

# WORKERS' COMPENSATION

## ASK AN EXPERT

### QUESTION:

Does community based funded employment work? Is it effective?

### RESPONSE:

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### JOB AVAILABILITY IN THE CURRENT ECONOMIC CRISIS: IS IT TIME TO RECONSIDER FUNDED EMPLOYMENT?

Returning an injured employee to work is one of the fundamental goals of our workers compensation system. The employee, employer and insurer all benefit from a return to work following a disabling work injury. Yet, returning an injured worker to employment is one of the most contentious and litigated aspects of the workers' compensation system, with the availability of a suitable job for the employee the central issue.

In workers' compensation practice, an injured employee traditionally returns to work through one of two avenues: The time-of-injury employer in the original or a modified duty job or in an actual job position at another employer that is identified via job development. The original employer, however, may not have an open position for the employee to return to work or one that can accommodate limitations due to the work injury. Job development pursued on behalf of the employee using the Kachinski standard requires the employer or insurer to find open and available jobs that are within the employee's work capabilities. Both of these approaches have become more difficult of late with the current economic crisis severely limiting the opportunities to place employees back to work with their employer or elsewhere.

An alternative to traditional Kachinski-style job development – employment arrangements that are funded or subsidized by the employer or insurer, provide another method for returning an injured employee to the workplace. Whether due to the limitations in the availability of actual jobs from a sputtering economy, or perhaps the difficulties in market surveys / earning power assessments are valid tools for challenging an injured workers' benefit status,

such alternative work arrangements are seeing a renewed interest in Pennsylvania workers' compensation practice.

Funded or subsidized employment involves jobs outside of the original employer that are paid for in some way by the injured workers' employer or insurer. The jobs can be existing positions in the community, or created specifically for the employee. The common element is that the employment accommodates the injured workers' limitations and is funded or subsidized for a period of time in order to ensure that there is actual work available.

Funded or subsidized employment is not new in Pennsylvania workers' compensation. Over the last twenty years, various forms of such alternative employment have been offered by vendors in an attempt to provide a return-to-work vehicle. The examples of such work have included home-based telemarketing or service positions, where the employee is set up in their home to make phone calls on behalf of companies; assembly of fishing tackle or other items at home; and placement of employees in existing social service or charitable organization. These jobs are typically funded for a specified period of time by the insurer, with the employer then taking over responsibility for on-going employment.

The success of such alternative employment is difficult to accurately identify, as there are few reported decisions in the Commonwealth Court of Pennsylvania on the subject. The reported cases have, in general, recognized the validity of funded or subsidized employment, but they remain subject to the criteria for valid job development under Kachinski of open,

available work within the claimant's current vocational and physical abilities that is pursued in good faith.

For instance, in General Electric v. WCAB (Myers), 849 A.2d 1166 (Pa. 2004), a plurality of the Pennsylvania Supreme court upheld an alternative work arrangement involving home-based employment to effect a modification of the injured workers' benefits. However, the time period for the modification was limited to the 90 days of funding of the job that was guaranteed by the insurer, after which the alternative employer at which the employee worked was not required to continue the position. In Medved v. WCAB (Albert Gallatin Services), 788 A.2d 447 (Pa. Cmwlth. 2001), a claimant who was offered a telecommunications job from home as alternate employment did not have a good faith basis for rejecting it because there were no barrier from performing the work at home, while in Allegheny Power v. WCAB (Barry), 841 A.2d 614 (Pa. Cmwlth. 2004), a claimant was found to have rejected an in-home telecommunications position in good faith because his physical limitations would not allow him to work 40 hours per work and the confines of working in his mobile home would infringe on his home and family.

The experience with funded or subsidized employment is that it represents a legitimate alternative tool to enable an employee to return to work from a disabling work injury, with the primary issue being whether the position involves a genuine opportunity for long-term work such that modification or suspension of benefits, or the threat thereof for purposes of settlement of a claim, may be obtained for a period of time sufficient to justify the effort and cost of the program. In many cases, funded employment has been used successfully to enable the injured employee to return to work where other approaches have failed.

Funded employment, in some circles, has had a negative reception because it is viewed as "make work" simply to achieve a reduction in a workers' compensation claimant's benefits, rather than a

legitimate effort to return the worker back to their original employer or a productive position. That image, to some extent, may be present in any return to work effort, but funded or subsidized employment that combines genuine job opportunities within the injured employee's limitations and the prospect of long-term employment offers a realistic approach to getting injured workers back into the workplace such that employers and insurers may obtain modification or suspension of benefits, or settlement of cases.

A key to successful funded employment is the length of the funding commitment. As noted in the General Electric case, the period of guaranteed funding of the employment can limit the ability to obtain a modification or suspension of benefits. Typically, the period of funding is limited to up to 90 days, after which the employee is either hired or retained by the now unfunded employer, or they go back off work due to the lack of funding. In theory, the period of funded employment is long enough to enable the employee to resume normal work activity and for the funded employer to appreciate the benefit of the employee so that the employment continues, at the employer's expense. Indeed, vendors of such alternative employment tout high rates of retention of injured workers who complete the full program of funded work.

Ultimately, and perhaps most importantly for employers and insurers, funded or subsidized employment's greatest benefit is for settlement of cases. With settlements now occurring in most workers' compensation cases at some point, and with litigation on job offers and alternative employment often resulting in settlement based on the prospect of modification or suspension of benefits due to the employment opportunity provided, funded employment is a useful tool in an overall claim resolution strategy.

Today's economy, with employers cutting jobs, laying off employees, and otherwise facing limits on providing modified jobs to injured workers, presents the type of work environment in which alternative employment, such as subsidized jobs, can be successfully utilized.

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