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MEMORANDUM

FROM: D. Stephenson Schwinn
SUBJ: Light Duty Programs in the District of Columbia

Instituting a light-duty program can result in substantial savings. Many employers use some form of light duty program to limit long term exposures, and to encourage re-integration of disabled employees into the workplace. Some find it can be an effective component of the risk management plan by fostering safe work practices.

Principles

Where a claimant has sustained a work related injury and is functionally disabled from returning to her usual employment duties, the employer is obligated to either provide light duty employment within claimant's medical and functional parameters or to pay claimant income-replacement benefits under the Act. *Radford Ferguson v. Washington Metropolitan Area Transit Authority*, OWC No. 0988584, H&AS No. 88-139, Dir. Dkt. No. 88-108 (August 13, 1992).

Generally, the claimant is entitled to receive compensation benefits in the amount of two-thirds of her wage loss for so long as the disability continues.

It is the employer's burden to prove claimant is capable of returning to her regular job, or to suitable alternative employment that she is capable of performing with her work restrictions.

If the employer's burden is not met, claimant is entitled to permanent total disability benefits for the rest of her life, with annual cost of living increases which have averaged four percent per year since 1980.

Light duty employment must be suitable, i.e. within a claimant's physical restrictions, in order to limit the employer's liability for wage loss benefits.

If suitable alternative employment is offered, the claimant is entitled to receive no

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more than 667 weeks of temporary and permanent partial disability benefits, payable at the rate of two-thirds the difference between her average weekly wage and the comparable earnings in the new job.

If light duty employment within a claimant's functional restrictions has been offered, the claimant is obligated to attempt to perform said duties and thereby earn a wage.

A claimant who fails to accept suitable alternative employment has voluntarily limited her income and is deemed to have the wage earning capacity she would have had if the job were accepted. *Elva Sheppard v. Howard University Hospital*, OWC No. 098085, H&AS No. 88-387A (November 18, 1988); D.C. Code, as amended, § 36-308(3)(V)(iii).

Case Studies

1. *Bartley v. Canteen Corp.*, 1994 DC Wrk. Comp. LEXIS 196, 11-12 (1994).

Claimant worked four months for employer as a dry wall specialist and carpenter. On May 30, 1995, he felt sudden and severe shoulder pain while putting together a large door at work. Claimant received medical treatment and stopped working on June 1, 1995.

Claimant returned to light duty work with employer on January 15, 1996, for a month; he went on light duty for a second employer for 3 months commencing February 15, 1996; he commenced a third tour of light duty on May 6, 1997, for yet another employer. Even if claimant's testimony respecting the carpenter's job supported continuing disability from his accident, the claim would be barred because claimant limited his income voluntarily.

Employer described the light duty it had available to claimant's treating physician who had advised claimant lift no more than 50 pounds and that claimant not perform overhead work. Dr. Paik approved the assignment as satisfying these restrictions. The light duty consisted of sweeping the floor and picking up pieces of wallboard and metal scraps, using a two yard, wheeled, plastic cart to transport the discarded material to outside dumpsters.

On direct and cross examination claimant did not allege that the light duty contravened his restrictions. Employer's Mike Hutzler, claimant's light duty supervisor, testified that claimant protested the light duty, telling him that he was a drywall specialist rather than a janitor. After a month of light duty work, the claimant quit.

Once employer meets its burden of showing work for which the claimant is qualified, which comports with the claimant's medical restrictions, is in fact available then claimant must explain why said work is either not suitable or unavailable. If claimant has failed or refused to engage in work which was suitable and available to him during the time period at issue, then he has voluntarily limited his income such that employer is not responsible for any wage loss so incurred. *Logan v. District of Columbia Department of Employment Services*, 805 A.2d 237 (D.C. 2002); *Mukhtar, supra*; *Joyner v. District of Columbia Department of Employment Services*, 502 A.2d 1027 (D.C. 1986).

2. *Ugarte v. CAN-AM Contractors, Inc.*, 1997 DC Wrk. Comp. LEXIS 415 (1997).

The claimant must affirmatively show the "nature and extent" of his disability. The Court in *Logan*, however, utilized a burden shifting device as an aid to evaluating the evidence regarding the "extent" of claimant's disability. The Court held "once the claimant demonstrates an inability to perform his/her usual job, a *prima facie* case of total disability is established, which the employer may then seek to rebut by establishing the availability of other jobs which the claimant could perform. *Logan, id.* at 240.

Where employer meets this evidentiary burden, in order to sustain a disability finding, claimant must either successfully challenge the legitimacy of the employer's evidence of available employment, or demonstrate diligence, but lack of success, in obtaining other employment.

Claimant has not been released to return to work at his pre-injury position by his treating physician, Dr. Richard S. Meyer. Claimant has not been able to obtain employment within his previous light duty restrictions. Claimant has established a *prima facie* case of temporary total disability.

Employer sought to rebut by establishing the availability of light duty work with Employer. Employer witness Jibril testified that a number of employees were working on light duty restrictions. Jibril testified that if Claimant had sought to work, a light duty position would have been available. Employer has met the evidentiary burden to rebut Claimant's *prima facie* case.

Claimant testified in rebuttal that his immediate supervisor, Kevin Parker, did not want him to sit around since he did not have any light duty work for Claimant to perform. On November 10, 2009, Claimant was taken off light duty and placed off work by Dr. Meyer. Claimant could not perform light duty since his treating physician did not release him to work. Claimant has successfully challenged Employer's evidence of available light duty work.

Considerations

Advantages: A Light Duty Program can

1. Serve to bridge workers approaching retirement, drastically reducing potential workers' compensation exposure.
2. Reduce or eliminate expenses associated with vocational rehabilitation
3. Give risk management more control over a claim.
 - a. The employer has the unfettered right to call the claimant back to work in a suitable alternative job she is capable of performing with her physical limitations.
 - b. Even if the offer is refused, the employer can take credit for the wages claimant would have earned in the position and reduce her disability benefits accordingly.
4. Return the claimant back to the workplace, curtailing long-term disability status that can perpetuate disability.
5. Afford the claimant a better opportunity to network and secure a permanent position within her residual physical limitations.
6. Promote safety and foster a sense of shared responsibility.

Disadvantages/Limitations:

1. Everyone cannot be on light duty.
2. There cannot be Permanent Light Duty.
3. There is a risk some co-workers will be resentful or demoralized.

Observations

A successful Light Duty Program needs flexibility and support. When feasible, recovering workers should be returned to temporary suitable employment within their Department with no wage loss. This can foster a sense of cohesion and promote safety by serving as a reminder of the cost of workplace injuries.

For permanent disabilities that disqualify the employee from returning to pre-injury employment, appropriate light duty assignments can serve as a bridge to retirement, or an opportunity to transition to another suitable employment opportunity.

Light duty should be viewed as an opportunity to help a worker return to productive employment while recognizing that it is not a panacea, and if unsuccessful, the employee will need to be referred for outside placement.