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THE FIRST REPORT

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THE WC-240 APPROACH: SETTING EXPECTATIONS FOR AND LEVERAGING A LIGHT DUTY JOB OFFER

BY: JONATHAN WILSON

At first glance, the procedural requirements of offering suitable light duty work to a claimant may appear complicated when the WC-240 process is necessary. Given how things typically play out after a suitable position is offered, this can be a frustrating process for an employer/insurer if expectations are not appropriately set beforehand. Despite this, taking "the WC-240 approach" can provide useful leverage to move a claim toward a favorable resolution.

When an employer/insurer is paying a claimant income benefits while they are out of work due to an on-the-job injury, the question typically arises as to options for ending his or her entitlement to ongoing income benefits. When the authorized treating physician (ATP) releases the claimant to work in some capacity, the WC-240 approach can be an option. More specifically, if all of the procedural requirements for offering suitable light duty work to the claimant are met, the employer/insurer can, at least for some period of time, unilaterally suspend income benefits. However, there are multiple, detailed steps that must be handled appropriately for this to occur.

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First, it must be established that the employer is able to offer work that falls within the ATP-assigned light duty restrictions. The nature of the employer's business will dictate whether or not this is viable. A company able to offer a form of "desk work" will be more likely to accommodate restrictions than an employer who deals solely in physical labor. Once the employer believes it has a suitable position available for the claimant, Board Rule 240(b)(3)(i) requires "a description of the essential job duties to be performed, including the hours to be worked, the rate of payment, and a description of the essential tasks to be performed." Of significance, Board Rule 240(b)(3)(ii) also requires "the written approval of the authorized treating physician(s) of the essential job duties to be performed." There is no strict requirement as to the actual method of providing a written description of the light duty position to the ATP. However, a form WC-240A Job Analysis meets all of the aforementioned requirements and is used in the overwhelming majority of cases where the WC-240 approach is employed. The WC-240A specifies the physical requirements of a light duty position in great detail. Claimants and their attorneys may be more prone to question the validity of a job description provided by the employer, which is not as detailed as the form WC-240A Job Analysis.

Once a WC-240A form or job description is prepared, it must be submitted to the ATP for approval. Notably, Board Rule 240(b)(1) requires the employer/insurer to send the claimant and claimant's counsel a copy of the job description "at the time of submission to the authorized treating physician(s)." Moreover, the Board Rule mandates that the ATP's approval of the job description must take place within 60 days of the physician's last examination of the claimant. These two requirements are some of the easiest for a claimant's attorney to attack and can scupper a light duty job offer if there is failure to comply. Always be sure to send a claimant and his or her attorney (if any) a copy of the job description when you send it to the ATP, but only after you have confirmed the ATP has examined the claimant within the last 60 days. You can reasonably anticipate up to a week or two for a busy physician to review and approve a job description, so keep this in mind when evaluating the 60-day requirement.

After the ATP approves a proper job description, or WC-240A, within 60 days of last examining the claimant, it is time to prepare a form WC-240 Notice to Employee of Offer of Suitable Employment. This form provides formal notice to the claimant that

(1) a specific light duty job is being made available pursuant to the requirements of O.C.G.A. § 34-9-240 and Board Rule 240(b); (2) it was approved by her ATP after an examination within the last 60 days; and (3) refusal to perform the job will result in the suspension of weekly income benefits. Put simply, a WC-240 gives the claimant a "heads up" that she can no longer expect to sit back and receive weekly income benefits.

When properly completed, a WC-240 will contain information as to the hours to be worked in the light duty position, the rate of pay, the job location and the date and time the claimant should report to work. A properly completed WC-240 must also be accompanied by the ATP-approved job description or WC-240A. Finally, the WC-240 and attachment must be sent to the claimant and her attorney at least 10 days prior to the return to work date, as required by Board Rule 240(b)(1). As a practical consideration, it is prudent to set a return to work date with the employer, which will allow for at least 13 days for the claimant and her attorney to receive the WC-240, so there is no chance that the notice requirement will be challenged. The WC-240 and approved job offer may be sent via U.S. Mail, email or — even better — both.

Once the employer/insurer has met all of the foregoing requirements for a valid WC-240 job offer, the ball is in the claimant's court. One of the following three scenarios will then play out. Under the first scenario, if the claimant fails to report to work or attempts the light duty job for less than eight cumulative hours or one scheduled workday — whichever is greater — before ceasing to work, the employer/insurer can file a WC-2 Notice of Suspension of Benefits, along with a copy of the WC-240 and approved WC-240A or job description. Income benefits can be suspended effective the date the claimant fails to attempt the job or returns to work for less than the required minimum time, without having to either provide the claimant 10 days' advance notice of the suspension or request a hearing allowing for suspension.

Under the second and most common, scenario, the claimant attempts the light duty job for at least eight cumulative hours or one scheduled workday, whichever is greater. In this case, the employer/insurer can suspend income benefits effective the date the claimant returned to work. However, if the claimant then ceases performing light duty work before she has completed working more than 15 scheduled work days, the employer/insurer must immediately recommence temporary total disability (TTD) benefits. Failure to do so waives the defense that the light duty position was suitable for the claimant.

Under the final and far less likely scenario, if the claimant performs light duty work and ceases working after completing 15 scheduled work days, then the employer/insurer does not have to recommence income benefits. Rather, the burden of proving entitlement to additional income benefits shifts to the claimant. She will have to file a hearing request to prove entitlement to same.

In light of the foregoing, an employer/insurer can reasonably expect any return to light duty to be short lived. In most cases, the claimant performs just enough light duty work to meet the minimum legal effort, but not enough to surpass the 15-day trial return to work period, thus ensuring weekly income benefits must be reinstated after she ceases work due to an alleged inability to perform the job. At that juncture, it may initially appear that the WC-240 approach was useless. However, the employer/insurer can then file a hearing request seeking the State Board's permission to suspend income benefits based upon a finding that the claimant was not justified in ceasing light duty work. Doing so puts the claim in litigation when it typically would not have been because the claimant was receiving income benefits, and thus formal discovery "tools" are available. Moreover, the claimant will have to provide specifics as to why she ceased performing the light duty work. This generally moves the claim higher up the claimant's attorney's "to-do list" and can help initiate settlement negotiations in an otherwise stagnant claim or allow for a more reasonable settlement outcome.

More often than not, the claimant will contend that pain or problems related to her on-the-job injury prevented her from continuing with light duty work. The ATP's opinion will be extremely important on that issue. If the ATP re-examines the claimant and maintains the prior approval of the light duty position as suitable for the claimant, the employer/insurer will be in a strong position to argue for suspension of benefits for unjustifed refusal of suitable employment. Although suspension of benefits can be ordered retroactive to the date of refusal, from a practical standpoint, it can be extremely difficult to actually recover an overpayment of income benefits from a claimant. After fully litigating a WC-240 issue, there may be no practical recourse for recovery unless the employer/insurer expects a significant permanent impairment rating. In that case, the Board will allow the employer/insurer to take a credit or offset for permanent partial disability (PPD) benefits owed to the claimant. The employer/insurer may also seek to settle the claim with forgiveness of the overpayment as part or all of the consideration for settlement.

Ultimately, the time and expense of fully litigating a WC-240 job offer must be weighed against the expected outcome. The mere threat to a claimant's entitlement to ongoing income benefits that the WC-240 approach presents can be an effective motivator for a reasonable settlement. The WC-240 job offer is also one of the less common scenarios where the employer/insurer can put a case into litigation by filing a hearing request of its own. That fact can help

persuade a claimant's attorney to look at resolving the claim instead of litigating it.

All things considered, the employer/insurer cannot expect a WC-240 light duty offer to allow them to terminate TTD benefits for once and for all. Instead, this tactic should be viewed as a way to "shake things up" in a claim and help push it toward a favorable settlement, which will then allow for the desired finality.

ALABAMA CASE LAW UPDATE

BY: KAYLA WASHINGTON (WITH CONTRIBUTIONS BY TREY DOWDEY)

The following article summarizes a few recent decisions by the Supreme Court of Alabama and the Alabama Court of Civil Appeals. These decisions cover topics that include the return to work statute, the "last-injurious-exposure rule" and the exclusivity provisions of the Alabama Workers' Compensation Act.

***AMEC Foster Wheeler Kamtech, Inc. v. Chandler*, No. 2180101, 2019 WL 4894327 (Ala. Civ. App. Oct. 4, 2019).**

On Oct. 4, 2019, the Alabama Court of Civil Appeals released its opinion in *AMEC Foster Wheeler Kamtech, Inc. v. Chandler*, affirming the trial court's judgment awarding workers' compensation benefits. The trial court found the employee suffered a 35 percent vocational disability, based on the employee's Nov. 16, 2015 work injury to his back (from lifting a pipe as a welder for AMEC). An orthopedic surgeon determined on Jan. 5, 2016, the employee suffered degenerative changes in his spine and had a protrusion at the C6-7 vertebrae, a protrusion at the T7-8 vertebrae and a protrusion at the L4-5 vertebrae.

After physical therapy proved unsuccessful, the surgeon administered an epidural steroid injection (ESI) on Feb. 25, 2016, followed by a second ESI on March 31, 2016. However, after the employee missed three appointments, the surgeon placed him at maximum medical improvement (MMI) on June 14, 2016.

The employee worked light duty for AMEC, but he eventually left his job in January 2016. In July 2016, he sued AMEC for workers' compensation benefits. The employee also worked intermittently for other employers, supervising welders and doing some mechanical work, between the time of his employment with AMEC and trial in July 2018. The employee testified at trial that his back pain prevented him from working as a precision or specialty welder, his pre-injury role. The employee also returned to the surgeon for more ESIs from August 2016 through February 2018. The surgeon further determined the employee "markedly improved" since July 2016 and would only need additional ESIs once or twice each year. On Sept. 18, 2018, the trial court entered a judgment awarding the employee workers' compensation benefits, finding the employee suffered a 35 percent vocational disability. The trial court also determined the return to work statute was inapplicable because the employee was not working at the time of trial.

On appeal, the employer argued the trial court erred by awarding the employee benefits based on vocational disability, citing Ala. Code § 25-5-57(a)(3)i (the return to work statute), as the employee worked for an equal or higher hourly wage post-injury. The Court of Appeals reasoned the term "wages" in the return to work statute refers to an employee's average weekly wage. In finding the trial court did not err in failing to apply the return to work statute, the Court of Appeals determined the employer failed to demonstrate the employee made a higher average weekly wage for his post-injury work.

AMEC next argued that the "last-injurious-exposure rule" precluded the employee from receiving workers' compensation benefits from AMEC, as the employee testified his back felt worse after working long hours with subsequent employers. The Court of Appeals rejected this argument and determined the last-injurious-exposure rule was inapplicable, finding the employee's testimony established that he suffered a recurrence of the symptoms of his injury and not a second injury to his back.

Lastly, the employer argued the trial court's determination of the employee's Feb. 2, 2018 MMI date was not supported by the evidence. Instead, the employer relied on the surgeon's June 4, 2016, MMI date. The Court of Appeals held the trial court is not bound by a physician's determination of an MMI date and found there was substantial evidence in the record to support the trial court's conclusion the employee's MMI date was Feb. 2, 2018.

***Ex parte Burkes Mechanical, Inc.*, No. 1180402, 2019 WL6649357 (Ala. Dec. 6, 2019).**

The Supreme Court of Alabama issued a plurality opinion in *Ex parte Burkes Mechanical, Inc.*, denying the employer's petition for a writ of mandamus. In this case, the employee suffered severe burn injuries while working as an iron worker for Burkes Mechanical. The employee alleged another Burkes Mechanical employee sprayed an improper substance on the burn, transported him in a private vehicle to a local doctor (instead of calling an ambulance) and stopped by a

drugstore to buy over-the-counter burn cream before taking him to a hospital. That hospital determined the employee's injuries were too severe and ordered the employee to treat at another hospital capable of treating his injuries. The employee was hospitalized for a week.

The employee sued his employer on Sept. 20, 2018, seeking benefits under the Alabama Workers' Compensation Act and asserting claims of negligence, wantonness and the tort of outrage. The tort claims were based on the employee's assertions the employer failed to furnish appropriate medical care and provide prompt access to qualified health care providers. The employer petitioned the court for a writ of mandamus directing the trial court to vacate its order denying the employer's motion to dismiss the employee's claims of negligence, wantonness and the tort of outrage, arguing that the exclusivity provisions (§ 25-5-52 and § 25-5-53) of the Alabama Workers' Compensation Act barred these tort claims.

> "Supreme Court of Alabama issued a plurality opinion in *Ex parte Burkes Mechanical.*

The plurality opinion held the employer did not demonstrate a clear legal right to have the tort claims against it dismissed. The court determined that whether the employee's negligence and wantonness claims related to injuries that arose out of his employment (or occurred independently after the workplace accident) was a fact-intensive inquiry. The court did not address whether the exclusive-remedy provisions would bar the tort of outrage claim because the employer first raised the issue in its reply brief. Accordingly, the court denied the employer's petition.

***Brooks v. Austal USA, LLC*, No. 2180354, 2019 WL 6648176 (Ala. Civ. App. Dec. 6, 2019).**

In *Brooks v. Austal USA, LLC*, an employee filed a workers' compensation action against his employer. It was undisputed that the complaint was filed within the two-year statute of limitations. The complaint also included instructions for the circuit clerk to serve a summons and copy of the complaint on the employer via certified mail. However, the address the employee provided was the employer's former registered agent and the summons was returned. Seven months later, the employee provided the clerk with the address of the employer's current registered agent and service was perfected on the employer. The employer moved to dismiss the complaint, arguing the action was barred by the statute of limitations. The trial granted the employer's motion to dismiss and the employee appealed.

The Court of Civil Appeals noted that for an action to commence for statute of limitations purposes, a complaint must be filed and there must also be a bona fide intent to have it immediately served. The court determined, considering the evidence in a light favorable to the employee, that the employee's instructions for the clerk to issue service of process by certified mail to the employer's former registered agent, made with the filing of the complaint, constituted a bona fide attempt at immediate service. Accordingly, the court reversed and remanded the decision of the trial court.

In summary, these cases highlight the nuanced nature of the Alabama Workers' Compensation Act and the relevant case law. *AMEC Foster Wheeler Kamtech, Inc. v. Chandler* demonstrates the importance for employers, insurance carriers, adjusters and attorneys handling Alabama workers' compensation claims to calculate the post-injury, average weekly wage when arguing the return to work statute is applicable. Meanwhile, *Ex parte Burkes Mechanical, Inc.*, shows the exclusivity provisions of the Alabama Workers' Compensation Act do not necessarily bar fact-intensive tort claims against employers for acts occurring independently after the initial workplace accident. Lastly, *Brooks v. Austal USA, LLC*, illustrates that for an action to commence for statute of limitations purposes in Alabama, a complaint must be filed and there must be a bona fide intent to have it immediately served.

WHEN TO ARREST THE BENEFITS OF YOUR INCARCERATED CLAIMANT

BY: JOANNA HAIR AND COLLEEN HAMPTON

What happens when a claimant is arrested during the course of a workers' compensation claim? How does a claimant's incarceration affect the compensability of her claim? Can the employer/insurer suspend benefits? For assistance in this matter, let us turn to the case of Felicia the Felon.

Felicia the Felon is an injured worker who is receiving income benefits while on light duty restrictions. Her employer, looking to return her to work, has identified a suitable light duty job, which complies with Felicia's restrictions. However, before offering Felicia this position, the employer learns Felicia has been arrested for distribution of heroin. Felicia's employer decides to go ahead and offer her the position, notwithstanding. Unfortunately, Felicia was unable to make bail and cannot perform the job while sitting in jail, awaiting trial. Does the employer have the right to unilaterally suspend Felicia's income benefits?

Your instinct might lead you to believe the employer has the right to suspend Felicia's benefits. After all, Felicia cannot perform the job because of her unrelated arrest, not because of her work injury. Unfortunately, the Court of Appeals of Georgia concluded that suspending benefits while an incarcerated claimant is awaiting trial would favor the claimants capable of posting bond over those who cannot. A claimant released on bond would presumably be physically available to work the light duty job or at least attempt to perform the light duty job. Favoring a claimant who can post bond over a claimant who cannot would violate the Equal Protection Clause of the Fourteenth Amendment. Ultimately, the Court of Appeals concluded, and the Supreme Court of Georgia agreed, the arrested claimant is entitled to receive benefits while imprisoned until the claimant is adjudicated guilty. *Howard v. Scott Hous. Sys. Inc.*, 180 Ga. App. 690, 350 S.E.2d 27 (1986); *Scott Hous. Sys. Inc. v. Howard*, 256 Ga. 675, 353 S.E.2d 2 (1987).

What does it mean to be "adjudicated guilty?" In *Mintz v. Norton Co.*, the Court of Appeals of Georgia explained adjudication of guilt occurs when the court pronounces judgment and imposes a sentence upon the criminal defendant. In *Mintz*, the defendant pled guilty in November 1989, but it was not accepted, nor sentence imposed, until April 1990. As the defendant could have withdrawn his plea at any time before the pronouncement of guilt by the trial court, he was entitled to continue receiving income benefits. *Mintz v. Norton Co.*, 209 Ga. App. 109, 432 S.E.2d 583 (1993).

What if Felicia was a convicted felon prior to hiring and she is arrested for violating her probation while collecting income benefits? Can the employer/insurer immediately suspend benefits upon her arrest? Arguably, Felicia has already been adjudicated guilty for committing a felony and her arrest for violating probation is directly related to that conviction. However, the Court of Appeals of Georgia found a probation revocation hearing is required, and a finding that the defendant violated probation must be made, before income benefits can be suspended. Notably, a full trial as to the merits of the new offense is not necessary, so long as a determination has been made the claimant violated probation and is incarcerated following this determination. *Sargent v. Brown*, 186 Ga. App. 890, 368 S.E.2d 826 (1988).

Significantly, the Court of Appeals of Georgia has streamlined this process somewhat since *Howard*. In *Mize v. Cleveland Express*, the claimant argued his benefits should not have been suspended because no suitable light duty work was offered while he served 23 years in prison. The Court of Appeals found the claimant's income benefits should terminate upon the date guilt was adjudicated and an offer of employment was unnecessary for the suspension. *Mize v. Cleveland Exp.*, 195 Ga. App. 56, 392 S.E.2d 275 (1990). Though not explicitly stated by the court, the current accepted practice is for the employer/insurer to unilaterally and immediately suspend benefits upon an adjudication of guilt, rather than go through the charade of offering a light duty position, which the claimant cannot accept from prison.

In conclusion, if you find yourself with your own Felicia the Felon, suspend income benefits with care. First, determine the type of charge against Felicia. Is it a new charge or a probation violation under a prior conviction? Next, determine if she is incarcerated or likely to bond out soon. Remember, as soon as there is an adjudication of guilt and a sentence imposed including incarceration, you may unilaterally suspend income benefits. Finally, file a WC-2 form memorializing the suspension of income benefits due to an adjudication of guilt and incarceration.

EVENTS

Webinar: Abusive Litigation and Bad Faith
April 29 — 1-2 p.m. ET

Webinar: Posted Panel and Initial Claims Handling
June 16 — 1-2 p.m. ET

Webinar: Evaluating Coverage for Business Income and Bodily Injury Claims Due to COVID-19
June 17 — 1-2 p.m. ET

Webinar: Time-Limited Demands and Statutory Bad Faith
July 15 — 1-2 p.m. ET

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