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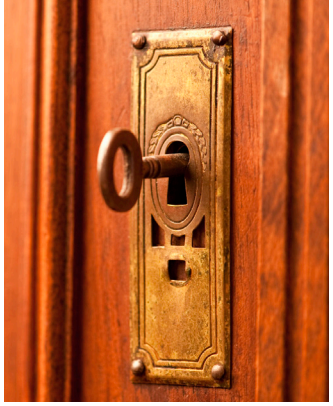

The 1st Report
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Timeless Values. Progressive Solutions.

WC-240 Update: Returning an Employee to Work is No Easy Job!

By: W. Bradley Holcombe

Once TTD benefits are initiated to an employee, our options for suspending benefits are very limited. We may suspend benefits in conjunction with an unrestricted work release from the authorized treating physician; or, we can suspend benefits in conjunction with the employee's actual return to work for us or with a subsequent employer. One such mechanism for compelling an employee's return to work and potentially suspending his or her TTD benefits is presented by the WC-240.

In the circumstance where we are paying TTD benefits and the employee has been released to light duty work by the authorized treating physician, we can provide the physician with a WC-240A/Job Analysis or job description, detailing and proposing a specific light duty job. When doing so, do not overlook our obligation to copy the employee — and his attorney if represented — on any communication to his physician conveying a WC-240A/Job Analysis or proposed job description. Failure to do so will render any job offer invalid. Assuming we properly tender the proposed job and the authorized treating physician approves the position, we can then serve the employee with an offer of employment within 60 days.

Pursuant to the recently revised provisions of O.C.G.A. § 34-9-240, if the employee fails to attempt the light duty job offer for at least eight hours or one work day, whichever is longer, we can immediately and unilaterally suspend his income benefits. By the same token, if he accepts the job and successfully returns to work for at least 15 business days, he would bear the burden of proving entitlement to a later reinstatement.

However, a question arises in the circumstance where an employee returns to work for more than the minimum eight hours or one work day, but before the 15-day requirement is met, he is taken out of work by his physician for a non-work-related medical condition, such as high blood pressure or appendicitis, and accordingly stops working. In such a scenario, would you suspend TTD benefits?

Last month, the Court of Appeals answered this question and made the already challenging WC-240 process even more cumbersome for employers. In *Technical College System of Georgia v. McGruder*, (A13A2353), the claimant accepted a light duty job pursuant to the employer's WC-240, and returned to work for a period of 10 days. However, on the eleventh day, the claimant produced a letter from her primary care physician, which stated that in addition to her work injury, she had other serious medical problems which prevented her from working in any capacity. The claimant immediately stopped working, and the employer did not resume payment of TTD benefits following her departure. The employer took the position that benefits were not payable, as the light duty job was within her work restrictions and she stopped working solely for reasons unrelated to her work injury.

Following an evidentiary hearing on this issue, an administrative law judge sided with the employer, and upheld the suspension of the claimant's income benefits. However, on appeal, the State Board's Appellate Division reversed the ALJ and ordered the employer to resume payment of income benefits. The Superior Court and the Court of Appeals affirmed the Appellate Division. The Court of Appeals reasoned, "pursuant to the plain language of O.C.G.A. § 34-9-240(b)(1), which contains no exceptions, [the Employer] was required to immediately reinstate [the Claimant's] TTD benefits." While the court acknowledged the Claimant stopped working the ligh duty position for reasons unrelated to her injury, it found the employer was not excused from its obligation to immediately reinstate TTD benefits. In such a circumstance, the court noted the employer's sole remedy was to file a WC-14/Request for Hearing, seeking a determination her subsequent non-work-related condition was the cause of her disability or that she had undergone a change in condition for the better. Assuming the employer prevailed in that regard, they could, theoretically, show entitlement to reimbursement of all TTD benefits paid to the employee after the date she abandoned her light duty job.

Summarizing, when an employee returns to work pursuant to a WC-240 and works at least eight hours or one work day, but is subsequently unable to work for more than 15 business days due to an unrelated medical condition, we cannot immediately suspend TTD benefits. To the contrary, the Court of Appeals now tells us we must recommence TTD benefits and request an evidentiary hearing, in order to prove the reason the employee ceased working was unrelated to her work injury.

For more information on this topic, contact Brad Holcombe at 404.888.6180 or brad.holcombe@swiftcurrie.com. ■

TPD — "A Mystery, Wrapped in a Riddle, Inside an Enigma[1]"

By: R. Alex Ficker

O.C.G.A. § 34-9-262 outlines the often confusing issue of entitlement to income benefits when an injured employee is earning a lesser wage following her accident, regardless of whether the employee is working for the same or another, subsequent employer. Pursuant to this statute, the injured worker is entitled to payment of temporary partial disability income benefits where her disability to work resulting from the injury is only partial in character and temporary in quality. That language alone is somewhat enigmatic and vague, but the true mystery in temporary partial disability benefits lies in the determination of whether to pay them at all.

Although the calculation of the amount of these benefits is relatively straight forward, i.e., two-thirds of the difference between the pre-injury average weekly wage and the post-accident average weekly wage, the determination of whether to pay these benefits at all is not nearly as clear cut. The difficulty in making this determination lies in the fact one must go beyond the simple determination of whether the claimant has returned to work and is earning less than before her accident. One must dig deeper than the post-accident wages to get to the heart of the matter.

Under the Georgia Workers' Compensation Act, the term "disability" as used in O.C.G.A. § 34-9-262 means a loss of earning capacity due to the injury, not due to the employee's unwillingness to work or to the economic conditions of unemployment. *Federated Mutual Implement & Hdwe v. Whiddon*, 88 Ga. App. 12 (1953). Thus, although the fact a claimant actually earns a weekly amount equal to or greater than the pre-injury average weekly wage can establish the absence of diminished earning capacity, and, therefore, the absence of entitlement to temporary partial disability benefits, in situations where the claimant is earning less than the pre-injury average weekly wage we must go beyond the wage figures. *See Castle v. Imperial Laundry & Dry Cleaning Co.*, 62 Ga.

Panel of Physicians in Georgia Workers' Compensation

By Jon W. Spencer

Medical expenses are often the largest component of a workers' compensation claim. Additionally, losing control of the medical may result in an extended period of payment of temporary total disability benefits to an injured employee. Maintaining and properly utilizing a Panel of Physicians is one way to help control the overall expense of the case.

In order to maintain control of medical treatment, the employer must utilize a Posted Panel of Physicians. There are three methods under the statute to meet the requirements for a posted panel, but this article will focus on the standard panel. A posted panel is a list of doctors, which allows employers to ensure appropriate, reasonable care is provided to their injured employees. Doctors for the panel are chosen by the employer. Your Swift Currie attorney would be happy to help with choosing good, conservative physicians.

A panel must include at least six, non-affiliated physicians or practices, with at least one orthopedic surgeon and not more than two industrial clinics. A panel must also include a "minority" physician, who may be in an industrial clinic or one of the other physicians chosen for the panel. "Minority" is defined as a group which has been subjected to prejudice based on race, color, sex, handicap or national origin. Do not include an emergency room or hospital on the panel. While that may be the first place an employee is treated for a work injury, hospitals are not generally a place where an injured worker would obtain regular, follow-up treatment, and may invalidate the panel. Due to the nature of work injuries, panels should include more than one orthopedic physician when possible.

The Panel of Physicians must be posted in a conspicuous place, like in a break room or near a time clock. An employer must take all reasonable measures to ensure employees understand the function of the panel and the employee's right to select a physician from the panel; and, are provided assistance in contacting panel physicians. If an employer fails to provide any of the statutory requirements for selection of physicians, an employee may select any physician to render service at the expense of the employer. Panels should be re-

App. 184 (1940). Indeed, the mere fact the claimant may be actually earning less income than before her accident, or, in rare circumstances, no income at all, despite working, is not necessarily determinative of whether temporary partial disability income benefits should be paid.

What is determinative in such situations is whether the claimant's on-the-job injuries continue to cause a decreased earning capacity, and this decreased earning capacity results in an actual decrease in the claimant's gross weekly wages when compared to her pre-injury average weekly wage. The focus, then, should first be on the impact the claimant's compensable injuries have on their ability to earn an income. For example, in *Wal-Mart Stores, Inc. v. Harris*, 234 Ga. App. 401 (1998), the claimant was actually offered a full-time position which was suitable for the assigned restrictions, but she declined, and instead chose a part-time position and requested temporary partial disability benefits. Although the trial court initially ruled in the claimant's favor, the Court of Appeals ultimately held she was not entitled temporary partial disability benefits. The Court found she did not have a decreased earning capacity due to her injuries, despite the fact she was actually earning less than her pre-injury average weekly wage, because the claimant chose to accept a lesser earning position, despite her ability to earn an equal or greater wage when compared to her pre-injury average weekly wage.

Thus, simply examining the claimant's post-accident wages in the *Harris* case did not determine the outcome on the issue of entitlement to temporary partial disability benefits. It was only after the employer/insurer dug deeper than the wages that they were able to successfully unravel the enigma of entitlement to temporary total disability income benefits and get to the truth of the matter. This should serve as a lesson to all of us dealing with claims that all is often not what it seems on the surface, and taking the time to investigate further can help solve the riddle of entitlement to temporary partial disability benefits.

For more information on this topic, contact Alex Ficker at 404.888.6215 or alex.ficker@swiftcurrie.com.

[1] Winston Churchill.

Don't Let the Mail Bring You Down — Legislative Changes to Board Rule 104

By: Amanda M. Conley

Few things can be as frustrating as a physician's refusal to release a claimant to light duty work. So, when that coveted light duty release finally appears, we want to make the most of it. One of the most effective tools we have is the Posted Panel of Physicians. Further, an employer may make a copy of the Panel, have the employee circle their choice of physician, sign it and date it. The copy should be maintained in the employee's file to demonstrate the panel was reviewed with them again at the time of an injury. Then, if the employee makes a request for a second physician, this process may be completed again.

viewed at least annually to determine and ensure their validity. Physicians may move, stop accepting workers' compensation, retire or even die, any of which could invalidate the panel.

To maintain control of medical care, the employer must train the employees on the Posted Panel of Physicians. When a new employee is hired, they need to be told what to do if they are injured on the job. They should be directed to tell their supervisor immediately if they are injured, and shown where the Panel of Physicians is posted. They should be told their rights under the statute regarding the selection of a physician from the Panel, and of their right to make a second choice from the Panel.

Though many employers do this as part of their standard orientation, after an injury, the employee may state they were never given an opportunity to select a physician, that they never saw a panel posted on the employer's premises or they were forced to go to the "company doctor." To rebut these arguments, Employers may have employees sign off on a statement as part of the orientation process indicating they have been instructed on what to do if they were injured on the job, instructed on the Panel and know where the panel is located. Employers may also document their employee's files by taking pictures of the employee standing next to the

Supervisors need to be made aware of what to do if an employee tells them they have been injured on the job, if they witness an on-the-job accident or if somebody asks them if they can see a doctor. Supervisors must be aware of the Posted Panel, and trained in what to do if an employee is injured, or if an employee even claims to be injured. It is not the supervisor's job to make a determination as to whether or not the accident happened, but to ensure the employee receives appropriate medical treatment, and the report of injury is filed with the insurance company. The supervisor should not simply direct the employee to the Panel, but should assist in scheduling an appointment, or take the injured employee to the appropriate company personnel to have the appointment scheduled.

For more information on this topic, contact Jon Spencer at 404.888.6240 or jon.spencer@swiftcurrie.com.

WC-104, which allows us to reduce a claimant's benefits from temporary total to temporary partial disability after either 52 consecutive, or 78 aggregate, weeks from the release to light duty work. Utilizing the WC-104 process can save the employer/insurer a significant amount in indemnity benefits, and can also serve as leverage to entice a claimant to settle. No one likes to find out their weekly benefit is going to be reduced in the future.

Despite the usefulness of the WC-104, its implementation can be fraught with difficulty. Board Rule 104 previously required the form be served on both the claimant and his or her attorney, if represented. This is one of the few forms that must be sent directly to the claimant, even if they have an attorney. If the WC-104 is not properly served it is invalid and cannot be used as a basis to reduce benefits. Problems repeatedly arose when we would attempt to reduce a claimant's benefits, only to be met with shock and incredulity on the part of the claimant and opposing counsel. When we would explain that the reduction was pursuant to a WC-104, the response time and again was, "Well, I didn't get a copy of it and neither did my client."

Thus began a quest to try and hunt down an envelope from a year earlier to show when the form was mailed and to whom. Even if you could produce an envelope or a certified mail receipt showing the form was sent, the claimant and/or his attorney would simply claim it was never delivered to their door. While we never believed this excuse, the State Board of Workers' Compensation tended to. Unlike forms WC-2 and WC-3, which much also be sent directly to the claimant, form WC-104 was not filed with the State Board, so there was no independent evidence to show that it had even been prepared, let alone sent out. As a result, one could end up months or even years behind in the timeline to reduce the claimant's benefits. There were also issues with supposedly invalid reductions, particularly where the claimant hired an attorney after the WC-104 had already gone into effect, for which there was exposure for associated fees and penalties.

On January 1, 2014, the State Board put into effect an updated version of Board Rule 104 to address this very problem. Under the new Board Rule, the WC-104 must be simultaneously filed with the State Board at the same time it is served on the claimant and his or her attorney. By showing the form was sent to the claimant's address of record, in conjunction with documentation that the form was filed with the State Board, the familiar "we didn't get it" refrain has, hopefully, been silenced. This does create an extra step that employer/insurers must follow in order to properly reduce a claimant's benefits using a WC-104, but at least it will end the arguments over whether a WC-104 was ever prepared.

Unfortunately, the State Board has not yet provided a way for the WC-104 to be filed electronically. Thus, it must be mailed to the Board like the paper forms of old. We anticipate that in the future, there will be an electronic WC-104 that can be filed on ICMS, but for now, mail is the only option. Because this new version of the rule just went into effect, we are not sure what effect the lack of electronic filing options will have on arguments concerning whether the WC-104 was filed with the Board contemporaneously with service on the claimant and his or her attorney. However, it is certainly a step in the right direction.

For more information on this topic, contact Amanda Conley at 404.888.6203 or amanda.conley@swiftcurrie.com.

Events

Workers' Compensation Webinar: A Primer on Troublesome Board Forms and Legislative Update
April 22, 2014
1:00 pm - 2:00 pm EST

Joint Litigation Luncheon Presented with McAngus Goudelock & Courie
Offers 3 Ethics Hours
April 24, 2014 — Atlanta, GA
May 2, 2014 — Charlotte, NC
October 1, 2014 — Raleigh, NC
October 2, 2014 — Richmond, VA

Joint Workers' Compensation Luncheon Presented with McAngus Goudelock & Courie
May 1, 2014 — Charlotte, NC
May 15, 2014 — Atlanta, GA

Most Swift Currie programs offer continuing education hours for insurance adjusters. To confirm the number of hours offerer, for more information on these programs or to RSVP, visit www.swiftcurrie.com/events.

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