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Pennsylvania Workers' Compensation Bulletin

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What's Happened Since *Weis*?

A Review of the Workers' Compensation "Retirement" Cases since 2006

When the case of County of Allegheny (Dept. of Public Works) v. WCAB (Weis), 872 A.2d 263 (Pa. Cmwlth. 2005) was decided in 2005, there was a flurry of publicity surrounding the case. However, seasoned workers' compensation attorneys were not fazed by Weis because the holding was nothing more than a restatement of existing case law. Weis held that a claimant's benefits could be suspended if claimant failed to establish that he was forced out of the entire labor market by his injury, and not just his pre-injury job.

A few "retirement" cases have been decided since Weis, a case which remains applicable law in Pennsylvania. Most recently, the Commonwealth Court decided Keene v. WCAB (Ogden Corp.), No. 1421 C.D. 2010 (May 19, 2011). In Keene, Claimant stopped working in 1989 when she injured her knee. She underwent surgery, and then began searching for jobs. Claimant applied for multiple positions, but was never hired. In 2007, Employer filed a suspension petition alleging that Claimant had removed herself from the workforce. At the first hearing, Claimant testified about her efforts to find employment, as well as the fact that she never submitted a retirement statement to Employer and was not drawing a pension from them. The Commonwealth Court held that Claimant had not voluntarily removed herself from the workforce. The court looked to the Kachinski framework and held that "in a voluntary retirement case, a claimant's failure to seek employment is only relevant **after** the employer initially proves that the claimant has voluntarily retired from the workforce. An Employer cannot rely on a claimant's failure to seek work to prove voluntary retirement from the workforce, because a claimant has no duty to seek work **until** the employer meets its initial burden to show a voluntary retirement. Until the employer proves voluntary retirement, the employer still has a duty to make job referrals to the claimant." Here, Employer did not meet its initial burden of proving voluntary retirement because Claimant's own testimony indicated that she was not retired, she had not accepted a retirement pension, and she had not refused suitable work. Accordingly, Employer's suspension petition was denied.

In City of Pittsburgh and UPMC Benefits Management Services, Inc. v. WCAB (Leonard), No. 650 C.D. 2010 (Pa.Cmwlth.2011), Claimant sustained an injury while working as a police officer. He was off work for years and eventually received a disability pension from Employer. An IME found Claimant capable of light duty work. Employer sent a Notice of Ability to Return to Work and filed a Petition to Suspend Benefits alleging that Claimant voluntarily removed himself from the workforce and benefits should cease. Under Kachinski, an employer must establish job availability in order to obtain a suspension or modification of a claimant's benefits. This can be accomplished through either offering the injured Claimant a modified job, or directing the injured Claimant to an open position with another Employer.

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COMMONWEALTH COURT CASE REVIEWS

Securitas Security Services USA, Inc. V. Workers' Compensation Appeal Board (Schuh), No. 349 C.D. 2010, Filed April 4, 2011.

(Causation - The mere filing of a UR request by an employer does not establish a causal relationship between a medical condition and the claimant's work injury.)

Employer acknowledged claimant's work injury of November 30, 2004 pursuant to a Notice of Temporary Compensation Payable (NTCP) as a "lower back strain." The NTCP then converted to a Notice of Compensation Payable by operation of law.

In October of 2005, claimant sought treatment from Matthew Berger, M.D., for a major depressive disorder. Employer filed a utilization review (UR) request seeking prospective review of all future treatment provided to claimant by Dr. Berger. The UR determination rendered on July 7, 2006 found all of the health care reviewed was reasonable and necessary. Employer did not appeal that determination.

On July 30, 2007, claimant filed a review petition seeking to amend the description of her work injury to include diagnoses of depression and anxiety. Claimant presented no evidence in support of her petition, but merely averred that employer was prevented from denying liability for her psychological injuries by virtue of the unappealed UR determination.

The Workers' Compensation Judge (WCJ) granted claimant's petition, concluding that employer was estopped from denying liability for claimant's psychological treatment. The WCJ found that, by filing the UR request in the first place, employer effectively acknowledged that her psychiatric condition was related to the work injury.

Employer appealed to the Workers' Compensation Appeal Board (WCAB), which agreed that all of the elements of collateral estoppel were satisfied. The WCAB affirmed the WCJ's decision. The WCAB noted that employer effectively acknowledged liability for claimant's psychiatric condition by paying for medical expenses and taking advantage of the UR process.

Upon employer's further appeal, the Commonwealth Court reversed the WCAB's decision.

The Court noted that a judgment in a prior action operates as an estoppel in a second action only as to those issues that: (1) are identical; (2) were actually litigated; (3) were essential to the judgment; and (4) were material to the litigation. In this case, the critical issue presented by claimant's petition was whether her depression and anxiety were causally related to the work injury. That issue was not identical, litigated, essential or even relevant to the UR determination. In fact, the regulations specifically state that a Utilization Review Organization may not decide if treatment is causally related to an injury, but may only decide if treatment is reasonable and necessary.

Further, the Court noted that an employer's voluntary payment of a claimant's medical expenses is not an admission of liability.

Finally, and most importantly, the Court noted that nothing in the regulations or the case law suggests that the mere filing of a UR request imposes liability on an employer for a specific injury. (*The regulations do provide one caveat at 34 Pa. Code §127.405: In a medical only case where there has not been an acknowledgment or determination of liability for a work-related injury, an employer may request utilization review but shall be liable to pay for treatment found to be reasonable or necessary.*)

Accordingly, the Court found that the WCAB erred in affirming the WCJ's grant of claimant's review petition based solely on the UR determination.

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University of Pennsylvania v. Workers' Compensation Appeal Board (Hicks), No. 2240 C.D. 2010, Filed April 5, 2011.

(Suspension - Wage loss benefits may be suspended where claimant has been convicted of a crime and is incarcerated, but may not be suspended where claimant has appealed his conviction and is out on bail, unless there is evidence to establish that claimant's loss of earnings is unrelated to his work injury.)

Claimant was employed as a campus police office when he was injured in a work-related car accident on June 25, 2006. A Notice of Compensation Payable was issued and claimant began to receive benefits.

On December 12, 2007, employer filed a suspension petition alleging that, as of December 3, 2007, claimant's wage loss was due to his post-injury conduct leading to criminal convictions. Claimant had been convicted of second degree misdemeanors for endangering the welfare of children, criminal conspiracy to commit this offense and simple assault. He was sentenced to a period of incarceration of not less than 6 months and not greater than 23 months; however, he was incarcerated only from December 3, 2007 through December 14, 2007, when he was released on bail pending his appeal from the convictions.

At hearings before the Workers' Compensation Judge, claimant testified that he did not believe he was able to return to work due to ongoing pain relative to his work injury. Claimant also presented medical testimony in support of his position.

Employer presented contrary

medical testimony, as well as testimony from the Commanding Office of the Staff and Administrative Services Unit responsible for certification and qualification issues relative to employer's police force, Captain Leddy.

Captain Leddy testified that employer's police department is governed by the Municipal Police Officers Education and Training Commission (MPOETC) and the statutes associated with that Commission. The statutes required that, if a police officer is convicted of a crime, then the officer would be disqualified and his certification would be void. As such, claimant was not eligible for re-employment as a police officer with employer. When asked if a police officer who successfully appealed his conviction could be re-certified, Captain Leddy explained that would be a decision for the MPOETC. There would be no way for an officer to be re-certified if he did not appeal his conviction.

The WCJ denied employer's petition. The WCJ was not persuaded that claimant's loss of earning power was for reasons unrelated to the work injury. Despite Captain Leddy's testimony, employer did not present any evidence to establish that claimant's certification as an officer had been revoked or that his employment had been terminated. The WCJ noted that the MPOETC statutes do not provide for an automatic revocation of an officer's certification upon conviction; but rather, the MPOETC has the right to revoke the certification only after the officer is provided notice and an opportunity to be heard. There was no evidence that such a proceeding occurred.

Employer appealed the WCJ's decision to the Workers' Compensation Appeal Board. The WCAB stated that the Workers' Compensation Act disqualified claimant for benefits only for the 11-day period during which he was incarcerated. Employer presented no evidence that claimant was currently prohibited from work due to a conviction. As such, the WCAB affirmed the WCJ's decision.

Employer then sought review by the Commonwealth Court, again arguing that claimant's wage loss was caused by factors unrelated to the work injury, i.e., his post-injury criminal conduct and the resulting convictions.

The Court noted that it was employer's burden to prove claimant's wage loss was due to something other than his work-related injury. The WCJ rejected the testimony of employer's medical expert and found credible the testimony of claimant's expert that the work injury prevented claimant from returning to his regular duty position. Given that finding, claimant is unable to perform his pre-injury job regardless of his certification status as an officer.

Further, the WCJ found that the MPOETC statutes do not provide for an officer's automatic revocation of certification or a need for re-certification based on a criminal conviction. In fact, the MPOETC statutes state only that it is the MPOETC's duty to revoke an officer's certification when he is convicted of a criminal offense, and that the MPOETC has the right to revoke an officer's certification after notice and an opportunity to be heard, which employer failed to show occurred.

Because there was insufficient evidence to support a finding that claimant's loss of earnings was unrelated to his work injury and was related to his convictions, the decision of the WCAB was affirmed.

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City of Pittsburgh and UPMC Benefits Management Services, Inc. v. Workers' Compensation Appeal Board (Leonard), No. 650 C.D. 2010, Filed January 21, 2011, Reported April 20, 2011.

(Voluntary Withdrawal from Workforce - Acceptance of a pension alone does not mean that the claimant has retired; but rather, the determination of whether a claimant has retired depends upon the totality of the circumstances.)

(Voluntary Withdrawal from Workforce - A claimant can rebut the presumption that he has voluntarily left the workforce by establishing either: 1) that he is seeking employment, or 2) that his work injury forced him to retire.)

Claimant suffered a work injury on August 10, 1994. Although he returned to work for a period of time, he subsequently ceased working and received workers' compensation benefits.

On April 1, 2006, claimant received a service-connected disability pension from employer. On July 19, 2007, Dr. Tucker performed an independent medical examination and opined that claimant was capable of performing modified duty work. As such, a Notice of Ability to Return to Work form was sent to claimant on August 16, 2007. Shortly thereafter, employer filed a petition seeking to suspend claimant's benefits, arguing that claimant had removed himself from the workforce.

The Workers' Compensation Judge granted in part and denied in part employer's petition, suspending claimant's benefits only for the period of August 16, 2007 through November 30, 2008. The WCJ found claimant's testimony credible that, starting on or about December 1, 2008, he began a good faith search for work within his restrictions. At that time, he not only searched the internet and newspaper ads, but he also applied for 6 different positions for which he was not hired. Therefore, the WCJ found that a suspension was appropriate only from the date that the Notice of Ability to Return to Work form was served (August

16, 2007) through the date claimant began looking for work.

Employer appealed to the Workers' Compensation Appeal Board, which affirmed the WCJ's decision.

Employer then filed a petition for review with the Commonwealth Court arguing that claimant's benefits should have been suspended as of the date claimant accepted his service-connected pension, April 1, 2006. The Court disagreed.

In the case of *Southeastern Pennsylvania Transportation Authority v. WCAB (Henderson)*,. 543 Pa. 74, 669 A.2d 911 (1995), the Supreme Court established that, if a claimant has "retired," workers' compensation benefits will continue only if the claimant is able to demonstrate that (1) he is seeking employment or (2) the work-related injury forced him to retire. But first, in order to show that a claimant has "retired," an employer must show *by the totality of the circumstances* that the claimant has chosen not to return to the workforce. Circumstances that could support a holding that claimant has retired include: (1) where there is no dispute that the claimant retired; (2) the claimant's acceptance of a retirement pension; (3) the claimant's acceptance of a pension and refusal of suitable employment within his restrictions. See e.g., *City of Pittsburgh v. WCAB (Robinson)*, 4 A.3d 1130 (Pa.Cmwlth 2010).

Here, the WCJ determined that claimant had voluntarily withdrawn from the workforce only as of the date of the Notice of Ability to Return to Work. Only then did employer have evidence, shared with claimant, that claimant had restored work capabilities. Because claimant subsequently failed to seek employment, there was sufficient evidence that claimant had voluntarily left the workforce and benefits were then suspended. Once claimant began his job search on December 1, 2008, benefits were required to be reinstated because claimant had then reentered the workforce.

The decision of the WCAB was affirmed.

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Susan Gary v. Workers' Compensation Appeal Board (Philadelphia School District), No. 1736 C.D. 2010, Filed April 21, 2011.

(Utilization Review—An employer need not necessarily show a change in the claimant's condition since an earlier UR Determination before proceeding with a new UR Request; the mere passage of time may affect the reasonableness and necessity of a particular medical treatment.)

Employer issued a Notice of Compensation Payable acknowledging claimant suffered work-related cervical and lumbar strains on March 7, 2001. On November 19, 2003, a Workers' Compensation Judge issued an order relative to a utilization review (UR) and directed employer to pay for claimant's chiropractic treatment with Robert Ackert, D.C. on and after June 11, 2002. Thereafter, a second WCJ issued a decision on May 23, 2007 expanding claimant's injuries to include cervical and lumbar radiculopathy. On January 28, 2008, employer filed a UR Request challenging the reasonableness and necessity of the treatment provided by Dr. Ackert beginning December 31, 2007. The UR Reviewer found the ongoing treatment by Dr. Ackert to be therapeutic but, because there had been no significant improvement in claimant's symptoms, he found the treatment to be unreasonable and unnecessary.

Claimant filed a UR Petition challenging the UR Determination. After receiving evidence, the WCJ found the UR Determination to be convincing and persuasive and dismissed claimant's petition. Claimant appealed to the Workers' Compensation Appeal Board, which affirmed the WCJ's decision.

Claimant then sought review by the Commonwealth Court arguing, among other things, that: (1) the original 2003 UR Decision established the starting point for employer's burden of proof and (2) employer's position that the treatment at issue was not improving claimant's condition was rejected in the 2003 UR Decision and, under the doctrine of collateral estoppel, employer may not re-litigate that issue.

The Court was not persuaded. The Court noted that the first UR petition requested sought review of the reasonableness and necessity of the chiropractic treatment provided after June 11, 2002, and the second UR sought review of treatment rendered after December 31, 2007, a difference of 5 years and 6 months. The substantial difference in the length of time between UR requests satisfied the Court's concern that URs do not "vitiate the application of the doctrine of collateral estoppel to allow a constant stream of utilization review requests where the treatment and claimant's condition remain the same even though time has passed while an employer hopes that a WCJ will finally find in its favor."

The Court noted that a UR petition is different from a termination petition because, unlike a termination petition that is predicated on a change in claimant's physical condition, a UR petition is predicated on the reasonableness and necessity of certain medical treatment. As such, in a UR proceeding, the passage of time may affect the reasonableness and necessity of a particular medical treatment, even if the claimant's medical condition has not changed. For example, surgery may not be a reasonable and necessary form of treatment for a claimant soon after a claimant is injured, but may become reasonable and necessary later if other

less invasive forms of treatment have not been beneficial. Similarly, it is possible that a treatment may initially be reasonable but, if it does not prove to be beneficial over time, a different treatment may become more appropriate.

The order of the WCAB was affirmed.

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Dr. Jeffrey Yablon and Dr. Vincent Ferrara v. Bureau of Workers' Compensation Fee Review Office (PMA), No. 2042 C.D. 2010, Filed April 21, 2010.

(Medical Bill Payment—Insurer does not lose the right to downcode provider's charges simply because more than 30 days have passed since the bill was submitted.)

This case stems from vertebral axial decompression (VAX-D) treatment provided by 2 providers to 2 workers' compensation claimants. Both providers billed the VAX-D treatment using CPT code 97799, which is an unlisted code only to be used if there is no physical medicine code describing the service performed. Insurer downcoded both bills to CPT code 97012, mechanical traction, resulting in a smaller fee paid to the providers. Insurer did not notify the providers of its intent to downcode the bills until after 30 days from the submission of the bills had passed.

Providers contested both the downcoding and timeliness of the downcoding to the Bureau and the matter was assigned to a hearing officer. The hearing officer found that insurer had correctly downcoded the bills from CPT code 97799 to 97012 and that the 30-day limitation violation resulted in interest payments to the providers, not a bar to the insurer's ability to downcode.

The providers appealed to the Commonwealth Court, contending that the 30-day limitation found in §306(f.1)(5) of the Act and its implementing regulation, 34 Pa. Code §127.208(d), which gives the provider the opportunity to discuss the proposed changes but does not extend the time for payment, acts as an absolute bar to insurer's ability to downcode after 30 days of the submission of the bill. The providers maintained that an insurer must pay the amount billed or notify the provider that it intends to downcode within 30 days and, if it does not, insurer is required to pay the bill as submitted.

The Court did not agree. Section 127.207 only provides penalties when the procedures regarding downcoding are not followed. It does not provide for any penalty for failure to institute the procedure within 30 days. Section 127.208(d) provides that if an insurer proposes to change the provider's codes, the time required to give the provider the opportunity to discuss the proposed changes does not lengthen the 30-day period in which payment is to be made to the provider. Finally, the penalty provided for failing to institute the procedure within 30 days is set forth in 127.210, which provides the procedure for non-compliance with the 30-day time limitation contained in §127.208(d), which is 10% interest.

The Court noted that, in effect, the penalty for failing to institute the procedure for downcoding the bill is the same as not paying a bill at all—interest on the unpaid balance at 10%.

Because this is the same remedy ordered by the hearing office, the hearing officer's decision was affirmed.

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Frederick Schmidt v. Workers' Compensation Appeal Board (IATSE Local 3), No. 1100 C.D. 2010, Filed December 15, 2010, Reported April 26, 2011.

(Termination—A termination of benefits may be proper even where employer's medical expert acknowledges that claimant may continue to suffer from residual pain relative to the work injury.)

Claimant, who is employed as a stage hand, was injured on September 11, 2007 while working at the Mellon Arena in Pittsburgh. While climbing a pole he slipped and fell approximately 8 feet, landing on concrete. Claimant then suffered periods of partial and total disability; however, he returned to work without a loss of wages on July 3, 2008.

After claimant filed a Claim Petition in August of 2008, the parties reached an agreement that claimant suffered an injury described as "L3-L4 disc herniation and lumbar strain." The agreement resolved claimant's right to benefits only through June 30, 2008. The parties requested that the Workers' Compensation Judge determine if employer was then entitled to a termination or suspension of benefits.

Claimant, who underwent surgery in February of 2008, presented copies of his records of treatment from 3 physicians: (1) Dr. Orlang, who claimant had seen since January of 2008; (2) Dr. Ragoowansi, who diagnosed claimant with an L3-L4 pars defect and disc herniation, but who also reported claimant's surgical incision had healed; and (3) Dr. Dunne, who released claimant to return to work and who did not consider claimant's morning soreness and stiffness to be unusual.

In response, employer presented testimony from Dr. Kasdan, who performed and IME on June 30, 2008. Dr. Kasdan opined that claimant had fully recovered from the work injury and could return to work without restrictions. Nevertheless, Dr. Kasdan testified that he would recommend that claimant stretch his back on a regular basis, which he would recommend to anyone who had undergone surgery similar to claimant's surgery. He also

acknowledged that claimant may even have some back pain with change in the weather down the road, although "that doesn't mean that he hasn't recovered and can do his job." Dr. Kasdan acknowledged the claimant's subjective complaints of stinging in his back now and then. Finally, Dr. Kasdan stated: "If claimant never took Ibuprofen before and if he's taking the Ibuprofen only for residual pain in his back, I cannot say that it isn't the employer's responsibility to take care of that."

The WCJ credited Dr. Kasdan's opinions and terminated claimant's benefits as of the date of Dr. Kasdan's IME. The WCJ found Dr. Kasdan's statements regarding claimant's use of Ibuprofen to be irrelevant, noting that Dr. Kasdan did not recommend its use.

Claimant appealed to the Workers' Compensation Appeal Board which affirmed the WCJ's decision to terminate. On appeal to the Commonwealth Court, claimant argued that Dr. Kasdan's opinion cannot support a termination of benefits because Dr. Kasdan testified claimant continues to suffer from residual symptoms that will need future treatment. The Court disagreed.

The Court recognized that there is a difference between an employer's medical expert accepting the fact that the claimant suffered from pain and the medical expert's mere recognition that the claimant *complained* of pain. Testimony by the employer's medical expert as to the existence of claimant's complaints of pain does not require the WCJ to find for the claimant. What is relevant is whether the claimant actually suffers from pain as a result of the work injury. Termination is proper where employer's medical expert unequivocally testifies that claimant is fully recovered, can return to work without restriction and that there are no objective findings which either substantiate the claims of pain or connect them to the work injury.

Viewed in its entirety, Dr. Kasdan's testimony was deemed sufficient to support a finding that there was no objective evidence to support claimant's complaints of pain. His comment that claimant may have back pain due to changes in weather do not support an inference that Dr. Kasdan found objective medical findings for claimant's pain. Likewise, his recommendation that claimant do back strengthening exercises is irrelevant since Dr. Kasdan makes that recommendation to anyone who has had back surgery. Finally, Dr. Kasdan's statement that employer could be responsible to pay for claimant's use of Ibuprofen is irrelevant. Dr. Kasdan did not prescribe Ibuprofen, nor had any other physician. Dr. Kasdan is a medical expert, not a legal expert, and cannot impose liability for payment of medications on any party.

The decision of the WCAB was affirmed.

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However, an employer is not required to establish job availability where a claimant has voluntarily removed himself from the workforce through retirement. For disability compensation to continue following retirement, a claimant must show that he is either (1) seeking employment after retirement, or (2) that he was forced into retirement because of his work injury. The Court held that acceptance of a pension alone will not always create the presumption that a claimant has voluntarily left the labor market. Here, the Court held that Claimant voluntarily withdrew from the workforce as of the date of the Notice of Ability to Return to Work, explaining that it was not until Claimant received *notice* that he was capable of working, and then subsequently failed to seek employment, that there was sufficient evidence to conclude that Claimant voluntarily left the workforce. Finally, the Court held that Claimant became engaged in a good-faith job search after being found capable of light duty work. Accordingly, benefits were only suspended between the date the Notice of Ability to Return to Work was tendered, and the date that Claimant began good faith efforts to look for a job within his restrictions.

Another development since Weis is the courts' pronouncement that enticing a Claimant to retire from his job by offering him a large, lump sum, monetary severance package does not change the "retirement" analysis. For example, in Pries v. WCAB (Verizon Pennsylvania), 903 A.2d 136 (Pa.Cmwlth.2006), Claimant suffered a work-related injury in 1989. Claimant was paid total disability benefits until 2001, when he returned to light duty work for one day so that he could retire and receive a $60,000 retirement package from Employer. Employer then filed a Petition to Suspend Benefits. At the hearings, Claimant testified that he understood that in order to accept the retirement package, he needed to voluntarily withdraw from employment. Claimant also testified that he had not looked for work since accepting Employer's package and retiring. Employer entered into evidence a recent IME which showed Claimant had reached maximum medical improvement and was capa-

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ble of performing light duty work. The WCJ held that Claimant was forced into retirement because he only had two weeks to accept Employer's $60,000 retirement deal, and therefore, his benefits should continue. The Board reversed, and Claimant appealed the decision to the Commonwealth Court. On appeal, Claimant argued that Weis should be overturned, but the Court did not accept this argument and instead held that Weis remained in effect. Accordingly, Pries held that the Claimant's testimony was insufficient to meet his burden: He clearly was not seeking post-retirement employment elsewhere, and he offered no evidence to support the notion that he was not only forced out of his pre-injury job due to injury, but the entire work force.

Another development to occur since Weis is the courts' explanation of how the receipt of unemployment compensation benefits and workers' compensation benefits affects the "retirement" analysis. For example, in Day v. WCAB (City of Pittsburgh), 6 A.3d 633 (Pa.Cmwlth.2010), Claimant was injured in 1992, returned to a light duty position in 1995, and was laid off in 2000. Claimant began receiving unemployment compensation (UC) benefits, which expired in 2001. Claimant then began receiving a pension from his employer and "old age" Social Security benefits. Claimant admitted that he did not look for work after his UC benefits expired. At this same time, Claimant was receiving temporary total workers' compensation benefits. Claimant then underwent an IME which found him capable of performing medium-duty work. Employer sent a Notice of Ability to Return to Work and filed a Petition for Suspension of Benefits based on the grounds that Claimant voluntarily withdrew from the workforce. The court found that because Claimant received partial disability workers' compensation benefits while working in a light duty position for employer, Claimant knew he was capable of light duty work. By applying for and receiving UC benefits, Claimant demonstrated he was able and available for suitable work. He admitted that once his UC benefits ran out, he stopped looking for work and applied for his pension and Social Security benefits. The court found that, under the totality of the circumstances, Claimant had retired. Therefore, the burden shifted to the Claimant to prove that he was still seeking work, or that he was forced to retire from the entire workforce due to his injury. Claimant admitted he wasn't looking for work and interestingly, Claimant presented no medical evidence to support a finding that he was not capable of any work. Therefore, per the standard set forth in Weis, Claimant was denied further benefits.

Finally, another "retirement" case of interest is Pennsylvania State University/PMA Insurance Group v. WCAB (Hensal), 948 A.2d 907 (Pa.Cmwlth.2008) in which the court held that claimant failed to show he was engaged in a good faith effort to seek employment after retiring from employer. The claimant did not begin to search for a job until two weeks prior to the hearing and he did so by simply searching the internet and casually reading newspaper ads for jobs. The court found this effort insufficient, labeling it "window shopping" rather than a true attempt to look for a job after retirement.

In summary, the rules regarding how to address a claimant's retirement status haven't changed since Weis was decided in 2006. However, the courts have authored multiple opinions since then which clarify and elaborate upon the framework. The first step usually starts with the employer filing a termination or suspension petition alleging that a claimant who is receiving benefits and not working has removed himself or herself from the workforce, and that benefits should cease. Under Kachinski, an employer must then establish job availability in order to suspend or modify claimant's benefits by either offering claimant a job or referring him to an open job with another employer. However, an employer is not required to establish job availability where a claimant has "voluntarily removed himself from the workforce through retirement." This can be proven through evidence that the claimant has submitted retirement paperwork, draws a company pension, or receives social security benefits. If this is established, the burden shifts to the claimant to prove that he is seeking employment after retirement (only "good faith" efforts will be considered), or that he was forced into retirement because of his work injury. It is only after an assessment of this complex framework that a workers' compensation judge can decide whether a claimant's benefits should continue in light of his "retirement."

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ATTENTION READERS: The editors of the Thomson, Rhodes & Cowie Pennsylvania Workers' Compensation Bulletin invite you to submit questions you may have dealing with workers' compensation issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified workers' compensation attorney.

Send questions to: Harry W. Rosensteel, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219.

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