By ANTHONY NATALE III

Workers' Compensation in Retirement

"Retirement" Does Not Mean Retirement When You are Collecting Workers' Compensation Benefits

Over the past two decades, a thorny issue has arisen in the area of Pennsylvania Workers' Compensation Law surrounding an injured employee's voluntary removal from the workplace. Traditionally, an employer must generally establish job availability, and more recently, earning power in order to modify or suspend an injured worker's right to indemnity benefits. Notwithstanding this concept, there has been a long-standing exception in place when dealing with injured workers who voluntarily remove themselves from the workforce due to retirement.

In *Southeastern Pennsylvania Transportation Authority v. WCAB (Henderson)*, 543 Pa. 74, 79, 669 A.2d 911, 913 (1995), the Pennsylvania Supreme Court established that an employer need not be required to establish job availability (or earning power) where a claimant has voluntarily removed herself from the workforce due to retirement. The court affirmatively stated that disability benefits must be suspended when a claimant voluntarily leaves the labor market upon retirement and those benefits can only continue following retirement if it is demonstrated that a claimant is "seeking employment after retirement or that he was forced into retirement because of his work related injury." This has come to be known as the *Henderson* standard and while once clear in scope, its progeny cases have left room for question as to evidentiary burdens.

In recent years, whether a claimant has actually "retired" is a question that has seeded much litigation in Pennsylvania. Foregoing available job opportunities in favor of accepting a disability pension has been adjudicated to be sufficient evidence under a "totality of the circumstances" standard to support the finding that a claimant has voluntarily left the workforce. *Pennsylvania State University v. WCAB (Hensal)*, 948 A.2d 907 (Pa. Commw. 2008). However, the mere acceptance of a disability pension with nothing more may not be sufficient. *City of Pittsburgh v. WCAB (Robinson)*, 4 A.3d 1130 (Pa. Commw. 2010). Whether a claimant has "retired" has suddenly become a convoluted legal skirmish as opposed to a department of human resources declaration.

Once it is established that a claimant has "retired," there are more evidentiary hurdles for the employer to prove that benefits should be suspended in light of such a retirement. As with any standard tending to negate ongoing benefits, aggrieved claimants have made a concerted effort in these types of cases to fit their retirement activities into one of the two *Henderson* exceptions. Claimants will either argue that they are continually seeking employment despite their retirement; or that they have been "forced" into retirement due to the work injury. The latter exception can only be adjudged by a review and comparison of the competing medical evidence produced by the parties and those battles can drone on for years – a fact that is not helpful to either party. As even the most seasoned treating medical experts are beginning to concede that many retired injured employees have some return to work capabilities, a trend has developed regarding these cases. Claimants are now arguing, more often than not, that they are actively seeking employment subsequent to retirement. One would postulate a more favorable outcome for the employer under these facts – a postulation that fails to consider the complexity of our legal system.

In *City of Pittsburgh and UPMC Benefits Management*

It is clear that an employer's ability to suspend the disability benefits of an injured claimant who obviously retired from the workforce is becoming more difficult.

Services, Inc. v. WCAB (Leonard), No. 650 C.D. 2010, Opinion by Judge Brobson, filed Jan. 21, 2011, Ordered for Publication April 20, 2011, Commonwealth Court reviewed this very issue. In short, it was determined that the claimant had retired from the workforce and, as a defense, he asserted that he was seeking employment after his retirement per the first *Henderson* exception. The "evidence" offered in this case to support this contention was the claimant's testimony on the issue. He testified that he applied for one position that had already been filled, another that was beyond his physical limitations, and still yet another position for which he was not even qualified. He contended that he further applied for at least two additional positions but was not hired. In as much as the underlying judge found the claimant's testimony credible, Commonwealth Court affirmed the adjudication that there was sufficient evidence to support that the claimant acted in a "good-faith" job search and his benefits should continue despite his retirement from the workforce.

It is clear that an employer's ability to suspend the disability benefits of an injured claimant who obviously retired from the workforce is becoming more difficult. The evidence mounted in this case to establish a good faith job search on the part of the claimant was argued to be less than gleaming. The *Hensal* court determined a good faith job search to mean "indicia" that the claimant was actively applying for employment. It was argued in *Leonard* that applications to jobs that are either filled or for which the claimant is unqualified woefully fell short of this standard.

It is submitted that a standard requiring documentary evidence demonstrating a claimant's application to appropriate, available and suitable employment would be the best means by which to adjudge whether a retired claimant is actively seeking employment. This standard would protect both claimants and employers during the litigation process and allow for a more understandable burden of proof for each party entering into the litigation. ■

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