

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
APRIL 2014 AT A GLANCE
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JOINDER

- Regulation §131.36 states in pertinent part:

(a) A party desiring to join another defendant to assert a claim relevant to the pending petition may do so as a matter of right by filing a petition for joinder.

*(b) A petition for joinder shall set forth the identity of employers and insurance carriers sought to be joined and the reasons for joining a particular employer or insurance carrier as well as **the specific facts and the legal basis for the joinder.***

*(d) An original and the number of copies specified on the Bureau petition for joinder form shall be filed **no later than 20 days after the first hearing at which evidence is received regarding the reason for which joinder is sought**, unless the time is extended by the judge for good cause shown.*

The regulation states that the twenty-day time period begins when evidence is presented regarding the **reason** for which joinder is sought, not evidence **establishing a reason** for requesting joinder.

The 20 day requirement for the finding of the Joinder began to run when the Claimant testified to the existence of other parties who likely were, or at least may have been, in a contractual relationship with Claimant's uninsured employer.

Accordingly the WCJ did not err nor abused his discretion upon dismissing the Joinder Petition of UEGF where it Joinder was not filed within twenty days of the claimant's testimony, and UEGF did not seek an extension of time in which to do so.

- Although UEGF is not an insurer and is exempted from being subject to penalties, unreasonable contest fees, and certain reporting requirements, the Act expressly provides that the "fund shall have all of the same rights, duties, responsibilities and obligations as an insurer" and the Regulations regarding the filing of a Joinder Petition would apply to it.
- In workers' compensation proceedings, joinder is governed by 34 Pa. Code §131.36, part of the Special Rules of Administrative Practice and Procedure

before Workers' Compensation Judges. Joinder is permitted as of right, so long as a petition for joinder is filed within the prescribed time period, i.e., no later than twenty days after the first hearing at which evidence is presented regarding the reason for which joinder is sought. The WCJ may waive or modify the deadline for good cause. The decision to grant or deny a petition for joinder is within the discretion of the WCJ.

Pennsylvania Uninsured Employers Guaranty Fund v. WCAB (Dudkiewicz, deceased, Builders Prime Window and TH Properties), No. 1540 C.D. 2013 (Decision by Judge McCullough, April 7, 2014) 4/14

EVIDENCE/ REINSTATEMENT/ VOCATIONAL/WAGES IN LIEU OF COMPENSATION/ WCJ

- Where the employer issued a Medical Only NCP but paid the Claimant salary continuation in lieu of compensation and medical expenses, Medical Only NCP constituted a de facto NCP.

Accordingly, the claimant's subsequent petition seeking benefits was to be construed as a Petition for Reinstatement and not a Claim Petition.

- Salary continuation does not necessarily discharge an employer from its obligations under the Act. Payments in lieu of compensation are 'any voluntary or informal compensation, apart from the Act, paid with the intent to compensate for a work-related injury.

It is the intent of payment that is its predominant characteristic. In order to demonstrate necessary intent, the burden is upon claimant to show that the monies paid to him were paid and received as compensation under the Act and the record must demonstrate that such finding is based on substantial evidence.

However, if the claimant is totally disabled and money is being paid in relief of the employee's capacity to labor, it having been determined that the employee is entitled to worker's compensation, the amount paid raises a rebuttable presumption, a sufficient inference of an intent to compensate

Thus, under certain specific circumstances, a claimant need not prove the employer's intent concerning its salary continuation. Rather, the burden is on the employer to rebut the presumption.

- Where there is both a documented work-related injury, either by adjudication or acceptance by a document such as an NCP and that injury gives rise to a disability, i.e. loss of earning power, the proper burden of proof is that of a reinstatement petition. In the absence of both or either of these prongs, the burden of proof is that of a claim petition.

Generally, a claimant seeking reinstatement must prove that through no fault of his own, his disability is again adversely affected by the work injury, and the disability giving rise to the original claim continues.

- In the absence of the filing of a Petition for Termination or Suspension but in the context of the litigation of Claimant's Petition for Reinstatement a WCJ has authority to suspend/terminate a claimant's benefits where doing so would not be prejudicial to the claimant, i.e., the claimant is put on notice that a suspension/termination is possible and is given the opportunity to defend against it.
- In the context of employer's defense against claimant's Petition for Reinstatement Employer has satisfied its burden that suitable employment was available where the record is replete with evidence that Employer made a good faith effort to return Claimant to productive employment by creating a modified-duty job specifically tailored to Claimant's physical restrictions, and the WCJ expressly rejected the Claimant's testimony that the job exceeded his/her limitations.
- A modified-duty job is temporary or of short duration only when it will become unavailable on a date certain.

Therefore, the WCJ did not commit an error by suspending claimant's compensation premised upon its denial of claimant's Petition for Reinstatement although employer witness testified the job analysis reflected that Claimant's job could not be permanently modified. This is because there was no record evidence that Employer intended to stop accommodating Claimant's restrictions at any point.

- The WCJ did not commit an error of law by affording the job description probative value entered into evidence without objection.

This is because hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding if it is corroborated by any competent evidence in the record.

- Hearsay is defined as a 'statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted. It has long been established that hearsay evidence, properly objected to, is not competent evidence to support a finding whether or not corroborated by other evidence. However, hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding if it is corroborated by any competent evidence in the record.

Furnari v. WCAB (Temple Inland and Chartis/AIG/ESIS), No. 1171 C.D. 2013 (Decision Judge Covey, April 10, 2014) 4/14