

# What Constitutes Timely Notice of an Employee's Ability to Return to Work?

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In the context of workers' compensation, it is well-settled that a timely Notice of Ability to Return to Work must be issued upon receipt of medical information documenting an employee's change in medical condition.<sup>1</sup> Further, the issuance of a Notice of Ability to Return to Work is a pre-requisite to obtaining a modification or suspension of claimant's benefits.<sup>2</sup>

Despite these well-settled foundations, the Courts continue to address the issue of what constitutes a timely or prompt written notice of the Notice of Ability to Return to Work, especially in the context of a labor market survey. Recently, the Commonwealth Court of Pennsylvania revisited this issue in Kleinhagan v. WCAB (KNIF Flexpak Corp.), No. 2009 C.D. 2009, filed April 22, 2010.

In Kleinhagan, the claimant sustained a work-related injury to his low back. Claimant then underwent an independent medical examination on March 20, 2007, with defendant's medical expert, who ultimately opined claimant was capable of returning to work in a medium duty capacity. The requisite Notice of Ability to Return to Work was issued on March 28, 2007.

Defendant then initiated a labor market survey. On May 4, 2007, the vocational expert conducted a vocational interview. Pursuant to the opinions of the vocational expert, defendant filed a Modification Petition. Defendant presented the testimony of the vocational expert in support of its petition. According to the vocational expert, he presented a copy of the Notice of Ability to Return to Work to claimant and counsel at the initial vocational interview. The vocational expert added that he questioned both claimant and counsel if Notice of Ability to Return to Work was previously received; both the claimant and counsel confirmed the receipt. Claimant's testimony in opposition to the petition was limited to his inability to perform the positions identified through the labor market survey. Claimant did not present medical evidence in opposition to the petition.

Ultimately, the Workers' Compensation Judge granted the Modification Petition, crediting both defendant's medical and vocational experts. The Workers' Compensation Judge found that claimant was physically capable of performing the positions included in the labor market survey and claimant's benefits were modified accordingly. Claimant appealed to the Workers' Compensation Appeal Board, which affirmed the Workers' Compensation Judge's Decision. Claimant then appealed to the Commonwealth Court.

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<sup>1</sup> Section 306(b)(3), 77 P.S. § 512(3) states, If the insurer receives medical evidence that the claimant is able to return to work in any capacity, then the insurer must provide prompt written notice, on a form prescribed by the department, to the claimant, which states all of the following: (i) The nature of the employee's physical condition or change of condition. (ii) That the employe has an obligation to look for available employment. (iii) That proof of available employment opportunities may jeopardize the employe's right to receipt of ongoing benefits. (iv) That the employe has the right to consult with an attorney in order to obtain evidence to challenge the insurer's contentions.

<sup>2</sup> Summit Trailer Sales v. WCAB (Weikel), 795 A.2d 1082 (Pa.Cmwlt. 2002), app. denied, 806 A.2d 865 (Pa. 2002).

Claimant argued on appeal to the Commonwealth Court that defendant was precluded from obtaining a modification of benefits as a result of its failure to timely provide a Notice of Ability to Return to Work consistent with Section 306(b)(3).

Claimant acknowledged the vocational expert's testimony that at the time of the vocational interview on May 4, 2007, the vocational expert presented a copy of the Notice of Ability to Return to Work to claimant and his counsel. Claimant further acknowledged that the vocational expert asked if they had previously received copies of that document and they agreed that they had.

Claimant averred; however, that merely submitting evidence that the Notice of Ability to Return to Work was "received" does not satisfy the Act's requirement that the document be "promptly" provided. According to claimant, the fact that Section 306(b)(3) mandates that a Notice of Ability to Return to Work be "promptly" supplied to an injured worker necessitates a finding that the document be sent as quickly as possible after the receipt of new medical evidence indicating he was physically capable of some work.

Claimant asserted that "[a]t best, the testimony...establishes that claimant received the Notice on May 4, 2007...[T]he Notice [of Ability to Return to Work] be provided promptly, undoubtedly suggests that the Notice [of Ability to Return to Work] be sent quickly, and not almost two months thereafter."<sup>3</sup>

Ultimately, the Court rejected claimant's argument, citing Melmark Home v. WCAB (Rosenberg), 946 A.2d 159 (Pa. Cmwlth. 2008), wherein the Court squarely addressed the issue of what constitutes "prompt" service of a Notice of Ability to Return to Work for the purposes of Section 306(b)(3) of the Act.

Importantly, the Rosenberg Court acknowledged that the phrase "prompt written notice," as it appears in Section 306(b)(3) of the Act, is not defined. However, the Court also stated,

The purpose of this statutory requirement is to provide notice to a claimant that there is medical evidence that the claimant can perform some work; that benefits could be affected; and that the claimant has an obligation to look for work. A claimant must have notice that her benefits could be affected **before** the employer attempts to modify benefits. Otherwise, a Modification Petition would be a claimant's first notice that a doctor has found the claimant capable of work. We hold that "prompt written notice" requires an employer to give a claimant notice of the medical evidence it has received a reasonable time **after** its receipt lest the report itself becomes stale. It also requires an employer to give notice to the claimant a reasonable time **before** the employer acts upon the information.

Id. at 163 (emphasis in original).

In the instant matter, the Court noted that defendant satisfied the requirements of Section 306(b)(3) in the instant matter. The Court noted that the independent medical examination identified claimant was physically capable of returning to medium duty employment. Pursuant to Rosenberg, claimant must receive his Notice of Ability to Return to Work based on the results of the independent medical examination opinion before defendant attempted to modify benefits.

Claimant did not dispute that he and his attorney received copies of the Notice of Ability to Return to Work by at least May 4, 2007 when claimant submitted to the initial vocational interview. Moreover, defendant did not file its Modification Petition until September 17, 2007 wherein it sought modification of claimant's benefits. Ultimately, the Court noted that there was no question that claimant was provided

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<sup>3</sup> Kleinhagan at 7.

with the Notice of Ability to Return to Work prior to defendant actually acting upon the information contained in the independent medical examination report.

Claimant also argued that defendant failed to present evidence that the vocational expert was in compliance with Sections 123.203<sup>4</sup> and 123.204<sup>5</sup> of the Act 57 Regulations. Claimant contended that the record is devoid of evidence that the vocational expert simultaneously mailed a copy of the earning power assessment/labor market survey to claimant or his counsel upon providing those documents to defendant. Claimant also alleged that the document was not mailed to himself or his counsel at all, let alone simultaneously with it being sent to defendant or its insurer.

The Court noted that there was no indication that defendant's burden of proof includes producing evidence establishing its compliance with these regulations. Accordingly, the Court rejected claimant's argument. The Court also noted that defendant need not establish compliance with Section 123.204(c) as a part of its initial burden of proof when seeking a modification of benefits.

The Court continued by concluding that claimant shall bear the responsibility of raising the issue of a vocational expert's alleged failure to supply him with a copy of the earning power assessment/labor market survey as a defense to a modification before the Workers' Compensation Judge.

Moreover, claimant should raise as a defense any claim that this document was not sent to him or his counsel "simultaneously," as that term may be defined, when it was sent to the employer or its insurer. Once this is done, the burden should shift to the defendant to establish the labor market survey was timely and appropriately supplied to the claimant and his counsel.

However, in the case at bar, claimant did not raise this issue before the Workers' Compensation Judge. Claimant did not raise the issue of the timeliness of his receipt or lack thereof of the vocational expert's labor market survey in the evidentiary record. Thus, the burden never shifted to defendant to establish that this document was appropriately provided.

In light of this case, it is a good practice to ensure that the vocational experts are in compliance with the regulations before filing a Modification Petition in the event that this issue is raised by a claimant's attorney during litigation. Further, it is important to ensure that the proper testimony is elicited from the vocational expert during litigation to ensure the Workers' Compensation Judge can properly rule if claimant raises such an objection.

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<sup>4</sup> 34 Pa. Code § 123.203 states, (a) A workers' compensation judge will resolve disputes regarding whether a vocational expert meets the minimum qualifications established in §§ 123.202 and 123.202a (relating to qualifications for current vocational experts under Act 57 of 1996; and qualifications for vocational experts under Act 53 of 2003). (b) Except as set forth in subsection (c), this subchapter does not limit a workers' compensation judge's authority to determine a vocational expert's qualifications under §§ 123.202 and 123.202a or a vocational expert's bias or objectivity. (c) A workers' compensation judge may not consider the results of an earning power assessment interview if the workers' compensation judge finds that the vocational expert has not complied with § 123.204 (relating to conduct of vocational experts) or that the insurer has not complied with § 123.205 (relating to financial interest disclosure).

<sup>5</sup> 34 Pa. Code § 123.204 states, (a) Before conducting an earning power assessment interview, the vocational expert shall disclose to the employee, in writing, the role and limits of the vocational expert's relationship with the employee. (b) A vocational expert who conducts an earning power assessment interview shall generate a written initial report detailing the expert's involvement in the litigation and conclusions from the interview. The initial report need not contain the results or conclusions of any surveys or tests. The vocational expert shall serve a copy of the initial report on the employee and counsel, if known, within 30 days of the date of the interview. (c) A vocational expert who authors additional written reports, including earning power assessments or labor market surveys, shall simultaneously serve copies of these written reports upon the employee and counsel, if known, when the expert provides the written reports to the insurer or its counsel. (d) A vocational expert who satisfies the requirements of this section complies with the Code of Professional Ethics for Rehabilitation Counselors pertaining to the conduct of expert witnesses for purposes of section 306(b)(2) of the act (77 P. S. § 512(2)).