered by employer. The "no work" position required claimant to stay alert and, if the claimant were to be caught sleeping again, he would be subject to

additional discipline, including discharge. As such, the WCJ found that claimant was not able to return to his regular duty job, the modified duty job or even the “no work” position.

The Workers’ Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, employer argued that claimant could have performed either light duty or no duty work and the fact that the claimant “might have” fallen asleep is not sufficient to find that he could not perform the no-duty position.

The Court disagreed. The claimant’s medical condition, as testified to by his doctor, prevented claimant from being able to fulfill the duties of that job, in particular, staying awake. The evidence supported the WCJ’s finding that the claimant’s medication caused drowsiness and claimant had, on one occasion, fallen asleep at the job. The Court found this to be more than sufficient evidence that the claimant “might fall” asleep on the job. In fact, employer had threatened to fire him if he did fall asleep again.

Because employer failed to meet its burden to show that claimant was capable of performing the no-duty position, the order of the WCAB was affirmed.

Raymond Michel v. Workers’ Compensation Appeal Board (United States Steel Corporation), No. 2045 C.D. 2008, filed February 26, 2009.

(Termination—Even if performed “blinded,” a discogram is a partially subjective test; WCJ is free to credit employer’s expert’s testimony that claimant has fully recovered despite positive dis-

cogram results.)

Claimant suffered a low back injury in the course and scope of his employment on June 18, 2003. Employer sought to terminate claimant’s benefits as of September 30, 2003 based upon the opinion of Michael Seel, M.D.

According to Dr. Seel, claimant sustained a lumbar strain from which he had fully recovered. Dr. Seel testified that he acknowledged that claimant had degenerative changes in his lumbar spine, but further noted that claimant’s pain was from a non-organic, or non-anatomic, source and explained that there was no objective evidence to support claimant’s continued complaints of pain.

In response, claimant presented testimony from Hong Shi, M.D., who diagnosed him with left sacroiliac joint dysfunction and chronic low back pain. Dr. Shi concluded that claimant was not fully recovered.

The Workers’ Compensation Judge found Dr. Seel credible and terminated claimant’s benefits effective September 30, 2003. Claimant appealed to the Workers’ Compensation Appeal Board and requested a rehearing before the WCJ in order to present after-acquired evidence.

Claimant sought to present testimony from Peter Gerszten, M.D., who performed surgery 6 months after the WCJ rendered his decision. Dr. Gerszten was of the opinion that the work injury lead to annular tears at the L4-5 and L5-S1 levels as evidenced by the results of a discogram, which was a blinded study. According to Dr. Gerszten, the test is impossible to fake when performed blinded because the patient is lying on his stomach while fluid is injected in various disc levels and the patient has no idea which

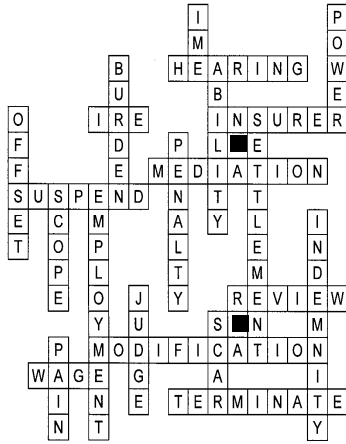
level is being injected. As such, Dr. Gerszten was of the opinion that claimant had not fully recovered.

The WCAB granted the rehearing. Dr. Gerszten’s testimony was presented to the WCJ. Employer again presented testimony from Dr. Seel, who saw claimant for a follow-up examination and reviewed claimant’s updated medical records. Dr. Seel reiterated that claimant’s work injury was a lumbar strain and that claimant had fully recovered. Dr. Seel rejected the results of the discogram which he noted to be a subjective test. Dr. Seel conceded on cross-examination that, in order for a discogram to be properly performed, it should be performed “blinded.” Dr. Seel further explained, however, that the test is still subjective because the patient states whether there is an increase or decrease in pain.

The WCJ again found Dr. Seel credible and concluded that claimant had fully recovered.

Claimant argued on appeal that Dr. Seel was incorrect in stating that no objective testing supported his pain complaints. Claimant maintained that the discogram was an objective test. The Court disagreed, concluding that a discogram is a diagnostic test that has both objective and subjective components. While optimal results are obtained when the patient is “blinded,” the portion of the test where the claimant is injected with needles must be found subjective inasmuch as the patient is required to communicate when the pain most closely mimics his normal symptoms.

Because Dr. Seel’s opinion that the claimant had fully recovered from the work injury was credited by the WCJ and the WCJ is the final arbiter of credibility, the decision to terminate



benefits was affirmed.

William Ward v. Workers' Compensation Appeal Board (City of Philadelphia), No. 1755 C.D. 2008, Filed March 2, 2009.

(Reinstatement—Where claimant's benefits are modified due to bad faith conduct, claimant must establish that his medical condition worsened to the point where he can no longer perform job previously found available.)

While working as a fire fighter in 1992, claimant sustained injuries to his neck and low back. He subsequently began to receive total disability benefits.

Seven years later, employer sought modification of claimant's benefits based on his failure to apply in good faith for occupationally appropriate work. The Workers' Compensation Judge found that claimant was capable of performing the job of an assembler, but had acted in bad faith by failing to apply for the position. The WCJ granted employer's petition and modified claimant's benefits to partial disability based on the wages claimant could have earned as an assembler.

In April of 2006, claimant filed a petition to reinstate total disability benefits, alleging that his disability increased to the point he is no longer capable of working in any capacity.

Before the WCJ, claimant testified that his back pain had increased and that his medications caused drowsiness, grogginess, constipation and blurry vision. Claimant also testified that he did not know of any work he was then capable of performing. The WCJ found claimant to be credible, but noted that claimant failed to address the specific issue of whether he was capable of performing the assembler position.

The WCJ discredited the testimony of the claimant's medical experts. As such, the WCJ denied claimant's reinstatement petition. The Workers' Compensation Appeal Board affirmed.

Claimant filed a petition for review with the Commonwealth Court, arguing that the WCJ erred in concluding that he failed to meet his burden of proof. The Court noted that, generally, a claimant seeking reinstatement following a modification of benefits must prove that through no fault of his own, his disability is again adversely affected by the work injury, and the disability giving rise to the original claim continues.

The claimant's burden of proof, however, is different when a modification of benefits occurs due to the claimant's bad faith, which is what happened here. Under such circumstances, the claimant must establish his medical condition worsened to the point where he can no longer perform the employment previously found available.

Here, claimant's testimony failed to describe how his current condition affects his ability

to perform the assembler duties. As such, claimant failed to meet his burden of proof.

Accordingly, the decision of the WCAB affirming the WCJ's decision and order was affirmed.

Consolidation Coal Company v. Workers' Compensation Appeal Board (Albani), No. 2216 C.D. 2007, Filed March 5, 2009.

(Pension Offset—The rationale of Hensal is applicable to all collectively-funded defined benefit plans, not merely to multiple employer plans.)

Employer was a contributing employer to the UMWA Health & Retirement Funds' 1974 Pension Plan (Plan). Prior to working for employer, claimant worked for over 17 years for other employers who were contributors to the Plan. Claimant suffered a work injury while working for employer. He subsequently applied for a multi-employer defined benefit disability pension from the Plan, which was awarded in February of 2003. At that time, the Plan paid claimant a \$17,061.44 back payment, less taxes, as well as net monthly pension payments of \$1,180.37.

On August 9, 2004, employer issued a Notice of Workers' Compensation Benefits Offset, noting its intention to take a \$139.74 weekly credit. Additionally, employer notified claimant that it was suspending his workers' compensation benefit payments for 35 weeks to recoup the overpayment.

Claimant filed a Review Petition. After hearings, the Workers' Compensation Judge concluded that employer was not entitled to receive recoupment for the period preceding the issuance of the Offset Notice, but was entitled to a credit

of \$139.74 per week from March 11, 2003 through August 15, 2004.

Both parties appealed to the Workers' Compensation Appeal Board. The WCAB did not address the issues raised by employer, but did reverse the WCJ's decision to the extent it denied claimant's Review Petition. The WCAB found that the Commonwealth Court's decision in Pennsylvania State University v. WCAB (Hensal), 911 A.2d 225 (Pa.Cmwlth. 2006) did not apply because Hensal involved a multiple employer pension plan, whereas this case involved a multi-employer pension plan. A multi-employer plan is one to which "more than one employer is required to contribute and is maintained under one or more collective bargaining agreements between one or more employee organizations." 34 Pa. Code §123.2. Although not defined, a multiple employer pension plan is maintained by one or more employers where participation is not linked to a collective bargaining agreement.

In Hensal, the claimant received a multiple employer defined disability pension from the State Employees' Retirement System (SERS). Employer produced testimony of SERS' actuary and of the Director of SERS Benefits Determination Division. SERS Director testified that both claimant and employer contributed to SERS plan and that SERS calculated the offset using an actuarial formula. The actuary testified that SERS method was reasonable and actuarially sound. The Court concluded that the employer's evidence was legally sufficient to establish the extent to which the employer funded the claimant's defined benefit pension for purposes of the offset.

Here, the WCAB distin-

guished Hensal on the basis that Hensal did not apply to a multi-employer defined benefit plan. The Court disagreed, stating that the holding in Hensal is applicable to all collectively funded defined benefit plans, not merely to multiple employer plans. Because the testimony presented by employer's witnesses was similar to the testimony accepted in Hensal, the

Court found the testimony competent and sufficient to support employer's right to an offset.

The order of the WCAB was reversed and the case remanded to the WCAB to dispose of the issues raised by employer in its appeal.

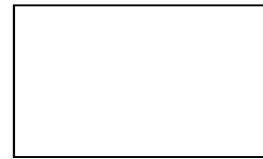


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A.2d 277 (Pa.Cmwlth. 2003); 3) **Claimant's contract is not renewed due to repeated incidents demonstrating her inability to get along with other employees**, *Coyne v. WCAB (Villanova University)*, 942 A.2d 939 (Pa.Cmwlth. 2008); 4) **Claimant is discharged for non-performance, a bad attitude and irregularities with claimed expenses**, *Christopher v. WCAB (Dravo Corp.)*, 556 A.2d 544 (Pa.Cmwlth. 1989); and 5) **Claimant is discharged for testing positive on a drug screen**, *Edwards v. WCAB (Sear's Logistic Services)*, 770 A.2d 805 (Pa.Cmwlth. 2001).

On the other hand, it is also clear that mere incompetence at one's job, where a good faith effort to perform is made, does not rise to the level of fault which disqualifies the claimant from benefits. *Eljer Industries v. WCAB (Evans)*, 707 A.2d 564 (Pa.Cmwlth. 1998), and *Stevens v. WCAB (Consolidation Coal Co.)*, 720 A.2d 1083 (Pa.Cmwlth 1998), *aff'd*, 760 A.2d 369 (Pa. 2000). To fire an employee for poor work performance, and avoid a reinstatement of workers' compensation benefits, the employer must demonstrate that the claimant has put forth a bad-faith effort, i.e., that he/she essentially sabotaged the job. The court has made it clear that in such cases, the burden of proof to show the sabotage falls squarely on the employer. *Virgo v. WCAB (County of Lehigh-Cedarbrook)*, 890 A.2d 13 (Pa.Cmwlth. 2005). Another area where it is difficult to prove fault is where the discharge results from absenteeism. That issue is clearly relevant to the question in the case of employer's employee. The light duty employee fired from her job for absenteeism is likely to argue that her absenteeism is due largely to the effects of the work injury. The courts have consistently held that absenteeism related to the effects of the work injury does not rise to the level of fault which will relieve the employer of the obligation to pay compensation benefits. The court will generally accept as credible the claimant's testimony that the effects of the work injury caused the absenteeism at issue. *Shop Vac Corp. v. WCAB (Thomas)*, 929 A.2d 1236 (Pa.Cmwlth. 2007). It is therefore recommended that the employer have more than absenteeism as grounds for dismissal, unless the employer can conclusively prove that most of the days missed were not the result of the

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