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SPECIAL DELAWARE WORKERS' COMPENSATION ALERT

EMPLOYER PETITIONS TO TERMINATE TOTAL OR TEMPORARY PARTIAL DISABILITY FOLLOWING *WATSON V. WAL-MART*

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In the recent decision of *Watson v. Wal-Mart*, Del. Supr. No. 442, 2010 (US 21-11), the Supreme Court of Delaware has identified certain additional elements that the employer must prove in order to obtain a successful result before the Board on a petition to terminate. In Delaware, a carrier cannot unilaterally suspend or terminate either form of wage replacement benefits under an open agreement unless the injured worker dies, signs a receipt for compensation, or a petition for review of the compensation agreement (commonly referred to as a petition to terminate) is filed with the Industrial Accident Board. The filing of such a petition is required even if the claimant has been released to full-duty work, has been offered and declined work within his/her restrictions, has failed to provide medical documentation to establish continuing disability or simply vanished to places unknown.

Once the petition to terminate is filed with the Industrial Accident Board, the carrier can stop payment as of the date of the petition's filing. The injured worker then has the option of submitting an affidavit to the Board in which he avers that he remains disabled and is not gainfully employed. The self-insured employer does not enjoy this advantage. A self-insured employer must continue to pay the total or temporary partial disability benefits until the Board has rendered a decision after a hearing as to whether the injured worker's disability has ceased or diminished.

The decision by an employer or carrier to file a petition to terminate may arise from a variety of different circumstances. The *Watson* case addresses the most common of those circumstances where the injured worker has continuing restrictions due to the work injury, which the employer cannot or chooses not to accommodate. In such cases, carriers or their defense counsel engage vocational experts to conduct a labor market survey to establish that the injured worker does not require a specially created job and that work is generally available in the labor market for someone with the injured worker's skills, work history and work capabilities.

There is continuing debate between the defense bar and the claimant bar as to whether the *Watson* decision represents a clarification of existing law or a new requirement that the employer show actual job availability for the claimant at a specific job. It is our interpretation that while this decision creates more stringent requirements for the testimony of vocational experts, it does not establish that the employer is

required to find an actual job for the claimant in order to eliminate or reduce total disability or temporary partial disability benefits.

A summary of the case follows but the salient points are as follows:

1. It will be more frequently necessary for a representative of the employer to appear at the hearing in order to offer testimony as to why the claimant could not be returned to work with the insured. The necessity for an employer representative to offer such testimony will increase with the size and sophistication of the employer.
2. The vocational expert will be required to establish the period during which the jobs identified in the labor market survey were available and how long those positions remained available. The vocational expert also will need to establish that the period of job availability was contemporaneous with the period of when the claimant had been released to return to work with restrictions.
3. The labor market survey and the accompanying job analyses or description forms must be provided to the claimant contemporaneously during the period when the petition is pending so that the claimant has the opportunity to apply for the identified positions. It will no longer be acceptable practice to produce the labor market surveys at the 30-day discovery cut-off date before a hearing.
4. Defense counsel will have to require the claimant to produce job search logs and records and provide them to the vocational expert. The vocational expert will then be expected to have contacted both the employers identified in the labor market survey as well as those in the claimant's work search log and be prepared to testify as to which positions were "actually available" to the claimant and the period during which such positions were available.
5. The Court also held that when a claimant has not received a response from an employer to whom he applied, there is a presumption that the reason he did not receive a response was because of his work-related restrictions. This will be a presumption that the vocational expert must be prepared to overcome by testifying as to the results of their post application discussions with the prospective employers.
6. The Court's strongest language in the decision holds, "The employer must establish that the jobs listed on the labor market survey are actually 'available'. If the claimant applied for the jobs listed in the employer's survey without success, then the survey alone is insufficient evidence to satisfy the employer's position." As such, it will be imperative for the vocational expert to identify jobs for which the claimant has a realistic opportunity to be hired, be prepared to testify as to whether or not the claimant actually applied for the positions and whether there were reasons other than the claimant's work-related restrictions which resulted in the claimant not obtaining the position sought. This will be necessary for both the jobs identified in the labor market survey and the claimant's job search records.

The *Watson v. Wal-Mart* decision demonstrates the necessity of using an experienced vocational rehabilitation expert familiar with Delaware and familiar with the requirements, not only of the *Jennings v. University of Delaware* case, but of the new more restrictive requirements established by the *Watson* decision.

For additional case summary information and the decision, please visit www.marshalldennehey.com.