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Legal Brief

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Court Refines Employer's Burden of Proof in Terminating Workers' Comp Benefits

In *Lewis v. WCAB (Giles & Ransome, Inc.),* _Pa. _, 919 A.2d 922 (April 18, 2007), the Supreme Court of Pennsylvania recently held that when prior petitions to terminate have been denied, an employer seeking a subsequent termination of benefits must demonstrate a change in the employee's physical condition since the last disability determination. The Court specifically found that it is no longer sufficient nor proper for an employer to subsequently challenge the diagnosis of claimant's injuries as determined in prior proceedings.

Factors in the Decision

Employee Lewis had been employed as a truck driver and was injured when the fork truck he was operating fell off the back of his truck on October 8, 1988, which resulted in the receipt of workers' compensation benefits. Between the years 1990 and 1999 the employer unsuccessfully pursued three separate petitions to terminate benefits. On December 12, 2002, three days after the Workers' Compensation Appeal Board affirmed the employer's third unsuccessful petition to terminate, the employer filed its fourth termination petition, once again alleging claimant's full recovery from his 1988 work injury. Each petition was assigned to a different workers' compensation judge. On July 2, 2004, the workers' compensation judge granted the employer's petition and issued an order terminating benefits. The Appeal Board and Commonwealth Court affirmed the decision and the Supreme Court of Pennsylvania accepted the case for review.

On appeal, the employee argued that the employer's fourth petition to terminate was not cognizable because it was not based upon any alleged change in physical condition since the prior unsuccessful petitions. As such, the employee argued the fourth petition was barred by the doctrine of res judicata, a matter already judged.

The employer, relying on *King v. WCAB (Kmart Corp.),* 549 Pa. 75, 700 A.2d 431 (1997), argued that it need not show an actual change in physical condition from prior proceedings in order to bring its petition to terminate.

In reaching its ultimate decision, the Supreme Court relied heavily upon its decision in *Kachinski v. WCAB (Vepco Construction Co.),* 516 Pa. 240, 532 A.2d 374 (1987), wherein it set forth a four-prong test an employer must satisfy when attempting to modify workers' compensation benefits based upon alleged job availability. The first prong required an employer seeking modification of a claimant's benefits to first produce medical evidence of a change in physical condition. Applying this reasoning to *Lewis*, the Supreme Court held that:

> In 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. Only then can the workers' compensation judge determine whether the change in physical condition has effectuated a change in the claimant's disability, that is, the loss of earning power. Further, by natural extension it is necessary that, where there have been prior petitions to modify or terminate benefits, the employer must demonstrate a change in physical condition since the last disability determination. Absent this requirement "a disgruntled employer (or claimant) could repeatedly attack what he considered an erroneous decision of a referee by filing petitions based on the same evidence ad infinitum, in the hope that one referee would finally decide in his favor."

Lewis, 919 a.2d at 926, citing, *Dillon v. WCAB (Greenwich Collieries),* 536 Pa. 490, 648 A.2d 386 (1994).

Impact of the Decision

It is now clear that in order to meet its burden that all disability related to the compensable injury has ceased, the employer must first produce medical evidence that the employee's current physical condition is different than it was at the time of the last disability adjudication. An employer is no longer permitted to challenge a diagnosis of a claimant's injury as determined by a prior proceeding.

Conclusion

The Court offers no guidance as to the type of medical evidence sufficient to establish such a change. The writer would suggest such evidence could be improved findings on diagnostic studies, documented consistent negative findings on subsequent physical exams coupled with the absence of objective evidence of ongoing injury, and/or functional capacity evaluations or surveillance evidence that establish a level of activity greatly exceeding the level previously expressed by the employee in earlier proceedings. Finally, before incurring the expense associated with multiple unsuccessful petitions to terminate, it would be prudent for an employer to give serious and lengthy consideration to closing the claim through a compromise and release agreement or returning the injured employee to work through vigorous vocational rehabilitation efforts. ⋆

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