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Pennsylvania Workers' Compensation Bulletin

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WHEN "JOB AVAILABILITY" IS NOT NECESSARY

As a general rule, an employer seeking to reduce its liability through either a modification or suspension petition is obligated to show "job availability." In other words, the employer must show that a physically and vocationally appropriate job is actually available to the injured worker in the local job market.

The seminal case on this issue is the Supreme Court's decision in Kachinski v. WCAB (Vepco Constr. Co.), 516 Pa. 240, 532 A.2d 374 (1987). Since 1987, many appellate court decisions have addressed and refined the employer's burden in such matters.

For example, a showing of job availability is required for a suspension of benefits to continue following a claimant's release from prison.[1] An employee's discharge from employment for misconduct that occurred prior to the work injury does not obviate the need for the employer to show job availability, even though the employee has been released to return to work without restrictions.[2] When an employee returns to work for the same employer at a lighter job that is legitimately eliminated due to economic conditions, the claimant is entitled to reinstatement of total disability benefits unless the employer can show work is available to the claimant.[3] Where the employee returns to modified duty work, four hours per day, three days per week, the burden is on the employer to show that work is available five days per week in order to obtain a further modification of the claimant's benefits.[4]

A list of the cases requiring the employer to prove job availability would far exceed the cases that do not require such a showing by the employer; however, the Courts have carved out some specific exceptions to the general rule.

One such exception to the requirement of job availability was announced by the Supreme Court in Harle v. WCAB (Telegraph Press, Inc.), 540 Pa. 482, 658 A.2d 766 (1995). In that case, the claimant, while still suffering from a physical impairment, returned to his time of injury job. He still suffered a loss of earnings, however, not as a result of his injury but due to other economic factors. The Court noted that, under such circumstances, a claimant is not entitled to the continued receipt of disability benefits unless it can be shown that the employee's loss of earnings is due, in fact, to the injury.

The Harle rationale has been argued and applied in many cases and, as such, is somewhat of a

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City of Scranton v. Workers' Compensation Appeal Board (Roche), No. 1243 C.D. 2006, Filed November 2, 2006.

(Hearing Loss—Since the passage of Act 1, the "discovery rule" under §315 of the Act has not been applicable to hearing loss cases.)

Claimant worked for employer's police department from 1957 through 1992 when he retired. On January 27, 2003, claimant filed a petition alleging he sustained an occupational noise induced hearing loss, which he only discovered on November 21, 2002.

Employer denied the petition, arguing that the petition was time-barred in that it was not filed within three years of his last exposure to occupational noise.

Before the Workers' Compensation Judge, claimant testified that he began having hearing problems in 1985, but was not aware that his problems were work-related until 2002 when Dr. Frattali examined him. Dr. Frattali testified that claimant suffered a 34.4% binaural hearing impairment.

In opposition, employer presented testimony from Dr. Miller, who opined that claimant had a 26.6% binaural impairment, but that claimant did not suffer from noise-induced hearing loss.

The WCJ found claimant and Dr. Frattali to be credible and granted the claimant's petition. Employer appealed to the Workers' Compensation Appeal Board, which remanded the case to the WCJ to address whether the claimant's petition was time-barred. On remand, the WCJ found the petition was not time-barred because claimant gave employer timely notice of his occupationally induced hearing loss once he discovered it in 2002. Employer again appealed and the WCAB affirmed.

Employer then sought review by the Commonwealth Court. The Court noted that, prior to Act 1, the time period for bringing a claim did not begin to run until the hearing loss was discovered. Act 1 added §306(c)(8)(viii) of the Workers' Compensation Act, which provides:

> Whenever an occupational hearing loss caused by long term exposure to hazardous occupational noise is the basis for compensation or additional compensation, the claim shall be barred unless a petition is filed **within three years after the date of last exposure** to hazardous occupational noise in the employ of the employer against whom benefits are sought.

Given the plain meaning of the Act, the discovery rule is no longer applicable to hearing loss claims.

As such, the WCAB erred in affirming the WCJ's decision that claimant's petition was not time-barred. Accordingly, the order of the WCAB was reversed.

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Allegheny Ludlum Corporation v. Workers' Compensation Appeal Board (Hines), NO. 1022 C.D. 2006, Filed December 19, 2006.

(Course & Scope of Employment—Employee who arrived at work 20 to 25 minutes before shift and who was on sidewalk entering employer's building when struck and killed by a truck was in the course and scope of employment as entering the workplace furthers the employer's affairs.)

Decedent was employed in employer's Brackenridge plant and worked the 7 AM to 3 PM shift. Shortly after 6:30 AM on February 12, 2003, decedent arrived at the plant and parked his car in employer's lot near Gate 7 of the plant. Decedent did not enter at Gate 7 because he punched in at Gate 5. To reach Gate 5, decedent had to leave the Gate 7 parking lot and walk on the sidewalk, owned by employer, that runs along River Road. While decedent was doing so, a pickup truck operated by a drunk driver crossed the center line of River Road, jumped the curb and fatally struck decedent.

On April 10, 2003, decedent's widow filed a fatal claim petition seeking compensation for herself and decedent's dependent children. She presented testimony from decedent's co-workers who explained that employer had instructed employees to park in the lot at Gate 7, walk along River Road, and enter at Gate 5.

Employer presented testimony from one of its managers, who stated that employees could park in any one of four lots adjacent to the different plant gates or on the street. Employer maintained that it was a matter of employee convenience as to how they traveled to work and where they parked.

The Workers' Compensation Judge concluded that decedent was furthering employer's business on employer's premises at the time of his death. As such, the fatal claim petition was granted. The Workers' Compensation Appeal Board affirmed the award of benefits.

Employer then sought review by the Commonwealth Court arguing that the WCAB erred in concluding decedent was furthering employer business at the time of his death.

In response, the Court noted that, even though not actually engaged in employer's work, an employee will be considered to have suffered an injury in the course of employment if the injury occurred on the employer's premises at a reasonable time before or after the work period. Arrival 15 to 30 minutes prior to the time a claimant is to begin work is a "reasonable time" and, therefore, during that time the claimant is considered to

be advancing the employer's business. Moving toward one's work station within a reasonable period of time before the beginning of one's work period is considered to be a necessary part of employment. Thus, the WCAB did not err in determining that decedent was furthering the business interests of employer at the time of his death.

The decision of the WCAB was affirmed.

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Virna Wood v. Workers' Compensation Appeal Board (Country Care Private Nursing), No. 1272 C.D. 2005, Filed January 10, 2007.

(Unreasonable Contest—Where defendant presents no medical testimony, but relies only on cross-examination and objection to testimony of claimant's family physician as to causal relationship between work injury and subsequent surgery, defendant has no reasonable basis to contest petition.)

Pursuant to a Notice of Compensation Payable, employer acknowledged that claimant, a home health aide, suffered a work-related low back strain on June 29, 1998. Claimant returned to work on August 18, 1998, and the parties then entered into a Supplemental Agreement suspending claimant's benefits. Her benefits were reinstated on October 12, 1998 due to a recurrence of her injury.

Claimant then began working as a part-time cashier in March of 2000. Employer filed a termination petition, alleging that claimant had fully recovered and was able to work without restrictions. The Workers' Compensation Judge found that, while the NCP described the injury as a low back strain, MRIs revealed that claimant suffered a herniated disc at L5-S1. In fact, claimant had undergone disc surgery on September 26, 1999. Thus, the WCJ denied the termination petition, but modified the claimant's benefits to reflect her return to work at reduced wages.

Claimant subsequently filed a reinstatement petition, alleging that, as of June 26, 2003, she was again totally disabled due to the work injury. In support of her petition, claimant offered the deposition testimony of her family physician and the medical records of her surgeon. Employer introduced no evidence, but preserved an objection to the testimony of the family physician. Employer argued that the family physician was not qualified to render an opinion on causation because she did not perform the surgeries. The WCJ overruled the objection. The WCJ concluded that claimant met her burden of proof and granted the petition. The WCJ, however, denied the claimant's request for unreasonable contest counsel fees inasmuch as "an issue existed as to whether the 2003 surgeries were related to the work injury since the claimant did not produce testimony of her treating surgeon."

The Workers' Compensation Appeal Board affirmed the WCJ's decision that employer's contest of the petition was reasonable. Claimant then filed a petition for review with the Commonwealth Court.

The Court noted that the purpose behind awarding attorney's fees under §440 of the Act is to ensure that successful claimants received compensation benefits that are undiminished by the costs of litigation as well as to discourage unreasonable contests of workers' claims. A "reasonable contest" exists when medical evidence is conflicting or susceptible to contrary inferences, and there is an absence of evidence that an employer's contest was frivolous or intended to harass a claimant.

Here, employer never presented its own evidence, but instead relied upon the cross-examination of claimant's family physician to refute claimant's allegations. Further, employer argued that it made a reasonable contest because it believed that the WCJ could not find claimant's family physician qualified to render an opinion regarding the surgeries. The Court disagreed with employer.

The burden to prove a reasonable contest is on the employer. The employer is required to establish that a conflict in the evidence existed or that contrary inferences could be drawn from the evidence. The employer failed to meet that burden.

Employer hinged its entire argument on claimant calling her treating *physician* to testify as to treatment rendered by her treating *surgeon*. The Court noted: "No case law or statute required claimant to produce testimony of her treating surgeon in order to meet her burden of proof. An expert, such as the treating physician, may base an opinion on facts of which he or she has no personal knowledge if they are supported by the record." That is precisely what happened here.

Given employer's failure to present any evidence contrary to claimant's evidence or from which a contrary inference could be drawn, the WCAB erred in holding that employer's contest was reasonable. Accordingly, the decision

DID YOU KNOW???

Workers' compensation is mandatory in Pennsylvania for any employer who:

- employs at least one employee who could be injured or develop a work-related disease in this state; or,
- could be injured outside the state if the employment is principally located in Pennsylvania, or
- Could be injured outside the state, while under a contract of hire made in Pennsylvania, 1) if the employment is not principally localized in any state, 2) if the employment is principally localized in a state whose workers' compensation laws do not apply, or 3) the employment is outside the United States and Canada

of the WCAB was reversed and the case remanded for the calculation of legal fees.

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Frederick Ragno v. Workers' Compensation Appeal Board (City of Philadelphia), No. 924 C.D. 2006, Filed January 16, 2007.

(Suspension—Retirement—Where the issue of whether claimant was retired had been previously litigated and claimant's benefits are suspended, claimant may not seek reinstatement of benefits based upon a mere showing that he is actively seeking employment.)

Claimant worked as a firefighter for the City of Philadelphia. He suffered a work injury in 1986 for which he received compensation. In March of 1996, employer petitioned to modify or suspend claimant's benefits based upon a job offer. During the litigation, claimant testified that he considered himself to be "retired." As such, the Workers' Compensation Judge determined that claimant had voluntarily removed himself from the work force and is retired. Benefits were thus suspended effective August 28, 1997.

In 2003, claimant petitioned to reinstate his benefits, alleging that his work-related injury caused decreased earning power. Claimant testified that, since March of 2000, he unsuccessfully applied for jobs at Wal-Mart and K-Mart.

The WCJ credited claimant's testimony and that of his medical expert. Employer was ordered to reinstate claimant's benefits as of January 1, 2002.

Employer appealed to the Workers' Compensation Appeal Board contending that the WCJ failed to take into consideration the prior WCJ's decision that claimant voluntarily retired on August 28, 1997 and that benefits were suspended as a result of his retirement. Employer argued that claimant was barred by the principles of collateral estoppel and res judicata from relitigating any issues regarding his retirement.

The WCAB agreed and the decision of the WCJ was reversed.

Claimant then petitioned the Commonwealth Court for review. Claimant argued that the Board erred in determining that a voluntary retirement may never be undone, even where claimant is actively looking for work.

When a claimant seeks to reinstate benefits after a suspension of benefits, the claimant must establish that the reasons for the suspension no longer exist. Here, the issue whether claimant was retired from the workforce was previously litigated. Consequently, collateral estoppel applied because, there was a final judgment on the merits, the parties are the same and claimant had the opportunity to fully and fairly litigate the issue. Claimant failed to prove during the prior round of litigation that he was forced out of the entire labor market as a result of the work injury. Under the doctrine of collateral estoppel, he may not do so now.

The Court noted that claimant's applications at Wal-Mart and K-Mart were "nothing more than an attempt to strengthen weak proofs."

Accordingly, the decision of the WCAB was affirmed.

(Query: Would the result have been the same had the claimant actually secured employment after it had been judicially determined that he was "retired," and then lost his job through no fault of his own? The Court did not address that possibility in its Decision. Look for future opinions on this issue!!)

DID YOU KNOW???

In Pennsylvania, an employer may be excluded from the requirement to insure its workers' compensation liability only if ALL of its workers are persons who work out of their won homes or other premises not under the control and management of the employer AND make up, clean, wash, alter, ornament, finish, repair or adapt articles or materials for sale that are given to them.

There are a number of other categories of employees that MAY exempt an employer from workers' compensation coverage liability. All of an employer's workers must fall into one of the categories for the exemption to apply. For more information, contact us at (412) 232-3400, or send an e-mail to wc@trc-law.com.

SUPERIOR COURT CASE REVIEWS

Commonwealth of Pennsylvania v. Corban Corporation, d/b/a Encor Coatings, Inc. and William R. Condosta, No. 2934 EDA 2005, Filed October 4, 2006.

(Failure to Insure—Statute of Limitations—Prosecutions for failure to secure workers' compensation insurance are subject to 5-year, rather than 2-year, statute of limitations.)

On December 7, 2000, Elmer Kennedy was working for Corban as a forklift operator and hard laborer. When Kennedy entered a building at the Corban facility, sparks made contact with his clothing and ignited. As a result, he suffered serious burns to his back, requiring protracted medical treatment.

Kennedy subsequently filed a claim for workers' compensation benefits. His claim was denied due to Corban's lack of workers' compensation insurance coverage on December 7, 2000.

The Lehigh County Insurance Fraud Task Force then investigated

Corban to determine the extent of the corporation's infractions. The investigation revealed that Corban had allowed its coverage to lapse on numerous occasions for extended periods of time, beginning in 1995, for failure to pay premiums. A criminal complaint was then filed asserting seven counts of third degree felony charges against Corban.

Corban objected to the timelines of the criminal complaint on the ground that the two-year statute of limitations set forth in 42 Pa.C.S.A. §5552 had expired. The trial court then granted Corban's motion to dismiss.

The Commonwealth filed a notice of appeal arguing that the five-year statute of limitations contained in the Workers' Compensation Act applied rather than the two-year statute of limitations for criminal offenses generally.

The Superior Court agreed. Section 1039.12 of the Workers' Compensation Act makes clear that prosecutions from offenses under the Act must be commenced within five years after commission. The general statute of limitations under 42 Pa.C.S.A. §5552 does not control prosecutions under the Workers' Compensation Act. The Workers' Compensation Act is a distinct area of law, which clearly defines the offenses and enunciates a penalty under its separate statutory scheme. Additionally, application of a five-year limitations period is consistent with the deterrent objectives of the Workers' Compensation Act and helps further the Act's intended purpose, which is to provide payment to the injured worker commensurate with the damage from a work-related injury, as a fair exchange for the surrender of every other right of action against the employer.

Accordingly, the decision of the trial judge was reversed and the case was remanded for further proceedings.

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SUPREME COURT CASE REVIEWS

Brookhaven Baptist Church v. Workers' Compensation Appeal Board (Halvorson), No. 35 MAP 2005, Decided December 27, 2006.
(Course & Scope of Employment—Decedent who cut grass for church for a weekly fee of $25 was an employee; however, as he was trimming and burning bushes at the time of his death (not cutting grass), he was not in the course and scope of his employment at the time of death.)

Claimant and decedent were married in 1938 and began attending the Church in early 1989. The Church had a small congregation, with only 25 members. Because contributions were meager, Church members performed the majority of the Church maintenance. In fact, the Church Constitution designated the Board of Trustees as the entity responsible for maintenance of the building and grounds. These duties were to be carried out on a voluntary basis. The single exception was that that Church paid to have the grass cut. Decedent, who was a member of the Board of Trustees, agreed to cut the grass for $25 per week. As a Trustee, decedent also performed various maintenance duties for the Church, such as painting, changing light bulbs, vacuuming, washing windows, and so forth.

On June 7, 1991, decedent left home at 8:30 AM to cut the grass at the Church. He also took his hedge cutting shears with him. Shortly thereafter, decedent was observed on the Church grounds, engulfed in flames. Apparently, he had gathered up shrub clippings, piled them in a corner of the Church driveway, and set fire to them using a can of gasoline. He died on July 1, 1991, nearly a month after suffering severe burns.

Claimant filed a Fatal Claim Petition, alleging that her husband died as a result of the work-related injuries he sustained while within the scope of his employment with the Church. The Church defended on the basis that the decedent was not cutting grass at the time of his death and, therefore, was not in the course and scope of his employment.

The Workers' Compensation Judge granted the petition, concluding that trimming the bushes was an incidental and necessary task for decedent to perform in order cut the grass. The Workers' Compensation Appeal Board affirmed. The Church then appealed to the Commonwealth Court.

The Commonwealth Court determined that decedent was not acting as a volunteer inasmuch as he received valuable consideration for cutting the grass. The Court also found no error in the WCJ's

DID YOU KNOW???

An uninsured employer faces serious civil and criminal penalties for failure to maintain continuous workers' compensation coverage. The employee can file a civil action in tort against the employer for his or her work-related injuries, in which case the employee may recover amounts in excess of those allowed under the Workers' Compensation Act. Additionally, the employer and those individuals responsible to act on its behalf may each be criminally charged for each and every day's failure to maintain continuous workers' compensation coverage. A misdemeanor conviction can result in a $2,500 fine and one year imprisonment for each day's violation. A felony conviction can result in a $15,000 fine and seven years imprisonment for each day the employer fails to maintain coverage.

DID YOU KNOW???

Injured employees are entitled to employer-paid medical treatment and, if cumulative period(s) of disability exceed seven days, the employee is entitled to wage loss benefits as well. Wage loss benefits must commence within 21 days of the employer's knowledge or notice of injury, unless the claim is denied within that time period. Failure to comply with the 21-day rule may result in the imposition of penalties.

determination that trimming the bushes on the Church property was essential to completing his primary task.

The Supreme Court granted the Church's Petition for Allowance of Appeal to determine whether an employer-employee relationship existed at the time of decedent's death.

The Court noted that in order to find that decedent was an employee, three elements must be considered: (1) was there valuable consideration; (2) was the employment casual in nature; and (3) was the employment in the regular course of the employer's business.

Here, the Church contended that the weekly fee paid to decedent was a "nominal honorarium," not wages. The Court disagreed. Clearly, the decedent received wages, or valuable consideration, in exchange for cutting the grass.

Additionally, the employment was not irregular, sporadic or incidental and was, therefore, not casual in nature.

Finally, the "maintenance and repair of church property" and "keeping the property in presentable condition" is generally considered part of the "usual course of business" conducted on those premises by the trustees or other church management personnel. Therefore, decedent was employed in the business of the Church when he was cutting grass.

However, decedent was not cutting grass at the time of his injury. The proper question is not whether trimming the bushes was incidental to the task of cutting the grass, but whether that activity was part of the employment arrangement. It was not.

Accordingly, the order of the Commonwealth Court was reversed and benefits were denied.

Justice Eakin wrote a concurring opinion. In his opinion, the decedent was not a Church employee, but an independent contractor. Therefore, he would deny benefits on other grounds.

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Pitt Ohio Express v. Workers' Compensation Appeal Board (Wolff), No. 54 WAP 2005, Decided December 27, 2006.

(Suspension—Where claimant is suspended for bad faith refusal to pursue work and then has a temporary worsening of medical condition, when claimant gets back to being able to work, a suspension of benefits is appropriate *without* showing job availability.)

Claimant suffered a back injury while working as a truck driver on April 3, 1996. He received total disability benefits through November 7, 1997, at which time a Workers' Compensation Judge had concluded that, lacking good faith, claimant failed to pursue a modified duty position offered to him by employer. Claimant later underwent back surgery and total disability benefits were reinstated.

In October of 2001, employer filed a new petition to suspend benefits, alleging that claimant had recovered sufficiently to perform the previously offered modified position. During a hearing before the WCJ, claimant acknowledged that he was physically capable of performing the modified position. The WCJ thus suspended his benefits.

The Workers' Compensation Appeal Board reversed, concluding that claimant's benefits could not be suspended because employer failed to show that the modified duty position was still available.

The Commonwealth Court reversed the WCAB and reinstated the WCJ's decision suspending benefits, holding employer did not have to again prove job availability when the disability did not continue and claimant was able to perform the modified position he previously rejected in bad faith.

The Supreme Court had not previously addressed this issue and, therefore, granted claimant's petition for review. Claimant argued that his benefits should be modified only for that period of time that the job was available regardless of whether or not he accepted the position or improperly refused it. The Court was not persuaded by the argument, stating: "Claimant's bad faith relieved employer of the requirement to again demonstrate a continued suitable position was available. An employer cannot be given a never-ending duty to keep a job available for a claimant who rejects it in bad faith. If we allowed a claimant to reject a job in bad faith and then place a burden on the employer to provide the claimant another job whenever he chooses, we would reward bad faith conduct and circumvent the purpose of the Workers' Compensation Act."

The order of the Commonwealth Court was affirmed.

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RAG (Cyprus) Emerald Resources, L.P. v. Workers' Compensation Appeal Board (Hopton), No. 1 WAP 2005, Decided January 11, 2007.

(Psychic Injury—Abnormal Working Conditions—Court will look to the totality of the circumstances to determine if claimant was subjected to abnormal working conditions.)

Claimant alleged that he suffered a disabling, work-related psychological injury in July of 1994. He alleged that his injury occurred because he "was subjected to harassing comments of a

homosexual nature by the employer's mine foreman on three occasions from July 6 to 13, 1994." Employer denied the allegations, asserting that claimant's psychological injuries pre-dated his employment with employer.

Claimant testified that he served in Vietnam between 1964 and 1967. During that time period, he was witness to many violent incidents, as well as frequent homosexual activity amongst his fellow soldiers. He stated that he was horrified by what he saw.

After returning from Vietnam, claimant experienced flashbacks from his experiences there. In 1978, he began employment with employer and worked without significant problems until July of 1994.

On July 6, 1994, the mine foreman, Dominic Rossi, told claimant "you have a nice butt, a real nice looking butt, come on up here and sit down next to me."

Two days later Rossi suggested to claimant that he wanted to have anal sex with him. Claimant testified that he experienced flashbacks of Vietnam and felt a great deal of shame and humiliation as a result.

On July 13, 1994, Rossi made comments insinuating that claimant was a male prostitute. Following this incident, claimant again experienced flashbacks of Vietnam and wanted to kill Rossi.

Claimant testified that no one in the mines had ever spoken to him in the way Rossi did. Rossi denied or downplayed the three incidents, but did confirm that he had been disciplined by employer for his comments.

Claimant presented testimony from two of his treating physicians, each of whom opined that claimant suffered from post-traumatic stress disorder (PTSD) following his experiences in Vietnam, and that Rossi's comments to him in July of 1994 aggravated the condition, causing claimant to become disabled. A court appointed doctor also testified that Rossi's comments were a substantial contributing factor to claimant's PTSD because they aggravated that condition which until then had been under control. In contrast, employer's expert testified that claimant suffered from paranoid personality disorder, not PTSD, and that Rossi's comments neither caused nor aggravated claimant's condition.

The Workers' Compensation Judge found claimant and his witnesses credible. The WCJ then concluded as a matter of law that Rossi's comments to claimant constituted abnormal working conditions, emphasizing that the incidents in question were not normal joking or merely uncivilized behavior but rather constituted a course of conduct that was clearly calculated to cause severe emotional distress to claimant. The Workers' Compensation Appeal Board affirmed, noting that several of claimant's co-workers testified that Rossi's comments went beyond those accepted in the mines.

The Commonwealth Court reversed, stating that the evidence failed to support a finding of abnormal working conditions. The Commonwealth Court noted that claimant was predisposed to mental problems. Additionally, while Rossi's comments were crude and unacceptable, they were nevertheless normal in the rough and tumble mining industry. Additionally, the Commonwealth Court noted that Rossi's comments occurred on three times over a period of eight days in claimant's sixteen-year mining career. Therefore, the Commonwealth Court concluded that claimant failed to establish the requisite abnormal working condition and was thus not entitled to benefits.

Claimant then filed a Petition for Review with the Supreme Court. The Court concluded that the Commonwealth Court abused its discretion by not limiting its review to a determination as to whether the WCJ's factual findings were supported by the record. Instead, in order to support its own conclusion that the comments were normal in the mining industry, the Commonwealth Court focused on a brief section of testimony not included in the WCJ's factual findings. This was error.

The Supreme Court noted further that this case involved a series of sexually harassing comments by a supervisor. Rossi acknowledged that his conduct resulted in disciplinary action by the employer. Arguably, his behavior constituted criminal harassment. Therefore, because the WCJ credited the medical testimony establishing a causal connection between Rossi's statements and the aggravation of claimant's pre-existing PTSD, the Court concluded claimant established a compensable injury.

The Court noted further that the Commonwealth Court erred in treating claimants with pre-existing mental injuries differently. Such claimants are not barred from recovery solely because of their pre-existing condition.

Finally, the Court noted that the Commonwealth Court erred in finding that Rossi's comments were too infrequent to constitute abnormal working conditions. It was within the WCJ's discretion to determine that Rossi's comments demonstrated a course of conduct by a supervisory employee clearly calculated to cause severe emotional distress.

The order of the Commonwealth Court was reversed and the case was remanded for reinstatement of the WCJ's order.

DID YOU KNOW???

The law requires an employer to post, in a prominent and easily accessible place, at its primary place of business as well as all other employment sites, a notice containing the name, address and telephone number of the insurer or other appropriate party to address questions and concerns regarding workers' compensation claims or to request information.

(Continued from page 1)

"general exception" to the "general rule." Most cases wherein a showing of job availability is not required, however, are very "fact specific."

For instance, a showing of job availability is not required where the employee is totally and *permanently* disabled due to a subsequent non-work related injury.[5] Likewise, an employer is not required to show job availability where the employee is an illegal alien.[6]

Recently, the Supreme Court held that where a claimant is suspended for his or her bad faith refusal to pursue available work, and then later has a temporary worsening of his or her medical condition, the employer is not required to show job availability in order to suspend the claimant's benefits once his or her medical condition is back to baseline. *(A summary of the decision in Pitt Ohio Express v. WCAB (Wolff), 912 A.2d 206 (Pa. 2006) may be found herein at page 6.)*

The Supreme Court's holding is consistent with a prior decision issued by the Commonwealth Court which held that an employer who has been successful in modifying benefits due to the employee's bad faith refusal of employment is not required to re-establish job availability when the employee becomes capable of performing the refused job following a subsequent period of total disability from the work injury.[7]

You may have a case with facts that will allow you to proceed *without* proving that a job within the claimant's physical and vocational capabilities exists within the claimant's local job market. Keep in mind that, if a showing of job availability is not required, you may save significant litigation expenses.

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[1]Mitchell v. WCAB (Steve's Prince of Steaks), 815 A.2d 620 (Pa. 2003).
[2]Brandywine Mazda Suzuki v. WCAB (Asman), 872 A.2d 253 (Pa.Cmwlth. 2005).
[3]Smith v. WCAB (Futura Industries), 471 A.2d 1304 (Pa.Cmwlth. 1984).
[4]Smith v. WCAB (Caton), 606 A.2d 599 (Pa.Cmwlth. 1992).
[5]Schneider v. WCAB (Bey), 747 A.2d 845 (Pa. 2000).
[6]Reinforced Earth Co. v. WCAB (Astudillo), 810 A.2d 99 (Pa. 2002).
[7]J.A. Jones Construction v. WCAB (Nelson), 784 A.2d 280 (Pa.Cmwlth. 2001).

ATTENTION READERS: The editors of 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.