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WITHDRAWAL FROM THE WORKFORCE SINCE *CITY OF PITTSBURGH v. WCAB (ROBINSON)*

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Burden of Proof

***City of Pittsburgh v. WCAB (Robinson)*, 4 A.3d 1130 (*en banc*) (Pa. Cmwlth. 2010), *appeal* granted 17 A.3d 917 (Pa. 2011) [argued before Supreme Court October 18, 2011]**

Key Facts

- 1997 work-related injury for which the employer provided modified duty.
- 2001 work-related injury while traveling to treatment for the 1997 work-related injury.
- Claimant placed on total disability and never returned to any employment with the employer.
- Employer terminated modified duty program in 2003.
- Evaluation by defense medical examiner in October 2007 releasing Claimant for sedentary work.
- November 2007 Suspension Petition alleging Claimant had withdrawn from workforce.
- Claimant applied for and accepted a disability pension after Employer terminated modified duty program.
- Claimant continued to look for work after accepting the disability pension.

Decision Below

- WCJ found that the Employer failed to meet its burden of proof that the Claimant withdrew from the workforce finding that the Claimant continued to look for work.
- Affirmed by WCAB.

Holding of Court

- Commonwealth Court provides the following guidance on the burden of proof: "In order to show that efforts to return a claimant to the workforce would be unavailing because a claimant has retired, **an employer must show, by the totality of the circumstances, that the claimant has chosen not to return to**

the workforce. Circumstances that could support a holding that a claimant has retired include: (1) where there is no dispute that the claimant retired; (2) the claimant's acceptance of a retirement pension; or (3) the claimant's acceptance of a pension and refusal of suitable employment within her restrictions. To impose a lesser standard on an employer to show that a claimant has retired would not be consistent with the humanitarian purpose of the Act or our Supreme Court's precedent." 4 A.3d at 1138

- Court held the Employer failed to prove the initial burden that the Claimant chose not to return to the workforce based upon the disability pension which only shows she cannot return to TOI employment, the Claimant did look for work **AND** the Claimant would have continued to work at the modified duty employment if the Employer had not withdrawn such work.

- This case establishes the predicate burden on an employer to show withdrawal from the workforce before the burden of proof shifts to an injured worker to show continued attachment.

***Day v. WCAB (City of Pittsburgh),* 6 A.3d 633 (en banc) (Pa. Cmwlth. 2010)**

- Companion case to *Robinson* when argued before Commonwealth Court *en banc*

Key Facts

- Claimant suffered 1992 work injury.

- Claimant worked modified duty until 2000 when the Employer laid him off.

- Claimant received unemployment compensation benefits after lay off.

- When UC benefits the Claimant applied for and received "social security pension," as stated by Commonwealth Court. 6 A.3d at 635

- Claimant actually received Social Security disability benefits as he was not old enough to receive "old age" benefits.

- Claimant accepted his regular pension after the UC benefits ran out.

- Defense medical examiner provided opinion in 2007 that Claimant could perform medium work.

- Employer files Suspension Petition in November 2007 alleging withdrawal from the workforce.

- Claimant testified that he believed he could have continued to perform janitorial work as he did for the Employer prior to such work being withdrawn.

- Claimant testified he stopped looking for work after his UC benefits stopped and he began receiving his "pensions." 6 A.3d at 635

Decision Below

- WCJ held that the Claimant withdrew from the workforce when he stopped looking for employment when his UC benefits stopped as he retired.

- Affirmed by WCAB

Holding of Court

- The court applied *Robinson* by holding the Employer met its burden of proof under "the totality of the circumstances" since the Claimant: 1) accepted the pension from the Employer; 2) accepted his Social Security "pension"; and 3) though the Claimant believed he could do some work he was not looking for work. 6 A.3d at 639

- Therefore the burden of proof shifted to the Claimant to show he was still attached to the workforce when the petition was filed. 6 A.3d at 642

***City of Pittsburgh v. WCAB (Sabina)*, 2010 Pa. Commw. Unpub. LEXIS 909 (Pa. Commw. Ct. 2010)**

Key Facts

- Claimant injured in 1997.

- Claimant was terminated from employment in 1999 by the Employer.

- Claimant never sought or received any pension or retirement benefits after he was terminated.

- In April 2008 defense medical examiner found the Claimant able to do medium work but not his time of injury employment.

- Claimant had not looked for work since losing job in 1999.

- Employer filed a Suspension Petition in June 2008 alleging withdrawal from the workforce.

Decision Below

- WCJ held there was no proof that the Claimant withdrew from the workforce, particularly as there was no showing of retirement or withdrawal from the workforce, so held the Employer did not meet its burden of proof and that the contest was unreasonable awarding attorney fees.

- The WCAB affirmed both ruling of the WCJ

Holding of Court

- Employer argued to Commonwealth Court that the failure of the Claimant to look for work after his termination from employment was sufficient evidence of retirement and should be considered withdrawal from the workforce.

- Commonwealth Court determined that the "totality of circumstances" did not allow solely for consideration of the Claimant looking for work. "The [Notice of Ability to Return to Work] in no way indicates that Claimant was able to work in any capacity before that date. The only evidence Employer could possibly rely upon would be actions, or inaction, on the part of Claimant during the brief period between the issuance of the notice of ability to return to work (April 30, 2008) and the date Employer filed its petition (June 19, 2008).

In accordance with *Henderson* and *Robinson*, Employer did not offer any evidence to establish that, under the totality of the circumstances, Claimant intended to retire or otherwise voluntarily removed himself from the workforce. Although the WCJ, in part, based his conclusion that Claimant had not voluntarily left the workforce on the fact that Claimant was not receiving a pension, it is clear that the WCJ also determined that Employer simply failed to offer any evidence to create a presumption that Claimant had voluntarily left the workforce. Therefore, the Board did not err in affirming the WCJ's ultimate conclusion that Employer had a burden under *Kachinski* to demonstrate the availability of suitable work for Claimant, and that Employer failed to satisfy that burden." 2010 Pa. Commw. Unpub. LEXIS 909, 8-9 (fn. omitted).

- The court also affirmed the award of attorney fees. "Employer's position is not reasonable under the law. Even though some of the decisions rendered by this Court do not explicitly state that a particular claimant's 'retirement' resulted from the payment of a disability or other pension benefit alone, Employer's suggestion that the Supreme Court's decision in Henderson can be stretched to accommodate Employer's reasoning is not well-founded in the law. Further, in this case, Claimant never testified that he intended to 'retire,' and, therefore, his testimony alone could not have supported a finding that he had retired." 2010 Pa. Commw. Unpub. LEXIS 909, 11.

***Keene v. WCAB (Ogden Corp.)*, 21 A.3d 243 (Pa. Cmwlth. 2011)**

Key Facts

- Claimant suffered 1989 work injury.
- Claimant never returned to work with the TOI Employer but did start looking for work after treatment for the work injury was completed.
- In October 2007, Employer filed Suspension Petition alleging withdrawal from the workforce.
- Claimant was not receiving a retirement pension, never submitted retirement papers to the employer nor had she applied for Social Security disability benefits.
- Claimant also testified that she had stopped looking for work for two years, sometime between the work injury and the filing of the petition, because it became very depressing given her inability to find work within her limitations.

Decision Below

- WCJ rejected the petition and held the Claimant had not voluntarily removed herself from the workforce.
- WCAB reversed the WCJ and granted the suspension petition on the basis of the testimony of the Claimant regarding her stopping her job search for two years.

Holding of Court

- Commonwealth Court reversed and held the WCJ correctly determined the Claimant did not withdraw from the workforce on the basis that the "totality of circumstances" did not retire.
- "Here, the WCAB concluded that Claimant voluntarily withdrew from the workforce because she did not look for work for two years. However, in a voluntary retirement case, a claimant's failure to seek employment is relevant only **after** the employer initially proves that the claimant has voluntarily retired from the workforce. An employer cannot rely on a claimant's failure to seek work to prove a voluntary retirement from the workforce because **a claimant has no duty to seek work until the employer meets its initial burden to show a voluntary retirement**. Until the employer proves a voluntary retirement, the employer has a duty to make job referrals to the claimant." 21 A.3d at 246 (emphasis in original)
- This decision makes the language in *Sabina*, cited above, controlling precedent, as this is a reported decision.

***City of Pittsburgh v. WCAB (Zaborowski)*, 2011 Pa. Commw. Unpub. LEXIS 945 (Pa. Commw. Ct. 2011)**

Key Facts

- Claimant had a 2003 work injury and never returned to work with the TOI Employer as no modified duty was ever provided.
- Suspension petition filed 2008 alleging withdrawal from the workforce.
- Claimant testifies he never took a pension after the injury, felt he was too injured to work and if offered would attempt to perform a modified duty position.

Decision Below

- WCJ found Claimant could do sedentary or light work but that the Claimant had not withdrawn from the workforce as he did not take a pension and would attempt work if offered.

Holding of Court

- Applying the "totality of circumstances" from *Robinson*, Commonwealth Court affirmed based upon the credible testimony of the Claimant, that he had not taken a retirement pension and would attempt modified work if offered.

***City of Pittsburgh v. WCAB (Goodlowe)*, 2012 Pa. Commw. Unpub. LEXIS 99 (Pa. Commw. Ct. 2012)**

Key Facts

- 1987 work relate injury to Claimant
- Worked modified duty off and on with Employer until 1994 when Claimant went on total disability.
- Defense medical examination June 2008 which alleged the Claimant was fully recovered.
- August 2008 Termination and Suspension Petition alleging full recovery or withdrawal from the workforce.
- In addition to describing the severity of his disability, Claimant also testified about his attempts to find work, is lack of education and computer skills and that he received no other benefits, including pension or Social Security, while on WC benefits.

Decision Below

- The WCJ accepted the testimony of Claimant as credible and while finding him able to do light work, he was not fully recovered nor had he withdrawn from the workforce given his unsuccessful attempts to find work.

- Decision affirmed by WCAB

Holding of Court

- "Employer appears to base its contention that Claimant withdrew from the workforce and/or retired largely on the fact that he has residual capacity but has not worked since his position was terminated, a position that we conclude is not supported by *Henderson*, *Kachinski*, or *Robinson*. The facts Employer relies upon were present in *Robinson*. In both *Robinson* and this matter, the claimants worked for City, had modified-duty jobs that were terminated by City, did not return to work after the termination of their modified-duty positions, thereafter received Notices to Return to Work, and started seeking employment immediately following the receipt of such Notices. *Robinson*, 4 A.3d at 1132. Unlike in *Robinson*, where the claimant received a pension from City which we considered a significant factor in determining whether the claimant was retired, Claimant, here, was not receiving a pension of any kind." 2012 Pa. Commw. Unpub. LEXIS 99, 22-23.

- As a result, the court held the Employer failed to meet its burden of proof for withdrawal from the workforce.

City of Pittsburgh v. WCAB (Marinack), 37 A.3d 39 (Cmwlth. Ct. 2012)

Key Facts

- Claimant had work-related injury in 2004.

- Treating physician released Claimant for light duty work September 2008.

- Employer sent NARTW two days after release then filed Suspension Petition alleging withdrawal from workforce on September 24, 2008.

- Claimant testified that he applied for two jobs (one with aunt and one with friend), looked in want ads and planned to go to OVR after March 25, 2009 surgery for his work-related injury.

- After the surgery, the Claimant was not able to work at any time during the pendency of the petition.

- The Claimant has applied for a disability pension but this was denied as the Employer had fired the Claimant.

- The Claimant also testified that he did not intend to withdraw from the workforce.

Decision Below

- The WCJ rejected the evidence that the Claimant did not withdraw from the workforce and granted the Suspension Petition.

- The WCAB reversed by holding the discharge showed the Claimant did not retire and that the application for disability pension also does not evidence retirement.

Holding of Court

- Commonwealth Court affirmed the WCAB on the basis that the Employer did not meet its burden of proof regarding withdrawal from workforce. "Employer's evidence did not prove that Claimant intended to withdraw from the workforce. Claimant denies any intention to withdraw from the workforce; in other words, Claimant's intent is not "undisputed." *Robinson*, 4 A.3d at 1134. *Robinson* gives examples of how an employer can prove an intent to withdraw from the workforce but otherwise does not provide guidance to make this case, and it is a difficult burden. Nevertheless, it is clear under *Robinson* and *Keene* that a claimant's lack of effort to look for a job does not prove an intention to withdraw from the workforce. Accordingly, it was Employer's burden to show that it assisted Claimant in returning to the workforce, and it did not present such evidence. We are constrained by *Robinson* to hold that Employer did not make a case for suspension." 37 A.3d at 46.

City of Pittsburgh v. WCAB (Woods), 2012 Pa. Commw. Unpub. LEXIS 118 (Pa. Commw. Ct. 2012)

Key Facts

- Original 1992 work-related injury to Claimant after which modified duty was provided.

- New injury in 2000 but Claimant continued to work until a disability pension was approved.

- September 2007 defense medical examination found the Claimant could do modified duty.

- October 15, 2007 a Suspension Petition was filed alleging withdrawal from workforce.

- Claimant stopped work when the disability pension was granted due to the extreme pain.

- Claimant did not look for work because she believed she could not work at all.

- The treating physician testified that the Claimant was precluded from even sedentary work on a full-time basis.

Decision Below

- The WCJ found the Claimant accepted the disability pension because she could not work and that work-related injury precluded the Claimant from performing any work so the Employer did not meet its burden of proof for withdrawal from workforce. This is in line with one of the methods stated by the Supreme Court in *Henderson* for defeating such a petition.

Holding of Court

- The appeal of the Employer was rejected by Commonwealth Court as, "In sum, Claimant took a disability pension because she was unable to do her light-duty job because of her work injury, and Dr. Bakkila has not released her to any specific job because he does not know her capabilities. Under the totality of circumstances test established in *Robinson*, Employer has not proven that Claimant intended to withdraw from the workforce. Accordingly, before it can suspend benefits, Employer must assist Claimant in returning to the workforce, which can begin with the work hardening program recommended by Dr. Bakkila." 2012 Pa. Commw. Unpub. LEXIS 118, 11.

- QUERY – How does this case differ from *Bonenberger* (below)?

City of Pittsburgh v. WCAB (Moreland), 2012 Pa. Commw. Unpub. LEXIS 316 (Pa. Commw. Ct. 2012)

Key Facts

- The Claimant was injured at work in 1991 and never returned to employment with the Employer as no modified duty was made available.

- An occupational disability pension was taken by the Claimant in 1993.

- A March 2008 defense medical examination stated the Claimant could perform full-time sedentary work.

- A NARTW was issued shortly after the evaluation and a Suspension Petition was flied in April 2008.

- The Claimant testified that until he spoke with his treating physician after receiving the NARTW he did not know he could work, but then applied for several jobs and was denied due to his medical condition.

Decision Below

- The WCJ accepted this testimony and found the Claimant was forced from the labor market by his work-related injury and that was the basis for his disability pension.

- The WCAB affirmed on the basis of *Robinson* and determined that the facts of this case were analogous to *Robinson*.

Holding of Court

- The Employer, on appeal, challenged the manner in which the WCAB applied *Robinson* which was rejected by Commonwealth Court.

- "The City's burden of proof argument seems to be grounded in a misunderstanding of both *Robinson* and *Southeastern Pennsylvania Transportation Authority v. Workers' Compensation Board of Review (Henderson)*, 543 Pa. 74, 669 A.2d 911 (1995). As the City notes, our Supreme Court in *Henderson* stated that:

It is clear that disability benefits must be suspended when a claimant voluntarily leaves the labor market upon retirement. 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. For disability compensation to continue following retirement, a claimant must show that he is seeking employment after retirement or that he was forced into retirement because of his work-related injury.

Id. at 79, 669 A.2d at 913. The City reads this statement to require a burden shifting paradigm under which an employer needs show only that a claimant has stopped working and taken some form of pension, after which the claimant must prove that he has not, in fact, removed himself from the labor market. As this court makes clear in *Robinson*, however, this is an over simplistic view because:

Employer, in this case, appears to assume that Claimant retired because she applied for, and accepted, a *disability* pension. Such an assumption is not surprising because the issue of *whether* a claimant had retired has rarely been in dispute.

* * *

[I]n cases interpreting *Henderson*, it appears that the issue of whether a claimant was, in fact, retired has seldom, if ever, been fully litigated. However, an examination of these cases reveals that in each, the claimant's retirement was undisputed or that the totality of the circumstances supported a holding that the claimant had made the decision to retire.

4 A.3d at 1135 (emphasis original). The court went on to note that:

Circumstances that could support a holding that claimant has retired include: (1) whether there is no dispute that the claimant retired; (2) the claimant's acceptance of a retirement pension; or (3) the claimant's acceptance [11] of a pension and refusal of suitable employment within her restrictions.

4 A.3d at 1138. Simply put, "retirement," as used in both *Henderson* and *Robinson*, is synonymous with "voluntarily leaving the labor market" and the employer's initial burden is to show that the claimant has, in fact, left the workforce in one of the ways described above. Only then does the burden shift to the claimant to show either that he is attempting to return or that his departure from the workforce was involuntary and caused by his work related injuries." 2012 Pa. Commw. Unpub. LEXIS 316, 9-12 (fn. omitted).

***City of Pittsburgh v. WCAB (Fouch)*, 2012 Pa. Commw. Unpub. LEXIS 109 (Pa. Commw. Ct. 2012)**

Key Facts

- Claimant had a March 2004 work-related injury.
- January 2005 Claimant accepts disability retirement pension.
- September 2008 defense medical examination released Claimant for full-time light duty work.
- Suspension Petition filed October 2008 alleging withdrawal from workforce.
- When he received the NARTW the Claimant began applying for work and applied for over 15 positions by time of hearing.

Decision Below

- The WCJ denied the petition on the basis that the testimony of the Claimant was credible and he continued to look for work after NARTW.

Holding of Court

- Commonwealth Court affirmed the WCJ by holding that the Employer failed to meet its burden of proof for withdrawal from the workforce and that the evidence must be viewed in its entirety, not selectively as the Employer sought. "Although Employer's recital of the law set forth in *Henderson* is correct as it applies to a claimant who voluntarily removes himself from the workforce, Employer ignores this Court's *Robinson* decision, in which we set forth a test for determining when and under what circumstances a claimant can be found to have done so. *Robinson*, 4 A.3d at 1135 ("[W]hen is a claimant "retired' such that Henderson and its progeny apply?"). Employer argues that the Board erred because

Claimant testified that he "retired" when he accepted a disability pension from Employer. According to Employer, Claimant's statement that he "retired" establishes as a matter of law that Claimant intended to withdraw from the workforce. That is precisely the type of bright-line analysis a plurality of this Court discouraged in *Robinson*. Claimant's testimony that he "retired" must be examined in light of the totality of the circumstances, which is what the Board did. We find no error in the Board's analysis." 2012 Pa. Commw. Unpub. LEXIS 109, 9-10.

***City of Pittsburgh v. WCAB (Bonenberger)*, 2012 Pa. Commw. Unpub. LEXIS 116 (Pa. Commw. Ct. 2012)**

Key Facts

- Claimant suffered 2002 work-related injury.
- Immediately the Claimant was put into a modified duty job by the Employer.
- This job ended by the Employer in 2003 when the Employer ended the modified duty program and the Claimant was forced to leave work.
- Claimant subsequently accepted a disability retirement pension.
- A defense medical examination found the Claimant capable of medium duty work.
- The treating physician testified the Claimant could do light duty work.
- The Claimant testified he went back to school and looked for several jobs through the military where he had served for 30 years before going to work for the Employer.

Decision Below

- The WCJ accepted the testimony of the Claimant and his treating physician finding that the Employer failed to meet its burden of proof.
- The WCAB found substantial evidence supported the findings of the WCJ.

Holding of Court

- Commonwealth Court reversed on the basis of *Day* (above) by stating the Claimant retired by accepting a pension to keep his medical benefits so the Employer met its burden of proof. 2012 Pa. Commw. Unpub. LEXIS 116, 9-10.
- The court then went on to state the jobs the Claimant sought were not sufficient to meet his burden of proof once the Employer met its burden regarding retirement. 2012 Pa. Commw. Unpub. LEXIS 116, 10-11.

- QUERY – How can *Robinson* state the disability pension was not enough for the Employer to meet its burden of proof, yet the panel here used the same pension to hold the Claimant was retired?

***City of Pittsburgh (Police) v. WCAB (Lewandowski),* 2012 Pa. Commw. Unpub. LEXIS 177 (Pa. Commw. Ct. 2012)**

Key Facts

- Claimant suffered 1995 work-related injury.
- After notifying the Employer he was retiring to apply for a service connected disability, Claimant filed with the Pension Board "to be retired on pension." 2012 Pa. Commw. Unpub. LEXIS 177, 2.
- Employer subsequently obtained an opinion the Claimant could perform some level of work and files a Suspension Petition based on withdraw from workforce.

Decision Below

- The WCJ held the Employer did not meet its burden of proof to show withdrawal from workforce.

Holding of Court

- Commonwealth Court ultimately remands to have the WCJ make a finding regarding whether the pension was a retirement or disability pension as differing rules would apply, *i.e.*, *Henderson* verses *Robinson*. 2012 Pa. Commw. Unpub. LEXIS 177, 16-19.

***City of Pittsburgh v. WCAB (Norris),* 2012 Pa. Commw. Unpub. LEXIS 262 (Pa. Commw. Ct. 2012)**

Key Facts

- Claimant suffered a December 1992 work-related injury and eventually returned to work with the Employer in modified duty.
- The Claimant was put out of work when the Employer ended its modified duty program in 2004.
- A disability pension was then accepted by the Claimant after the modified duty work was eliminated.
- On May 29, 2008, the Employer filed a Suspension Petition alleging withdrawal from the workforce based on a defense medical examination that the Claimant could do modified duty work.

- The Claimant testified she wanted to continue to work for the Employer but was gotten rid of, so that she did not intend to permanently retire.

- No employment was sought or obtained by the Claimant after being out of work because she had limited skills and received assistance in completing job applications from family and others.

Decision Below

- The WCJ found the Claimant did not voluntarily leave the labor market and had she not had the work removed by the Employer she would have continued her employment, on this basis the Employer did not meet its burden of proof.

Holding of Court

- Commonwealth Court affirmed the dismissal of the petition. “Here, the WCJ and the Board concluded that Employer did not meet its burden of proving that Claimant retired. We agree. Although Claimant accepted a disability pension, this alone is not enough to deduce that Claimant retired. See *Robinson*, 4 A.3d at 1137. In addition, Employer contends that Claimant conceded to signing the form indicating her desire to retire, which, in turn, is another circumstance that tends to prove that Claimant retired. (Employer's Brief at 16.) While an accurate statement, Claimant did not understand that her signature indicated a desire to retire. When asked if Claimant understood the significance of signing the form she stated, "No, I don't really understand it, because they told me—she just told me I would be getting a disability pension, the lady at the Board, so I signed it. I mean . . . ." (R.R. at 119a.) This statement does not indicate a desire to retire nor does it exhibit that Claimant understood the significance of accepting a pension. In fact, further testimony establishes that Claimant did not intend to retire. (R.R. at 58a.)

Finally, Employer contends that, although Claimant had the ability to work, she chose to not to work. As previously addressed and as evidenced by the WCJ and the Board, Claimant has limited literal skills that impaired her employment application process. Claimant's lack of employment does not indicate a desire to retire, but rather a lack of capacity to apply appropriately for positions. Moreover, Claimant expressed her desire to continue working in the labor market as well as her desire to keep her position with Employer. Based on the ***totality of circumstances*** in this case, Claimant did not voluntarily remove herself from the workforce and the Board did not err in its application of Robinson.” 2012 Pa. Commw. Unpub. LEXIS 262, 14-15 (emphasis supplied).

Receipt of Disability Pension

Robinson first discusses the effect of the receipt of a disability pension on whether the employer can use this to meet the burden of proof. *See* above.

City of Pittsburgh v. WCAB (Leonard), 18 A.3d 361 (Pa. Cmwlth. 2011)

Key Facts

- Claimant suffered 1994 work-related injury as a police officer and returned to full duty 1995.
- Worked full duty until 2004 when injury recurred and was eventually put on total disability benefits.
- Beginning April 2006, the Claimant began receiving a service connected disability pension.
- In July 2007, a defense medical examination allowed that the Claimant could perform full-time light work and part-time medium work.
- On September 4, 2007 a Suspension Petition was filed alleging withdrawal from the workforce.

Decision Below

- The WCJ found that the Claimant had withdrawn from the workforce from August 16, 2007 through December 1, 2008 and that based on the NARTW served on him after the defense medical examination was required to look for work.
- The WCJ then found the Claimant started a good faith job search after December 1, 2008 so the Claimant was then seeking work and became reattached to the labor market.

Holding of Court

- Employer argued on appeal that benefits should have been suspended on the taking of the disability pension, which equates with a retirement, and that the job search by the Claimant was not in good faith.
- Based on *Robinson*, the court held that the acceptance of a pension alone is not sufficient to show by the "totality of circumstances" that the Claimant withdrew from the workforce. 18 A.3d at 365
- Further, the court held that the job search by the Claimant met the requirements established in *Pennsylvania State University v. WCAB (Hensal)*, 948 A.2d 907, 910 (Pa. Cmwlth. 2008), for a valid job search. 18 A.3d at 366-367.

***City of Pittsburgh v. WCAB (Gregorchik)*, 2012 Pa. Commw. Unpub. LEXIS 9 (Pa. Commw. Ct. 2012)**

Key Facts

- Work injury to Claimant in 1994.
- Claimant returned to light duty with the Employer in 1995.
- The Employer terminated the light duty program in 2003.
- In December 2003, Claimant accepted a service connected disability pension.
- Defense medical examination in May 2007 which released her for medium work.
- On May 30, 2007 NARTW sent to Claimant and Suspension Petition filed based on removal from workforce.
- Claimant testified that after being removed from work in 2003 she took care of her ill mother for 2 years and then only looked through want ads until 2007.
- Claimant subsequently testified she began to look for work on March 14, 2008 by applying of a number of jobs, taking a Postal Service test and completed courses for computer usage.
- Claimant also stated that she would have continued to work for the Employer had it not terminated the modified duty which it provided.

Decision Below

- The WCJ found the Claimant could do medium work and accepted the testimony of the Claimant about her job search efforts, so he found the Claimant was withdrawn from the workforce from May 2007 until March 14, 2008 and then became reattached to the workforce, reinstating benefits.

Holding of Court

- Commonwealth Court applied decision in *Leonard* (above) to hold that the findings of the WCJ are conclusive and substantial evidence supports the decision. 2012 Pa. Commw. Unpub. LEXIS 9, 10-12.

***City of Pittsburgh v. WCAB (Darwin)*, 2012 Pa. Commw. Unpub. LEXIS 77 (Pa. Commw. Ct. 2012)**

Key Findings

- 1985 work-related injury to the Claimant.
- In 1989, the Employer made light duty work available to Claimant
- The Employer ended the light duty program in 2003 putting Claimant out of work.
- The Claimant applied for disability pension in January 2006 which was granted.
- March 2008 defense medical examination allows the Claimant light duty work followed by April 2008 NARTW.
- Suspension Petition filed May 1, 2008 alleging withdrawal from the workforce.
- Claimant testified he applied for a number of jobs, but not all the applications were completed due to poor computer skills.
- Claimant also testified he would have continued to work the modified duty had the Employer not removed it from him.

Decision Below

- The WCJ denied the petition on the strength of the testimony of the Claimant that he actively sought employment.

Holding of Court

- Commonwealth Court held *Robinson* controlling and that based on "totality of circumstances" the Employer failed to show any evidence the Claimant withdrew from the workforce. 2012 Pa. Commw. Unpub. LEXIS 77, 7-9.
- "*Robinson* established that the acceptance of a disability pension does not create a presumption that a claimant has left the workforce. *Id.* at 1137. *Robinson* requires the employer to offer other evidence that would, in totality, show that a claimant collecting a disability pension has intended to withdraw from the work force permanently." 2012 Pa. Commw. Unpub. LEXIS 77, 8.

Receipt of Social Security Benefits

Burks v. WCAB (City of Pittsburgh), 36 A.3d 639 (Pa. Cmwlth. 2012)

Key Facts

- Work injury to Claimant in 1984.
- Claimant received Social Security Disability benefits.
- Claimant never worked after the injury.
- There were other non-work-related medical problems from which the Claimant suffered.
- April 2008 defense medical examination allows for light duty work.
- April 2008 NARTW and August 2008 Suspension Petition on withdrawal from workforce.

Decision Below

- WCJ found, based upon evidence that the Claimant did not seek work since 1984 and she was on Social Security Disability benefits, had retired and withdrawn from the workforce.

Holding of Court

- Here the Employer argued in response to the appeal by the Claimant that under *Robinson* and the "totality of circumstances" the Claimant had withdrawn from the workforce.
- Commonwealth Court distinguished *Keene* (above) holding that the acceptance of the Social Security Disability benefits, evidencing the inability to do substantial gainful activity, plus the ability to work regarding the work-related injury shows the Claimant withdrew from the workforce.
- "Here, Claimant suffered from a work injury that limited Claimant to light-duty work, but she also suffered from non-work-related medical conditions that limited Claimant further. Because of the latter conditions, Claimant chose to apply for Social Security Disability benefits. To continue her receipt of those benefits, Claimant can work only through Social Security's "Ticket to Work" program, but there is no evidence in this case that Claimant participates in that program. Thus, Claimant's decision to receive Social Security Disability benefits shows that she has voluntarily withdrawn from the workforce for reasons unrelated to the work injury." 36 A.3d at 633-634 (fn. omitted)

Genuine Effort to Look for Employment

Day addresses what the standard is on the injured worker to look for work in the context of the *Robinson* standard. *See*, above.

Fuller v. WCAB (Henkels & McCoy), **2011 Pa. Commw. Unpub. LEXIS 428 (Pa. Commw. Ct. 2011)**

Key Facts

- 2006 work-related injury to the Claimant
- Claimant applied for and received Social Security disability benefits.
- 2008 termination petition filed by the Employer started the litigation based upon medical evidence that the Claimant could return to his time of injury employment.
- In addition to the work-related injury, the Claimant suffered from numerous non-work-related medical problems, including a heart condition, diabetes and sleep apnea which were used to avoid jury duty.
- Claimant applied for and received a retirement pension because he was going to lose his medical benefits for himself and his wife if he did not.
- Claimant did eventually apply for jobs, but only after he was advised to by his attorney with regard to the requirement of the WC Act.

Decision Below

- The WCJ found the Claimant was not fully recovered and could do some level of work, but based upon statements made to his doctor, the Claimant considered himself retired and that non-work-related medical conditions, would prevent him from working.
- The WCJ also found that the job search by the Claimant was not genuine but only for purposes of retaining his WC benefits, as those were on the advice of counsel, and given his non-work-related conditions would be futile, so the Claimant abandoned the workforce for reasons unrelated to his job.

Holding of Court

- Applying *Robinson*, Commonwealth Court held that the taking of the retirement pension due to his heart condition, which would prevent his TOI employment, and need for medical insurance, along with his non-work-related medical conditions, evidenced a withdrawal from the workforce. 2011 Pa. Commw. Unpub. LEXIS 428, 7.

- The court also rejected the job search. "Here, the WCJ concluded that Claimant did not engage in a good-faith job search because his job applications were solely an attempt to retain his compensation benefits. Claimant's own testimony supports that conclusion. Indeed, Claimant expressed a desire not to work because of his non-work-related medical conditions, stating his belief that he would be able to work only minimum wage jobs, which would cause him to lose social security benefits and, ultimately, cause him to lose money." 2011 Pa. Commw. Unpub. LEXIS 428, 8.

***Dep't of Pub. Welfare v. WCAB (Roberts),* 29 A.3d 403 (Pa. Cmwlth. 2011)**

Key Facts

- September 1998 work injury to Claimant.
- June 2003 defense medical examination allowing for sedentary work and NARTW sent on June 22, 2003.
- Suspension Petition filed June 24, 2004 alleging withdrawal from labor market.
- Claimant took retirement pension after he could not return to work because he had 20 years of employment with the Employer and was eligible.
- Claimant also began taking Social Security Disability "pension" shortly after his retirement pension. 29 A.3d at 404-405.
- Claimant testified he felt he could not work at all due to his symptoms, particularly his pain.

Decision Below

- The WCJ found that the Claimant did not voluntarily withdraw from the workforce as the taking of the retirement pension was an economic decision.
- The WCJ also found the Claimant was able to perform sedentary work based upon the testimony of the defense medical examiner.

Holding of Court

- Applying *Robinson* and the "totality of circumstances", Commonwealth Court reversed the WCJ because he had not worked since the injury, took his retirement pension shortly after leaving work, accepted a Social Security Disability "pension," that the Claimant has never looked for work and that the Claimant says that he cannot work though the WCJ found he can perform sedentary work. 29 A.3d at 407-408.

- Of significance is the classification of Social Security Disability benefits as a "pension" by the court though it is based on a disability and the inability to perform "substantial gainful activity" in the national economy.

- QUERY: What is the difference between a disability pension and Social Security Disability "pension" which makes the later indicative of retirement while the former does not?

***City of Pittsburgh v. WCAB (Stolar)*, 2011 Pa. Commw. Unpub. LEXIS 944 (Pa. Commw. Ct. 2011)**

Key Facts

- Claimant suffered 2003 work injury and never returned to work.

- Claimant accepted a disability pension in 2004.

- In 2008, Employer filed Suspension Petition alleging withdrawal from the workforce on the basis that the Claimant could do modified work.

- Claimant testified about her efforts to find employment unsuccessfully.

Decision Below

- WCJ found Claimant could do modified work but that the Claimant engaged in a genuine effort to obtain employment.

Holding of Court

- Employer sought review with Commonwealth Court on the basis that the Claimant, in response to a "poor choice of words" by counsel the Claimant admitted he retired in December 2004 when he took his disability pension. 2011 Pa. Commw. Unpub. LEXIS 944, 4.

- Commonwealth Court rejected the argument by looking at the "totality of circumstances" which showed the Claimant did not retire or withdraw from the workforce as he applied for three jobs, met with OVR and the credible testimony was the Claimant was looking for work. 2011 Pa. Commw. Unpub. LEXIS 944, 5.

***City of Pittsburgh v. WCAB (Page)*, 2012 Pa. Commw. Unpub. LEXIS 325 (Pa. Commw. Ct. 2012)**

Key Facts

- On January 1, 1994, the Claimant had a work-related injury.
- After surgery, the Claimant worked light duty for about 6 months and then went on to compensation benefits.
- By letter of December 2003, the Claimant wrote the Employer stating she would be retiring on a service connected disability.
- On April 30, 2008, the Employer filed a Suspension Petition alleging a withdrawal from the workforce on the basis she could work full-time light duty.
- The Claimant did not look for work until 2008, after she took her disability, when she applied for a number of jobs and was not hired due to her medical condition.

Decision Below

- The WCJ granted the petition by rejecting the testimony of the Claimant regarding her intention not to withdraw from the workforce and that the job search was not in good faith.
- The WCAB reversed the WCJ on the basis of *Robinson*, based on facts the WCJ did not deem credible. 2012 Pa. Commw. Unpub. LEXIS 325, 4-5

Holding of Court

- Commonwealth Court reversed and reinstated the WCJ decision on the basis of *Roberts* (above).
- "In the instant matter, the WCJ concluded that Claimant had voluntarily removed herself from the workforce and that Claimant did not credibly establish that she was seeking employment. The evidence establishes that Claimant signed and submitted the December 9, 2003 letter to Employer informing Employer that she was retiring. In addition, Claimant accepted a disability pension. Finally, Claimant failed to seek employment between 2003 and 2008. Based upon the totality of the circumstances, we conclude that there is sufficient evidence to support the findings of the WCJ. Thus, we find that the Board erred when it usurped the role of the fact finder and when it misapplied the law as set forth in Robinson by failing to consider the totality of the circumstances." 2012 Pa. Commw. Unpub. LEXIS 325, 8.
- QUERY – How does this differ from *Norris* (above)