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Workers' Compensation and Unemployment

Concurrent with Workers' Compensation Benefits

There are times when injured workers are eligible to collect unemployment insurance benefits while out of work due to a workers' compensation injury. In general, to qualify for unemployment benefits an individual must be able to work and be available to work. This general requirement is in addition to the more specific requirements set forth in the Labor Law. An individual who is totally disabled would not qualify for unemployment benefits for the simple reason that he or she is not able or available to work as required by the statute. On the other hand, someone who is only partially disabled may qualify for unemployment benefits, even if he or she is still receiving workers' compensation benefits at a partial rate. This situation

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is most commonly seen when an individual has been cleared to return to work with restrictions but has no job to return to either because the employer can't meet the restrictions or the job has been filled in the claimant's absence. As long as the claimant meets the statutory requirements to collect under each program individually, concurrent benefits are allowed subject to relevant statutory limitations.

It is important to know that a determination concerning

compensability made under the Unemployment Insurance Law is not binding on the Workers' Compensation Board. Even though the New York State Department of Labor is the parent agency of the Workers' Compensation Board, Section 142(2) specifically spells this out.

Statutory Limits and Duplication of Benefits

Prior to 1996 New York law did not provide any limit on the total amount of combined benefits an individual could receive from workers' compensation and unemployment. It was possible for an injured worker to receive combined benefits that actually exceeded his or her pre-injury wages. Recognizing that this situation provided a disincentive for the injured worker to return to work, the New York State Legislature amended the New York Labor Law to rectify this situation.

In September of 1996 the State Legislature added N.Y. Lab. Law Section 591 (5) which provided:

"If a claimant is receiving benefits to subdivision six of section 15 of the workers' compensation law, the unemployment benefits to which the claimant may be entitled pursuant to this article shall be limited to the difference between the amount of the workers' compensation benefits and one hundred percent of the claimant's average weekly wage."

The workers' compensation benefits are still primary, however under very limited circumstances, the claimant's unemployment benefits may now be reduced so that the combined amounts do not exceed 100% of the average weekly wage. Also, in many cases the claimant's workers' compensation average weekly wage as determined under New York Work Comp. Law Section 14 will differ from the average weekly wage determined under the Labor Law. In some cases, the difference will be significant.



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Employers Sick & Vacation Time and Workers' Compensation

Use of Sick and Vacation Time

Most employers provide their workers with a certain amount of sick time and vacation time and allow use of such accruals in accordance with either a collective bargaining agreement or the employer's own internally established procedures. When an employee suffers a work related injury, he or she may be allowed (or may be required) to receive full wages in lieu of workers' compensation

benefits while credit is taken for these accruals. When the employer makes this type of "advance payment of compensation" it may ultimately look to the Board to order reimbursement pursuant to the Workers' Compensation Law.

Section 25(4)(a) of the Workers Compensation Law reads as following:

"If the employer has made advance payments of compensation, or has made payments to an employee in like manner as wages during any period of disability, he shall be entitled to be reimbursed out of an unpaid installment or installments of compensation due, provided his claim for reimbursement is filed before award of compensation is made, or if self insured, by the insurance carrier at the direction of the board, unless he shall file a waiver of reimbursement with the chairman, in which event compensation shall be paid to the claimant notwithstanding the advanced payments."

The courts have recognized that the workers' compensation system should not be a one-way street, and that it does not compel any employer to make such payments during any period of disability. However, in order not to discourage an

employer from making these advance payments, the law provides this protected sources of repayment in an effort to strike an equitable balance.

Reimbursement of Sick and Vacation Time

An employer who has paid an injured worker wages in lieu of workers' compensation benefits in accordance with his or her accrued sick/vacation time, may seek reimbursement for such wages by filing a request for reimbursement with the Board **PRIOR** to the time the formal awards are made. The obvious benefit in doing this is to keep the injured worker "whole" from a financial perspective, at least on a short term basis.

The Board has limited jurisdiction over disputes between the employer and employee with respect to restoration of leave credits. The jurisdiction of the Board is limited to deciding whether or not to reimburse the employer under circumstances of the case. In addressing the propriety of the request for reimbursement to the employer, the Board will be guided by the principle that "reimbursement to an employer is not intended to achieve such disproportionate result, either to employer or employee". The Board will guard against situations that would unjustly enrich either the claimant or employer.

For example, the Courts have denied an employer's request for reimbursement when a collective bargaining agreement provided that the first 10 days of sick leave were to be charged against the claimant's accrued sick leave credits and that such credits, once so consumed, were not to be restored. To the contrary, the Courts have granted the reimbursement requests of an employer who paid wages even though the work related injury was sustained with a prior employer. In Silvanic v. Wall-to-Wall Sound & Video 188 AD2d 996 (3d Dept. 1992) the court noted that if the reimbursement request of the subsequent employer were denied, the claimant would then receive both workers' compensation and full salary for the same period of time, resulting in a clear imbalance to the employee.

If sick time is paid under a welfare or benefit plan then proof of the terms of the plan must be filed with the Workers' Compensation Board in addition to the reimbursement request.

Payments of continued wages during a period of disability entitle the employer to reimbursement in the workers' compensation claim. For any period of temporary disability

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during which an employer has advanced wages, the right to reimbursement or credit is limited to the amount of workers' compensation the claimant would have received during that period. However if the claimant is later determined to be eligible for a schedule loss of use award, the excess paid above the temporary disability rate, if any, may be credited against that award and repaid to the employer. For example, if the employer paid the employee \$800 per week but the compensation rate was only \$400 per week, the employer would be reimbursed only \$400 per week.

Situations Involving Schedule Loss of Use Award

In a situation in which the employer advances wages, and even recovers some of those payments out of an award of compensation, the remainder of any advanced payments may be recovered out of the schedule loss of use award up to the entire amount of such payments made. In order to receive full reimbursement the reimbursement request must specify that full reimbursement is being sought and the reimbursement request must be filed with the Board prior to the schedule award being made.



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Workers' Compensation Discrimination

In addition to the basic benefits of workers' compensation, the law provides an anti-retaliation provision that prohibits employers from taking adverse employment actions against employees for filing for benefits under workers' compensation.

Section 120 of the Workers' Compensation Law

If the Board finds that an employer has taken some deleterious action against an employee because the employee has claimed benefits under workers' compensation, attempted to or may attempt to file a claim for benefits, and/or testified in a workers' compensation proceeding, the employer will be found in violation of Section 120 of the Workers' Compensation Law. Such determination must be based upon "substantial evidence." The Board has been given great latitude in ferreting out the employer's motives. The claimant does not need to produce a "smoking gun" that directly established discrimination. If the Board's decision is supported by substantial evidence, the courts will not disturb this. Although Section 120 protects the employee from discrimination on the basis of claim filing, it should be noted that it does not serve to otherwise guarantee the continued employment of an injured employee.

Any employer found guilty of discrimination against an employee shall be directed to restore his or her employment, compensate the employee for any loss of wages arising out of such discrimination, provide any pay raise, promotion, or enhanced seniority to which the employee would otherwise have been entitled to, as well compensate the employee for lost retirement, health and other benefits. **Employers cannot be insured for claims under this section of the WCL. The employer – not the insurance company – must pay all awards and penalties.**

An injured employee has **two** years from the "commission of such practice" to file a claim of discrimination against an employer.

Discrimination in Hiring Based Upon Prior Claim for Compensation:

New York State Workers' Compensation Law Section 125 makes it unlawful for any employer to: (1) inquire into whether a job applicant has previously filed a claim for compensation benefits, or (2) discriminates in hiring a job applicant who has filed a claim. Unlike Section 120 of the WCL, Section 125 confers jurisdiction on the Supreme Court of the State of New York to address an aggrieved party's claim for damages rather than pursue a claim before the Board. If such discrimination is found, it is classified as a misdemeanor punishable by a fine of not more than \$1,000.

Employers must also be mindful of the New York State Executive Law. Article 15 is known as the Human Rights Law. This prohibits unlawful discriminatory practices.

Case Review – Discrimination Found

The following are examples of where the courts found discrimination pursuant to New York Workers' Compensation Law Section 120.

Buzea V. Alphonse Hotel Corp., 734 N.Y.S.2d 337:

Claimant sustained a head injury in the course of his employment, which was witnessed by a co-employee and reported to the employer's wife, also a co-employee. Employer's wife warned the claimant that the employer would terminate him if he were seen injured, or left to seek medical treatment. Claimant did seek medical treatment on the following day. When the employer learned of this, he immediately terminated the claimant. The board found that N.Y. Comp. Law Section 120 had been violated. The appellate Division affirmed.

Gillen V. U.S. Air Inc., 260 A.D. 2d 853, 854, 688, N.Y.S. 2d 761, 762 3d

Claimant sustained a work related back injury prior to the July 4th weekend. Employer, suspicious of claimant's absence, conducted surveillance that revealed the claimant driving his car, riding on a boat, and attending a family gathering. Thereafter, the claimant was terminated as the employer questioned whether his injuries were genuine. The Board found the employer had violated N.Y. Comp. Law Section 120, and the court affirmed.

Gizowski V. Pacos Const. Co., Inc., 158 A.D.2s 868 551 N.Y.S.2d 660

Claimant, a truck driver, sustained a compensable arm injury. Upon reporting to work following his convalescence, the employer advised the claimant that his services were no longer needed since the employer already had a driver. The record contained evidence to the effect that the claimant was told by the company bookkeeper that perhaps his arm was sore from completing workers' compensation forms. The Board found unlawful discrimination and the Appellate Division affirmed, noting that the claimant had met his burden of producing evidence of retaliatory intent.

O'Malley V. N.Y. City Transit Auth., 158 A.D. 2d 822, 822-823, 551, N.Y.S 2d

Claimant was terminated shortly after returning to work from surgery to repair a work related hernia. During his absence, the claimant's supervisor suggested that his injury was feigned. Upon reporting to work, claimant was assigned a "filthy desk," was shunned by supervisors, and was denied differential pay. Claimant was ultimately discharged without explanation. Board finding of discrimination was affirmed.

Cozzy V. Movers, Inc., 157 A.D.2d 897,550 N.Y.S 2d 167 3d

Board found violation of N.Y. Work Comp Law Section 120 when employer terminated the claimant after a compensable arm and shoulder injury. The Appellate Division affirmed, noting that Board had considered testimony that the claimant's termination was due to the employer's opinion that the "injury took too long to heal, the employer had to save face with the other employees, and the insurance carrier was causing problems about the claimant's lengthy absence." Board was within its discretion to reject employer's proffered explanation that the claimant was terminated due to tardiness and absenteeism.

Wesp V. Liberty Nat'l Bank & trust Co. 119 A.D. 2d 934, 934-935, 501 N.Y.S. 2d 207

Claimant, a bank teller, was held at gunpoint in the course of her employment. She was taken out of work by an attending psychiatrist for work related anxiety. The employer, upon learning that the claimant had attended a beauty pageant and worked as an usherette at a professional football game, terminated her due to being observed doing "things that were inconsistent with being out on disability." The court affirmed that Board's finding of discrimination, noting that such a medical determination was "not within the province of the employer."

Prevention

These cases reflect a fair number of the discrimination cases reviewed by the Appellate Division. One particular trend is clear: the Appellate Division will likely defer to the Board's factual determination as to whether or not the employer's actions are motivated by retaliatory intent. In no reported cases has the Appellate Division reversed a Board's decision finding, or failing to find, discrimination since 1984.

Among several of the cases where discrimination was found, another trend is revealed. In cases where the employer terminates the claimant due to its belief that the claimant is feigning disability, discrimination has been found. (Gillen V. USAir, O'Malley V. N.Y. City Transit Auth, Wesp. V. Liberty Nat. Bank & Trust).

The Workers' Compensation Law does not prohibit an employer from terminating an employee due to work-related absences so long as the employer's personnel decisions regarding absences do not discriminate between work-related and unrelated absences.

***** Employers should be cautious in seeking to terminate employees solely because they doubt the validity of the claimant's injury or the merits of the compensation claim.**



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Disability Benefits & Workers' Compensation

Disability benefits are provided and covered in Article 9 of the New York Workers' Compensation Law. All covered employers in New York State are required to provide for the payment of Disability Benefits to all eligible employees by either purchasing a policy of insurance or being self insured. A covered employer is defined as one who employs in the State of New York one or more employees on each of at least 30 days in any calendar year. In addition, employers of personal or domestic employees in a private home are covered employers if they employ at least one employee who works 40 or more hours per week for that one employer. The maximum rate is \$170 per week. Disability benefits are subject to Social Security and withholding taxes. The cost of medical care is not covered under Disability Benefits law.

Disability benefits are payable for non-work related injury or illness beginning with the 8th consecutive day of disability. Cash benefits are computed at 50% of the claimant's average weekly wage and are payable for up to 26 weeks.

When to apply

An individual may not receive both workers' compensation and disability benefits at the same time. A disabled worker may claim and collect disability benefits if and when his or her claim for workers' compensation is controverted. The application for disability benefits contains a question that asks if the claimant is receiving or claiming workers' compensation benefits. However, when the workers compensation claim is controverted, the claimant should apply for disability benefits and provide the disability insurance carrier with a copy of the workers' compensation carrier's Notice of Controversy (form C7). This will allow the claimant to proceed with the disability claim while the controversy in the workers' compensation is adjudicated. Any disability benefits received in lieu of workers' compensation benefits would be subject to reimbursement if and when the workers' compensation claim is ultimately established.

General Point:

Sometimes when a claimant receives a notice of controversy in his or her workers' compensation case the compensation carrier or employer automatically notifies the disability carrier, and that carrier contacts the claimant for information necessary to process a disability benefits claim. Often the compensation carrier or employer does not notify the disability carrier so it is incumbent on the claimant to begin the process. The first step is that claimant should obtain a DB-450 form from the employer, and make sure to answer "yes" to question 10 regarding claims for workers' compensation. The claimant should then take the DB-450 to the treating doctor, who should fill out the reverse side of the form and make sure to indicate this is a work related injury. A copy of the C7 should be attached to the completed DB-450 and mailed to the disability carrier so that disability benefits begin to be paid at the applicable rate – up to 26 weeks – so long as there is medical evidence of a continuing disability.

How to apply

To apply for disability benefits, the claimant must file written notice and proof of disability (form DB-450) with the employer or the disability insurance carrier within 30 days from the first day of disability. If the claimant has been out of work for more than four weeks from the date of disability, the claim must be filed with a DB-300. Awards will not be paid for any period of disability more than two weeks before the claim is filed if the claim for benefits is filed more than 30 days after the claimant has become disabled. In all cases, no benefits will be paid if the claim is filed more than 26 weeks after the disability begins. However, late filings can be excused if it is shown that it was not reasonably possible to file earlier.

In order to qualify for disability benefits the claimant must be under the care of a physician, chiropractor, podiatrist, psychologist, dentist, or certified nurse midwife. The health care provider should complete the health care provider section on the DB-450 form as proof of disability.

Reimbursement

The disability benefits insurance carrier that pays benefits prior to the commencement of a workers' compensation case will have a lien provided it takes the appropriate steps to protect its interests. This occurs when either the workers' compensation claim is filed after the commencement of disability benefits, or when the claimant files for both benefits and workers' compensation is controverted. In order to protect the lien, the disability benefits carrier must file a claim for reimbursement of benefits paid with the Workers' Compensation Board **BEFORE** the award of compensation is made.

General Point

Reimbursing of disability benefit liens attaches only to the time during which the disability benefits were actually paid. If workers' compensation benefits are awarded for the periods during which the claimant received disability benefits, reimbursement will be directed up to the full extent of the claimant's weekly compensation payments. To the extent that the workers' compensation rate exceeds the disability benefit rate, the balance will be paid to the claimant. For example, if a claimant received disability benefits of \$170 per week and the Board awards workers' compensation benefits at \$300 per week, reimbursement to the disability carrier is made at \$170 per week and the balance of \$130 is paid to the claimant. However, if the Board directs compensation payments at only \$100 per week, reimbursement to the disability carrier is limited to \$100 per week and the disability carrier cannot recoup the additional \$70 per week on future awards.