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VOLUNTARY RETIREMENT CASES: AN EVOLVING BURDEN OF PROOF

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KEY POINTS:

- The *Day* and *Robinson* cases solidify the burden of proof in voluntary retirement cases to the employer's advantage.
- Specifically, once the evidence establishes that an employee has taken a retirement, the burden shifts to that employee to prove that he has not removed himself from the workforce.

The companion cases of *Melvin Day v. W.C.A.B. (City of Pittsburgh)*, 6 A.3d 633 (Pa. Commw. 2010) and *City of Pittsburgh and UPMC Benefit Management Services, Inc. v. W.C.A.B. (Robinson)*, 4 A.3d 1130 (Pa. Commw. 2010) raise significant issues with regard to the burden of proof in retirement cases.

Prior to discussing the cases of *Day* and *Robinson*, it may be instructive for the reader to review a brief history of some of the more important cases decided by the courts in the not-too-distant past with regard to retirement.

In the case of *Dugan v. W.C.A.B. (Fuller Company and Catasauqua)*, 569 A.2d 1038 (Pa. Commw. 1990), the claimant indicated unequivocally that he was retired and would no longer attempt to obtain employment. The Commonwealth Court held that the employer did not have to show job availability in light of this testimonial evidence as the worker, even though he had been cleared for return to work, had forever removed himself from the job market.

Specifically, in *Dugan*, the claimant suffered a myocardial infarction. The employer contested the compensability of the claim. The judge held hearings, and after closing the record, he re-opened it to schedule an additional hearing because, in the interim, the claimant had retired. The claimant testified that he had since begun to receive Social Security retirement benefits because he turned age 65. The claimant testified unequivocally that he was retired. The judge granted a limited amount of benefits from the date of injury through the date of retirement.

The claimant appealed. He argued that when he retired, it did not relieve the employer's burden of proof to show that there was work available to the claimant prior to his retirement and the suspension of compensation. The Commonwealth Court in *Dugan* concluded that disability is

synonymous with a loss of earning power. Even though a claimant may continue to suffer a work-related disability, if the disability does not occasion a loss of earnings, then payment must be suspended. The court affirmed the judge's decision below, holding that the claimant's loss of earnings was caused by his voluntary retirement and withdrawal from the workforce.

The *Dugan* Court concluded that the employee must unequivocally state that under no condition will he seek to be employed again before eliminating the employer's burden of proof to show job availability.

In the case of *Scalise Industries v. W.C.A.B. (Centra)*, 797 A.2d 399 (Pa. Commw. 2002), the Commonwealth Court took on "forced retirements" and held that forced retirements are a cause of disability. In *Scalise*, "[I]n order to continue to receive disability benefits following retirement or separation from employment . . . , the claimant must establish that he is seeking employment or that he was forced into a compulsory retirement or separation from employment due to the work-related injury."

The claimant in *Scalise* suffered a work injury when a pipe, weighing between 500 and 600 pounds, fell on him. Three weeks later, the claimant returned to work at his job site in a limited capacity. He worked for four to five months. The claimant eventually underwent surgery to his heart. The employer disputed the work-relatedness of the heart surgery. At hearings, the claimant testified to the mechanism of this injury, his treatment and his current continuing complaints. He also testified regarding the circumstances surrounding his retirement. Mr. Scalise testified that he could not continue to work for the employer due to his physical ailments. He indicated his desire to continue working until he reached age 65, but he noted that he just "couldn't do it anymore." He testified that he "would go back to work, if he could."

The judge granted the claimant's petition. The employer appealed and argued to the Appeal Board that the judge erred in finding that the claimant was forced into retirement on July 1, 1996, as the claimant failed to present any unequivocal medical evidence that he was incapable of working as of that date. The Commonwealth Court disagreed.

The *Scalise* Court held that, even though the claimant never presented any evidence that his treating physicians recommended he retire, the claimant did testify as to the requirements of his job and the problems he was having prior to making his decision to retire.

In *Scalise*, the Commonwealth Court noted that the judge questioned the claimant as to his reasons for retiring. When asked what caused him to retire, the claimant responded that he "liked to work and that he couldn't do the things that he could do before." These "things" referred to what he had to do in his pre-injury job. The court in *Scalise* concluded that the testimony of the claimant, coupled with the other medical evidence of the case, constituted substantial competent evidence in support of the judge's decision.

In an interesting turn of events, the Commonwealth Court in *County of Allegheny v. W.C.A.B. (Weis)*, 872 A.2d 263 (Pa. Commw. 2005) held that in order to avoid suspension, a claimant is required to demonstrate that he was **forced out of the entire labor market** and not just out of his time-of-injury job.

In *Weis*, the claimant had been receiving benefits for 20 years when the employer

filed a Suspension Petition in 2001, averring that the claimant voluntarily withdrew from the workforce. The claimant's injury was to the knee. The claimant testified that he experienced knee problems and could not perform any work, although he acknowledged that he did not know if he could work at a desk job. He admitted that he never returned to work after his retirement, although he intended to "if they got my knee straightened out." It was undisputed that Mr. Weis did not seek work after his retirement. The judge, in part, found that the claimant remained physically incapable of returning to his pre-injury employment and further found that the employer presented no evidence to establish that work was available to the claimant within his physical limitations. Accordingly, the judge found that the claimant did not voluntarily remove himself from the workforce.

The Appeal Board affirmed. The employer appealed to the Commonwealth Court. On appeal, the employer's position was that the claimant was not forced to retire. Although he was forced to leave his time-of-injury job, Mr. Weis was not forced to leave the entire work market.

The Commonwealth Court concluded it was clear that the burden was on the claimant to establish that he was forced to retire from the entire labor market. The claimant failed to carry his burden either by showing that he was forced to retire from the entire labor market or that he sought employment.

SEPTA v. W.C.A.B. (Henderson), 669 A.2d 911 (Pa. 1995), a Pennsylvania Supreme Court case, also speaks to the situation where a claimant is forced to retire. In *Henderson*, the Pennsylvania Supreme Court stated it is clear that disability benefits must be suspended when a claimant voluntarily leaves the labor market upon retirement.

The Court stated that the mere possibility that a retired worker may at some future time seek employment does not transform a voluntary retirement from the labor market into a continuing compensable disability. An employer should not be required to show that a claimant has no intention of continuing to work. Such a burden of proof would be prohibitive.

Under *Henderson*, once an employer files a suspension based on its suspicion that a claimant has retired, the claimant must then overcome the presumption that he has left the workforce. Thus, a claimant who accepts a pension has to establish: (1) that he is seeking employment *or* (2) that the work-related injury forced him to retire. Once a claimant can establish either, the employer **can only modify benefits by offering suitable alternative employment**.

The voluntary retirement issue and whether or not it removes one from the workforce to the extent that the employer is no longer obligated to pay disability benefits has further evolved in the cases of *Day* and *Robinson*.

The facts of the *Day* case are as follows. The claimant was a helper in the employer's sanitation department in 1978 and 1979 and later became a driver. The claimant injured his neck on March 19, 1992. The defendant accepted the claim by way of a Notice of Compensation Payable. The claimant underwent surgery for the neck and returned to his pre-injury position in 1993 or 1994, but he could not continue in the position and began working for the employer in modified, light-duty positions in 1995 or 1996 as a custodian.

The employer laid the claimant off in 2000 or 2001. After the employer laid him off, the claimant applied for and received unemployment compensation benefits. **During this time, the claimant looked for light-duty jobs, but was unable to find any**. The unemployment compensation ran out sometime in 2000 or 2001. The claimant applied for and received a Social Security pension and a pension from the employer. The claimant **did not** look for work after his unemployment compensation benefits ran out. Instead, he began to collect his Social Security pension.

During this time, the claimant also received temporary total disability benefits. The claimant submitted to an independent medical evaluation, and the doctor concluded that the claimant was capable of full-time, medium-duty work. The employer then filed a Suspension Petition seeking to suspend the claimant's benefits on the grounds that he had voluntarily retired from the workforce.

When the claimant testified, he said that he thought he could perform the custodial work of the light-duty type that he had been performing for the employer. He admitted that he had **not** looked for work **after** he stopped receiving the unemployment compensation benefits and started receiving the pensions. Mr. Day testified that he was aware that he had been released to return to work with restrictions. He did not introduce any of his own medical evidence. On this basis, the judge concluded that the claimant had voluntarily removed himself from the workforce and granted the Suspension Petition.

The claimant appealed, citing *SEPTA v. W.C.A.B. (Henderson)* to the Appeal Board. The Appeal Board discussed *Henderson*, holding that after the claimant retired, he had to prove that he sought employment **or** that he was forced into retirement because of the work injury. Because Mr. Day did not look for work after he began receiving his pensions, this provided substantial evidence for the judge to conclude that the claimant voluntarily removed himself from the workforce. Thus, the Appeal Board affirmed the judge's Order.

Mr. Day appealed to the Commonwealth Court. The claimant argued to the Commonwealth Court that the judge and the Appeal Board **improperly shifted the burden of proof to the claimant** to show that he was still looking for work after taking the Social Security pension rather than requiring the employer to show that suitable jobs were available for the claimant.

Mr. Day argued that *Henderson* and *Weis* were misinterpreted by the Appeal Board, taking the position that the Appeal Board went too far in applying *Weis* and placed an unfair burden on the claimant, who was discharged by the time-of-injury employer from a modified-duty job.

The claimant further argued that to presume that a claimant who accepts a pension has retired goes against the intent of the Act. The court in *Day* disagreed, pointing to the fact that Mr. Day testified that he took a regular pension after the unemployment compensation benefits ran out and that he applied for and received Social Security Disability benefits. He admitted that he did not look for work beyond initially registering at the unemployment center when he was first laid off in the 2000 or 2001.

Most significantly, the *Day* Court looked at the **totality of the circumstances**, including the claimant's acceptance of a pension from the employer and a Social Security pension, after **receiving and exhausting unemployment benefits**, along with the

claimant's testimony that he believed that he could work but **was not looking for work**. This, in the *Day* Court's mind, justified a holding that, like the claimant in *Henderson*, the claimant intended to terminate his career and, therefore, retired.

The court in *Day* then looked to the companion case of *Robinson*. In *Robinson*, the claimant accepted a disability pension conditioned on her inability to perform her **time-of-injury job**. The acceptance of the pension did not preclude the claimant from other work. Unlike the claimant in *Day*, the claimant in *Robinson* credibly testified that she was still looking for work, despite not knowing her own capabilities.

Specifically, Ms. Robinson began working for the employer as a police officer on April 17, 1989. In 1997, she sustained a work injury to her neck and right shoulder. Subsequently, she worked for the employer in a light-duty position. She re-injured herself when traveling to an appointment for the work injury on October 15, 2001. The employer accepted these injuries. Ms. Robinson did not return to her light-duty job immediately after this second incident. In 2003, the employer discontinued its transitional duty program under which the employer had previously provided the claimant her modified-duty position. In late 2004, the claimant sought and received a disability pension from the employer.

The employer performed an IME, which released the claimant to light-duty, sedentary work. The employer then filed a Suspension Petition, arguing that the claimant voluntarily withdrew from the workforce because she failed to look for suitable work within her restrictions **after retiring**.

After the employer filed a Suspension Petition, Ms. Robinson went to a local employment center and looked for jobs that she believed she could perform, but she did not apply for any. She also searched the newspaper for jobs.

In *Robinson*, the judge determined that the employer forced Ms. Robinson into retirement by eliminating her modified-duty position. Interestingly, the court in *Robinson* also cited *Henderson*.

The judge, because he found credible the claimant's testimony that she was looking for work, concluded that the employer failed to meet its burden of proof and denied the Suspension Petition.

The employer appealed to the Appeal Board, but the Appeal Board upheld the judge's decision. The Appeal Board pointed to the fact that, because the claimant had looked for work, she remained attached to the labor market.

The employer appealed to the Commonwealth Court. The issues on appeal were whether the claimant did indeed remain attached to the workforce and whether the judge erred in finding that the claimant was forced out of the entire workforce and concluding that the employer needed to present evidence of the suitable work within the claimant's abilities in order to prevail on the Suspension Petition.

In *Robinson*, the court reiterated its previous holdings where the claimant has to bear the burden of proof of showing that her work-related injury has forced her out of the entire workforce or that she is not looking for work when she retires.

The employer argued that the claimant took herself out of the workforce, so it was her burden to find work. The claimant argued that where the employer has modified work available, but does not provide the work to the claimant, the burden is on the employer

to show the availability of work. Thus, fundamentally, the court pointed out that **what is at issue is when does the burden shifts from the employer, to show the availability of suitable work, to a claimant,** to show that she still was either attached to the workforce or forced out of the workforce by her work injury.

The court in *Robinson* also looked to what Ms. Robinson's **totality of circumstances** would show. They looked to whether, aside from merely accepting a pension, she intended to forego opportunities for employment in favor of receiving a pension and workers' compensation benefits.

In *Robinson*, the employer did not provide sufficient evidence to show under the totality of circumstances that the claimant intended to terminate her career. In *Robinson*, the claimant applied for and received a disability pension which was conditioned on her inability to perform her time-of-injury position. Ms. Robinson did not seek a disability pension that precluded her from working or receiving an old age pension. It is true that she did not return to her modified-duty position after her second work injury; however, this is because it was the employer that no longer made the position available to her. Finally, Ms. Robinson testified that she looked for work after she received the Notice of Ability to Return to Work from the employer. In addition, the employer never offered any position for the claimant to return to. The totality of circumstances provides no evidence that the claimant intended to terminate her employment or career. To the contrary, the judge found as fact that Ms. Robinson would be working if the employer had not eliminated the modified-duty position. Therefore, the employer failed to carry its burden under *Henderson* to show the claimant had retired.

In conclusion, in *Day* and *Robinson*, retirement cases appear to have evolved into fact-sensitive cases where the court will look to a totality of the circumstances. The employer must produce evidence that the claimant has retired. The burden will then shift to the claimant to show that she has not removed herself from the workforce. The court will then look at the totality of the circumstances. In that these cases are fact-sensitive, they will be subject to interpretation by judges and the appeals courts. Therefore, it would behoove an employer, in this writer's opinion, to always make light-duty work available to a claimant in situations where it suspects that the claimant has chosen to retire from the workforce.

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