MEMORANDUM

TO: Jason Krasno
FROM: George J. Matz
RE: Effects of a violation of employer policy or violation of law regarding drugs or alcohol on an injured worker's entitlement to wage loss and medical benefits.
DATE: May 21, 2010

QUESTIONS PRESENTED

1) What are the effects of a violation of employer policy regarding drugs or alcohol on an injured worker's entitlement to wage loss and medical benefits?

2) What are the effects of a violation of law regarding drugs or alcohol on an injured worker's entitlement to wage loss and medical benefits?

BRIEF ANSWERS

An employee's violation of either the law or employer policy in regards to drugs or alcohol can have adverse effects on the employee's entitlement to compensation under the Pennsylvania Worker's Compensation Act ("Act"). The type of violation and time at which it occurred can cause a claimant to lose all or part of compensation benefits for specific loss, medical expenses, and indemnity. When determining how a violation may affect a claimant's entitlement to benefits, there are two important factors to consider: (1) whether the violation was the "cause-in-fact" of the worker's injury; and (2) whether the loss of earning power is the result of the work-related injury or the violation. The facts pertaining to each of these inquiries determines whether a claimant remains eligible for and entitled to benefits.

Violation of Law or Employer Policy is a "Cause-in-fact" of the Injury

After suffering an injury, the first relevant inquiry is: (1) whether a violation occurred and was the "cause-in-fact" of the worker's injury. Section 301(a) of the Act bars compensation when an injury results from a claimant's violation of the law.[1] Benefits are not automatically precluded by the mere

[1] Pennsylvania Workers' Compensation Act, Act of June 1915, P.L. 736, No. 338, *as amended*, 77 P.S. § 431,

presence of a violation[2] and the employer bears the burden of proving that the violation was the direct cause of the accident resulting in injury.[3] However, conviction is not required in order to prove a violation was the cause of the accident; rather, it is to be considered by the factfinder in determining causation.[4] Furthermore, the involvement of law enforcement is not required as long as the evidence adduced at trial process that factors representing a violation of law occurred.

An employer asserting a claimant's violation of law as an affirmative defense must establish that the violation was the "cause-in-fact," as opposed to the proximate cause or substantial factor, of the injury.[5] In order to establish that a violation was the "cause-in-fact" of the injury, an employer must present evidence that is "clear and convincing."[6] However, the employer need not prove beyond a reasonable doubt or with absolute certainty that the violation was the cause of the injury.[7] Once an employer meets the burden of proving that, "but for" the employee's violation, the accident would not have occurred, the Act demands that compensation be barred.[8]

Section 301(a) of the Act provides in pertinent part:

> Every employer shall be liable for compensation for personal injury to, or for the death of each employe[e], by an injury in the course of his employment, and such compensation shall be paid in all cases by the employer, without regard to negligence, . . . Provided, [t]hat *no compensation shall be paid when the injury or death . . .* is *caused by the employe*[e] *'s violation of law, but the burden of proof of such fact shall be on the employer . . . .* (emphasis added).

[2] See, e.g., Duquesne Truck Service v. WCAB (McKeesport Truck Service), 644 A.2d 271 (Pa.Cmwlth. 1994) (finding mere presence of a violation of the law is insufficient for denial of benefits and employer bears burden of proof that violation was cause of the accident); Elinsky v. WCAB (Gulf Research and Development Co.), 540 A.2d 1019 (Pa.Cmwlth. 1988) (granting benefits to surviving spouse of employee killed in work-related automobile accident where evidence supported conclusion that employee's negligence was the cause of the accident, not his intoxication with a blood alcohol content ("BAC") of .291).

[3] See § 301(a) of the Act, 77 P.S. § 431, which provides in pertinent part:

> Provided, [t]hat no compensation shall be paid when the injury or death . . . is caused by the employe[e]'s violation of law, *but the burden of proof of such fact shall be on the employer . . . .* (emphasis added).

[4] See Ogden v. WCAB (Carolina Freight Carriers Corp.), 561 A.2d 837, 840 (Pa.Cmwlth. 1989) (rejecting claimant's argument that since driving under the influence charges were dropped by authorities there could be no finding that a violation of law was the cause of the accident).

[5] Clear Channel Broadcasting v. WCAB (Perry), 938 A.2d 1150, 1156 (Pa.Cmwlth. 2007) (citing Mahon v. WCAB (Expert Window Cleaning), 835 A.2d 420, 429 (Pa.Cmwlth. 2003).

[6] Ogden, 561 A.2d at 840.

[7] Id.

[8] See § 301(a) of the Act, 77 P.S. § 431, which provides in pertinent part: "no compensation shall be paid if the injury or death would not have occurred *but for* the employe[e's violation] . . . ." (emphasis added); see also Mahon, 835 A.2d 420 (Pa.Cmwlth 2003) (denying benefits because work-related injuries would not have occurred "but for" claimant's intoxication); Burns v. WCAB (State Pipe Services, Inc.), 654 A.2d 81 (Pa.Cmwlth. 1995) (denying benefits when clear and convincing evidence shows intoxication was cause of accident); Sherman v. WCAB

Although most conduct regarding drugs or alcohol constitute a violation of the law, a rare instance may arise where the conduct only is a violation of employer policy.[9] If such a situation arises, an employer may assert an affirmative defense that the claimant violated a positive work order while suffering the injury and therefore compensation should be denied.[10] The defense supposes that aclaimant, when suffering an injury, was operating outside the course and scope of his employment in such a manner that they were no longer furthering the interests of the employer; thus, once no longer acting in the interests of the employer, the claimant is not an employee covered by the Act.[11]

In order to succeed, an employer must show that the violation of a work rule was the direct cause of the injury, the employee was actually aware of the work rule, and the work rule implicated an activity that was not connected with the employee's normal work duties.[12] In essence, the employer must demonstrate that claimant, when violating a positive work order, was involved in an activity at the time of injury so disconnected with regular work duties so as to be considered nothing more than a "stranger" or "trespasser."[13] Additionally, the employer must prove that violation of the positive work order was the direct cause of injury.[14]

However, denial of benefits for a violation of positive work order is a rare exception to the general principle that all injuries sustained by an employee during the course of employment and causally

---

(National Advance Systems Corp.), 525 A.2d 474 (Pa.Cmwlth. 1987) (denying benefits when substantial evidence supports finding that claimant's intoxication was cause of fatal work-related car accident); but see Kovalchick Salvage Co. v. WCAB (St. Clair), 519 A.2d 543 (Pa.Cmwlth. 1986) (awarding benefits where employer did not meet its burden of proving that intoxication was cause of fatal accident); Oakes v. WCAB (Pennsylvania Elec. Co.), 469 A.2d 723 (Pa.Cmwlth 1984) (awarding benefits despite intoxication absent employer proving that intoxication was cause of accident).

[9] Almost any instance involving drugs would most likely constitute a violation of law, but a rare example might be where an employee under the influence of prescription narcotics operates machinery in violation of employer policy restricting such actions.

[10] See Johnson v. WCAB (Union Camp Corp.), 749 A.2d 1048 (Pa.Cmwlth. 2000) (denying benefits to claimant whose injuries did not arise during the course of employment because of claimant's violation of employer work rules); Dickey v. Pittsburgh and Lake Erie R.R. Co., 146 A. 543 (1929) (denying benefits when decedent ignored work order not to take shortcut across railroad tracks and was killed while crossing tracks).

[11] See Johnson, 749 A.2d 1048; Dickey, 146 A. 543.

[12] Asplundh Tree Expert Co. v. WCAB (Humphrey), 852 A.2d 459, 462 (Pa.Cmwlth 2004) (citing to Nevin Trucking v. WCAB (Murdock), 667 A.2d 262 (Pa.Cmwlth. 1995).

[13] Id.

[14] See Nevin Trucking, 667 A.2d 262.

related thereto are compensable under the Act.[15] Furthermore, courts have repeatedly held that actions involving drugs or alcohol, without more, do not normally represent a departure from furthering the employer's interests in order to depart from the normal course of employment.[16] Accordingly, only under exceptional circumstances would an employer succeed in asserting that the claimant violated a positive work order and should be barred from compensation.

Compensation benefits for a work-related injury will not be barred unless an employer is able to prove that the claimant violated the law or employer policy regarding drugs or alcohol and the violation was the "cause-in-fact" of the claimant's injuries. In addition, only under rare circumstances would the affirmative defense of a violation of positive work order bar compensation benefits. The Act bars compensation only if an employer presents evidence that clearly and convincingly establishes that the claimant's injuries would not have occurred "but for" the violation.[17] If an employer meets its burden of proof, the claimant will be barred from any compensation – whether for specific loss, medical or indemnity. However, if the employer fails to meet its burden of proof in establishing that a violation occurred and that it was the "cause-in-fact" of the claimant's injury, then a claimant shall be entitled to all applicable benefits under the Act.

Loss of Earning Power Due to Violation of Law or Employer Policy

Although a claimant's initial entitlement to compensation benefits is barred only if the employer proves that the violation is a "cause-in-fact" of the claimant's injury, the continuing entitlement to compensation benefits is dependent upon the second prong of inquiry: (2) whether the loss of earning power is attributable to the work injury or is the result of some other factor.[18] Compensation benefits may be modified or suspended if an employer is able to prove that the loss of earning power is no longer the

[15] Scott v. WCAB (Ames True Temper, Inc.), 957 A.2d 800, 804 (Pa.Cmwlth. 2008) (citing Camino v. WCAB (City Mission and MCRA, Inc.), 796 A.2d 412, 418 (Pa.Cmwlth 2002)).
[16] See, e.g., id.; Clear Channel, 938 A.2d 1150 (granting compensation benefits despite evidence of alcohol consumption); Kovalchick, 519 A.2d 543 (same); Oakes, 469 A.2d 723 (same).
[17] See § 301(a) of the Act, 77 P.S. § 431; Mahon, 835 A.2d 420.
[18] See Edwards v. WCAB (Sear's Logistic Services), 770 A.2d 805 (Pa.Cmwlth. 2001) (holding that "if the claimant's loss of earnings is related to a factor other than the work injury, the claimant's benefits must be suspended").

result of the work-related injury.[19] Furthermore, although a claimant may suffer an injury that is compensable under the Act, suspension of benefits can occur contemporaneously with the initial compensation award decision.[20] Typically, however, a modification of compensation benefits only relates to indemnity for wage losses and does not affect a claimant's specific loss or medical benefits.[21]

Once entitlement has been established, it is presumed to continue until proven otherwise.[22] However, Section 413 of the Act allows an employer to petition for a modification of benefits when a change occurs in the claimant's earning power.[23] During a petition for modification, the employer bears the burden of proving a change in earning power which can occur either when the disability has improved or the loss of earning power has been diminished in some other manner.[24] Loss of earning power can be diminished either when a suitable position within the claimant's restrictions becomes available or when the loss of earning power is no longer the result of the work-related injury.[25] In the context of a violation regarding drugs or alcohol, the loss of earning power no longer being due to the work-related injury can be the most damaging because modification is permitted despite the underlying disability not improving.[26]

---

[19] See id.

[20] See, e.g., id. (granting compensation benefits and terminating them in the same claim petition proceeding); Vista Int'l Hotel v. WCAB (Daniels), 742 A.2d 649 (1999) (holding that WCJ's have authority to render adjudications on claim petitions involving awarding, modification, suspension or termination where the evidence so indicates); Connor v. WCAB (Super Sucker, Inc.), 624 A.2d 757 (Pa.Cmwlth. 1993) (holding that claimant bears burden at claim petition to prove extent of disability including the burden of rebutting any relevant evidence by employer).

[21] See Edwards, 770 A.2d 805 (suspending indemnity benefits but continuing reasonable and necessary medical expenses for work injury); Scott, 957 A.2d 800 (holding that specific loss benefits are not precluded by positive drug test and subsequent termination unless employer alleges that intoxication was the "cause-in-fact" of the claimant's injury).

[22] Pappans Family Restaurant v. WCAB (Ganoe), 729 A.2d 661, 665 (Pa.Cmwlth. 1999).

[23] See generally § 413 of the Act, 77 P.S. §§ 771 *et. seq.*; City of Philadelphia v. WCAB (Szparagowski), 831 A.2d 577 (2003) (detailing employer's rights to petition for modification or suspension of benefits when a change in the earning power of the claimant has occurred).

[24] See id.; Virgo v. WCAB (Count of Lehigh-Cedarbrook), 890 A.2d 13 (Pa.Cmwlth. 2005).

[25] Although petitions for modification must be supported by the appropriate evidence, especially medical evidence when claiming that the disability has improved, nothing in the Act requires the limited interpretation that a "change in condition" is related only to the original, underlying disability. See City of Philadelphia, 831 A.2d at 585-86 (quoting Landmark Constructors, Inc. v. WCAB (Costello), 747 A.2d 850, 854 (2000)). Rather, the term "disability" is synonymous with a loss of earning power and when circumstances arise which diminish the loss of earning power, an employer is permitted to petition for a modification. See Banic v. WCAB (Trans-Bridge Lines, Inc.), 705 A.2d 432, 435 (1997); see generally Edwards, 770 A.2d 805. Therefore, and consistent with the principle that a disability is gauged by the loss of earning power, an employer may petition for modification when a suitable position within the claimant's restrictions becomes available.

[26] See, e.g., Derr v. Abington Manner, 2007 WL 2937029 (Pa.WCAB 2007) (denying indemnity benefits when claimant tested positive on post-injury drug screen and was terminated); Dunleavy v. P.J.Dick/UPMC Hillman

Historically, a petition for modification where suitable work was available required the employer to prove that a suitable position within the claimant's restriction was available and that the claimant was actually referred to or offered that position.[27] However, when the petition for modification is based on a loss of earning power that is no longer due to the work-related injury, the employer's burden varies.

First, an employer bears the burden of proof that the loss of earnings is due to some other factor and not the work-related injury.[28] Regarding drugs or alcohol, typically the other factor is a violation which renders the claimant ineligible for continuing employment. Ineligibility for employment can arise under circumstances ranging from incarceration thereby unavailable to work to conduct violating employer policy which produces a cause for dismissal.[29] Ineligibility can arise for violations which occur before, contemporaneously with, or after the work-related injury and need not even occur during the scope or course of employment.[30] In determining the cause of a loss of earning power, the imperative issue is whether the violation constitutes a cause for termination thus rendering the claimant ineligible for continuing employment. However, the employer still bears the burden of proof and must present conclusive evidence that the violation actually occurred and was the cause of the claimant's termination in order to rebut the presumption that the loss of earning power was through no fault of the claimant.[31]

Next, the employer must prove ineligibility is the cause of the loss of earning power. Essentially, the employer must demonstrate that a suitable position within the claimant's restrictions was available and that the claimant would have been referred to or offered the position "but for" the violation which

---

Cancer, 2004 WL 1752516 (Pa.WCAB 2004) (granting and then suspending benefits despite no change in underlying disability).

[27] See Kachinski v. WCAB (Vepco Construction Co.), 532 A.2d 374 (1987).

[28] See generally Edwards, 770 A.2d 805.

[29] See, e.g., Banic (suspending benefits for any period in which the claimant was incarcerated); Edwards, (suspending indemnity benefits when claimant violated employer drug policy and was terminated).

[30] See, e.g., Reyes v. WCAB (AMTEC), 967 A.2d 1071 (Pa.Cmwlth. 2009) (suspending indemnity benefits for claimant who was terminated post-injury for pre-injury substandard performance); St. Luke's Hosp. v. WCAB (Ingle), 823 A.2d 277 (Pa.Cmwlth. 2003) (suspending partial benefits when claimant was discharged for post-injury, non-work related criminal conviction in violation of employer policy).

[31] See Erisco Industries, Inc. v. WCAB (Luvine), 955 A.2d 1065 (Pa.Cmwlth. 2008) (granting claim petition and denying subsequent suspension petition when employer failed to prove chain of custody on drug test); Greene v. WCAB (Hussey Copper, Ltd.), 783 A.2d 883 (Pa.Cmwlth. 2001) (granting benefits where employer failed to prove that positive drug test was result of drug use and not narcotics administered during treatment for work injury).

rendered the claimant ineligible for employment.[32] Furthermore, the employer must show that circumstances were such that merit allocation of the consequences of the discharge to the claimant.[33] However, caselaw is not in accord regarding what an employer is actually required to prove. Some courts have required that an employer must show the availability of a suitable position within the claimant's restrictions, while other courts have not required any showing of availability once the loss of earning power has been attributed to factors unrelated to the work injury.[34] Inconsistencies also arise regarding the burden of proof when the violation occurred pre-injury but termination occurred post-injury.[35] In situations where termination is based on pre-injury conduct, the possibility arises that a claimant may counter an employer's evidence by claiming pretext or estoppel against the employer.[36] However, courts have tended to focus less on these arguments and emphasize that the "only relevant issue . . . is whether the loss of earnings was no longer the result of the work injury."[37]

Although well-established that an employer bears the burden of proof for modifying or suspending compensation benefits, the extent of that burden is unclear. Important to note is that once entitlement to compensation benefits has been establish, it is presumed to continue until proven

---

[32] Stevens v. WCAB (Consolidation Coal Co.), 760 A.2d 369, 377 (2000).
[33] See id. (quoting Vista, 742 A.2d at 658).
[34] In Edwards, the Commonwealth Court held that "an employer is not required to establish the availability of a suitable position within the claimant's restrictions." Edwards, 770 A.2d at 808; see also Dunleavy, 2004 WL 1752516 (Pa.WCAB 2004). However, in Erisco, the Commonwealth Court held that "an employer [meets its burden] by demonstrating that suitable work was available and would have been available but for the claimant's wrongful conduct." Erisco, 955 A.2d at 1068; see also Stevens, 760 A.2d at 377. Finally, in Harvey, the Commonwealth Court seems to treat the availability of a suitable position and the offer of the position as the same thing. Harvey v. WCAB (Monongahela Valley Hosp.), 983 A.2d 1254, 1261-63 (Pa.Cmwlth. 2009). The current burden on the employer is unclear, but it seems at a minimum that, at least implicitly, an employer must convince the factfinder that an equivalent level of compensation would have been available if not for the claimant's discharge.
[35] See Brandywine Mazda Suzuki v. WCAB (Asman), 872 A.2d 253 (Pa.Cmwlth. 2005) (holding that, inasmuch where the termination occurs post-injury for pre-injury, benefits could not be suspended absent proof of available work); but see Reyes v. WCAB (Amtec), 967 A.2d 1071 (Pa.Cmwlth. 2009) (holding that employer is not required to show available work despite pre-injury conduct when the employer is not aware of the conduct until after the injury; distinguishing Brandywine because employer was aware of conduct before injury).
[36] See Edwards, 770 A.2d at 809 (Friedman, J., concurring) (arguing for examination to determine whether claimant was actually at fault or whether employer was simply trying to avoid paying benefits); Vista Int'l Hotel, 742 A.2d at 656 (arguing that failure to conduct a fault-related assessment would allow suspension in a broad array of cases involving involuntary termination); United Parcel Service v. WCAB (Portanova), 594 A.2d 829, 832 (Pa.Cmwlth. 1991) (holding that "allowing an employer to discharge an employee . . . because of misconduct committed prior to the injury creates too much potential for abuse").
[37] See Coyne v. WCAB (Villanova University and PMA Group), 942 A.2d 939, 946 (stating that in Edwards, the holding of United Parcel Service had been rejected) (*note* – although given negative treatment, United Parcel Service has never been explicitly overruled).

otherwise.[38] Accordingly, it would be in the claimant's best interests to put forth any pretext, estoppel, or other relevant evidence which would tend to undermine the weight of the employer's evidence.

Compensation Benefits Affected by a Loss in Earning Power
No Longer Related to the Work Injury

After establishing that the loss of earning power is no longer due to the work-related injury, it must be determined what benefits and when those benefits are affected. Although an injury is compensable, suspension of benefits can occur contemporaneously with the initial award decision.[39] Suspension of benefits occurs as of the date in which the loss of earning power is no longer related to the work injury; typically, the date of termination. However, typically an employer is only permitted to suspend indemnity benefits and compensation for specific loss and medical expenses is unaffected.[40]

Regarding a specific loss, benefits are premised on providing compensation for the damage which results from a permanent loss of body part.[41] Compensation is awarded without consideration of a claimant's disability or earning power, and thus, a claimant shall be compensated even despite a lack of disability or loss in earning power.[42] As a result, a claimant's entitlement to specific loss benefits is unaffected by a violation of the law or employer policy which results in the subsequent discharge of the claimant.[43]

Regarding medical expenses, courts often fail to discuss the justifications for sustaining benefits. However, justification is found in the purposes underlying the Act which is to ensure that those who are injured are compensated quickly and without regard to negligence or fault while also limiting the employer's exposure to liability that arises from workplace injuries. The Act therefore balances the competing interests and allocates the consequences of injury to both parties by providing compensation

[38] See Pappans, 729 A.2d at 665.
[39] See Edwards, 770 A.2d 805 (granting compensation benefits and terminating them in the same claim petition proceeding).
[40] See Edwards, 770 A.2d 805 (suspending indemnity benefits but continuing reasonable and necessary medical expenses); Scott, 957 A.2d 800 (holding that specific loss benefits are not precluded by positive drug test and subsequent termination).
[41] Estate of Rosalie Harris v. WCAB (Sunoco, Inc.), 845 A.2d 939 (Pa.Cmwlth. 2004); Lente v. Luc, 119 A. 132 (1922).
[42] See Estate of Rosalie Harris, 845 A.2d 939.
[43] See Scott, 957 A.2d 800 (holding that specific loss benefits are not precluded by positive drug test and subsequent termination).

for medical treatment. A subsequent discharge does not obviate the need to treat the injury, and permitting otherwise would allow employers to circumvent the Act. Accordingly, a subsequent change in the loss of earning power should not suspend benefits for reasonable and necessary medical expenses related to the injury.

Accordingly, only continuing indemnity should be affected by a loss of earning power no longer due to the work injury. Indemnity attempts to restore an injured claimant to their pre-injury earning power. The amount of indemnity represents the difference between the pre-injury and post-injury earning powers – the compensable wage loss, *i.e.*, disability. Normally, an employer must show that the compensable wage loss has either diminished or ceased to exist. But a violation regarding drugs or alcohol permits modification of indemnity benefits even though the compensable wage loss has not changed.[44]

Essentially, Edwards proposes that all employees are subject to the law and employer policy, and an injured worker is no different than a non-disabled worker. It would be counterproductive to allow an employee to retain any benefit of employment while violating the rules of that employment. Implicit in this rationale is that a violation regarding drugs or alcohol is such that merits the severance of all obligations of an employer to the claimant. Thus, once the loss of earning power is due to a claimant's termination for a violation regarding drugs or alcohol, the employer may be relieved of the obligation to indemnify the claimant against future wage losses as a result of the work injury.

Conclusion

When a claimant violates the law or employer policy regarding drugs or alcohol, they risk substantial loss of benefits, whether those violations occurred prior to, contemporaneously with, or after

[44] See Edwards, 770 A.2d 805 (granting indemnity benefits but suspending them as of termination date because loss of earnings was not result of the work injury, but due to termination for violation of employer drug policy); Derr v. Abington Manner, 2007 WL 2937029 (Pa.WCAB 2007) (denying indemnity from date of termination for violation of employer drug policy despite presence of compensable injury) Dunleavy v. P.J.Dick/UPMC Hillman Cancer, 2004 WL 1752516 (Pa.WCAB 2004) (granting indemnity benefits and then suspending as of date of termination for violation of drug policy); see also Henry v. PA State Police, 2007 WL 1816638 (Pa.WCAB 2007) (suspending benefits when state trooper pled guilty to felony charge which violate ethical and professional mandates despite continuation of disability); but see St. Luke's Hosp. v. WCAB (Ingle), 823 A.2d 277 (Pa.Cmwlth. 2003) (denying claimant's petition for reinstatement of full benefits when discharged for non-work related criminal conviction in violation of employer policy, but implicitly allowing partial benefits to stand).

the work-related injury. If an employer is able to prove that the violation of law was the "cause-in-fact" of the injury then the claimant will be barred from any compensation. Likewise, even if an injury is compensable, a claimant may lose entitlement if the loss of earnings is no longer due to the work injury. However, in such a situation, a claimant typically only risks losing indemnity benefits as of the date of termination and compensation for specific loss and medical expenses is not affected.

CASES

Edwards v. WCAB (Sear's Logistic Services), 770 A.2d 805 (Pa. Cmwlth. 2001) – Claimant, Edwards, tested positive on drug test two weeks after injury and was terminated for violating employer policy. WCJ awarded benefits but suspended indemnity benefits as of date of termination finding that the loss of earnings was due to claimant's actions and not injury. WCAB and Commonwealth Courts affirmed.

Note – "*Edwards*" will be used as shorthand to indicate presence of a factor which renders the loss of earnings to no longer be related to the work injury.

Harvey v. WCAB (Monongahela Valley Hosp.), 983 A.2d 1254 (Pa. Cmwlth. 2009) – Claimant, Harvey, was a registered nurse injured in employer parking lot accident, whereby subsequent investigations discovered violations of employer polices and state nursing regulations regarding dispensation of narcotics and claimant was terminated. Initially awarded benefits, claimant was given partial clearance at which time employer petitioned for modification. WCJ granted petition for modification without a showing of an offer of a suitable work position, despite claimant's claim that *Brandywine* required such. WCAB affirmed and Commonwealth Court affirmed, holding that employer was not required to offer any position due to termination and ineligibility for continuing employment.

Erisco Industries, Inc. v. WCAB (Luvine), 955 A.2d 1065 (Pa. Cmwlth. 2008) – Claimant, Luvine, suffered a work-related injury, tested positive on drug screening, and was terminated for violation of employer policy. At initial claim proceeding, employer was unable to establish chain of custody on drug test. After appeal, Commonwealth Court reversed denial of benefits because employer failed to meet its burden of proof. The instant case arose when claimant was given full release and employer petitioned for a modification. Commonwealth Court affirmed WCAB's reversal of modification, finding employer was collaterally estopped from using same drug test again and therefore, employer failed to prove claimant's loss of earnings no longer being the result of the work injury.

Scott v. WCAB (Ames True Temper, Inc.), 957 A.2d 800 (Pa. Cmwlth. 2008) – Claimant, Scott, suffered amputation injury while violating positive work order, tested positive on drug screen, and was terminated. Claimant only sought specific loss benefits, which WCJ denied based on his violation of positive work order. WCAB affirmed. Commonwealth Court reversed, first holding that violation of positive work order is rare exception to general principles underlying the Act. Court also held that specific loss benefits are only precluded by positive drug test if employer alleges that it was the cause of the injury, thus barring compensation completely.

Coyne v. WCAB (Villanova University), 942 A.2d 939 (Pa. Cmwlth. 2008) – Complex case in which claimant, Coyne, suffered a work injury but whose employment contract was not renewed for disciplinary reasons. Commonwealth Court remanded for findings of facts behind separation from employment, but while doing so, stated that *Edwards* had rejected the holding in *Portanova* and that "the only relevant issue was whether the loss of earnings was no longer the result of the work injury."

Derr v. Abington Manor, 2007 WL 2937029 (Pa.WCAB 2007) – Claimant, Derr, was a registered nurse who suffered injury, tested positive on drug screen and was terminated. WCJ awarded medical benefits but denied indemnity from the date of termination. WCAB affirmed, finding loss of earnings was the result of claimant's drug use and subsequent termination and not the work injury.

Henry v. Pa. State Police, 2007 WL 1816638 (Pa.WCAB 2007) – Claimant, Henry, suffered injury during duty and was on total disability for a few years. Subsequently, he was cleared for light duty and

employer filed a modification petition after claimant pled guilty to felony charge. WCJ denied petition, finding that the employer didn't meet burden of proving suitable work was available. WCAB reversed, finding guilty plea was a cause for termination and that an employer is not required to show suitable work availability when the loss of earnings is no longer the cause of the work injury.

Dunleavy v. P.J. Dick/UPMC Hillman Cancer, 2004 WL 1752516 (Pa.WCAB 2004) – Claimant, Dunleavy, was injured, submitted to drug test two weeks later which was positive, and was terminated. Employer then petitioned for suspension based on *Edwards*, and WCJ suspended indemnity benefits as of date of termination. WCAB affirmed.

St. Luke's Hosp. v. WCAB (Ingle), 823 A.2d 277 (Pa. Cmwlth. 2003) – Claimant, Ingle, was partially disabled and on light-duty work when discharged for non-work related criminal conviction. After discharge, claimant petitioned for reinstatement of full benefits, and WCJ granted. WCAB affirmed. Commonwealth Court reversed, finding that once employer proved loss of earnings was not the result of the work-injury, the burden shifted to claimant to show a worsening of condition, which claimant could not. Validity of partial disability was not an issue raised from the record.

Greene v. WCAB (Hussey Copper, Ltd.), 783 A.2d 883 (Pa. Cmwlth. 2001) – Claimant, Greene, was injured, treated at hospital with narcotics for pain, operated on, then submitted to a drug screening which returned positive, and was terminated. WCJ granted claim petition, finding employer failed to meet burden that positive results was due to drug use or treatment. WCAB reversed. Commonwealth reversed on procedural grounds that WCAB exceeded its power of review.

Brandywine Mazda Suzuki v. WCAB (Asman), 872 A.2d 253 (Pa. Cmwlth. 2005) – Claimant, Asman, suffered injury, and then was terminated for pre-injury substandard performance. WCJ initially granted benefits, but found claimant was recovered and suspended benefits as to date of recovery. WCAB reversed only on grounds that employer must prove availability of suitable position before it can succeed with a suspension. Commonwealth Court affirmed, holding that, inasmuch when the termination occurs for pre-injury reasons, benefits could not be suspended absent proof of available work.

Reyes v. WCAB (AMTEC), 967 A.2d 1071 (Pa. Cmwlth. 2009) – Claimant, Reyes, was injured and then terminated for pre-injury conduct which occurred one day before injury. WCJ denied indemnity benefits finding the loss of earnings was due to discharge and not work injury. WCAB affirmed. Commonwealth Court affirmed finding fact of pre-injury cause is irrelevant in light of *Brandywine* because employer only learned of cause after injury and acted immediately and employer was not required to show availability of suitable positions.

United Parcel Services v. WCAB (Portanova), 594 A.2d 829 (Pa. Cmwlth. 1991) – Claimant, Portanova, was injured, returned to light-duty work, then discharged for pre-injury misconduct and filed a reinstatement petition. WCJ denied reinstatement finding discharge was for good cause. WCAB reversed. Commonwealth Court affirmed, holding that where discharge is for pre-injury misconduct and occurs after compensation and creation of light-duty position, the loss of earnings is deemed to have resulted from the disability, not the misconduct.
(Note – *Edwards* and *Coyne* gave negative treatment to this case, but it has never expressly overruled).

Mahon v. WCAB (Expert Window Cleaning), 835 A.2d 420 (Pa. Cmwlth. 2003) – Claimant, Mahon, was denied compensation benefits because "work-related injuries would not have occurred 'but for' his intoxication.

Sherman v. WCAB (National Advance Systems Corp.), 525 A.2d 474 (Pa. Cmwlth. 1987) – Claimant, Sherman, was decedent's widow who was denied compensation benefits because substantial evidence supported findings that husband was intoxicated and this was the cause of the accident.

Banic v. WCAB (Trans-Bridge Lines, Inc.), 705 A.2d 432 (S.Ct. Pa. 1997) – Claimant, Banic, was injured and awarded benefits, but was subsequently incarcerated for other reasons. Supreme Court held that benefits must be suspended for any period in which a claimant is incarcerated.

Burns v. WCAB (State Pipe Services, Inc.), 654 A.2d 81 (Pa. Cmwlth. 1995) – Claimant, Burns, was decedent's widow who was denied benefits because of clear and convincing evidence that decedent was intoxicated and intoxication was the cause of the accident.

Oakes v. WCAB (Pennsylvania Elec. Co.), 469 A.2d 723 (Pa. Cmwlth. 1984) – Claimant, Oakes, was decedent's widow who was granted benefits when employer failed to prove decedent's intoxication was the cause of the accident. Court also found that decedent was still in course of on-call employment despite accident occurring several hours after call ceased and while he was doing personal shopping.

Kovalchick Salvage Co. v. WCAB (St.Clair), 519 A.2d 543 (Pa. Cmwlth. 1986) – Claimant, St. Clair, was decedent's widow who was granted benefits when employer failed to prove intoxication was cause of accident.

M.D.S. Laboratories v. WCAB (Munchinski), 534 A.2d 844 (Pa. Cmwlth. 1987) – Claimant, Munchinski, was decedent's widow who was granted benefits despite decedent's intoxication that contributed to accident because other factors, *i.e.* icy roads, were concluded to reasonably be the direct cause.

Duquesne Truck Service v. WCAB (McKeesport truck Service), 644 A.2d 271 (Pa. Cmwlth. 1994) – the mere fact that a violation of law occurred is insufficient to meet the burden of proof for denial of benefits and an employer must prove that the violation was the direct cause of decedent's accident.

Camino v. WCAB (City Mission), 796 A.2d 412 (Pa. Cmwlth. 2002) – Claimant, Camino, was injured while mopping floors despite orders not to and WCJ denied benefits based on violation of positive work order. WCAB affirmed. Commonwealth Court reversed finding violation of positive work orders is a rare exception to the Act and employee must be so far outside the scope of employment so as to be a stranger or trespasser.

Asplundh Tree Expert Co. v. WCAB (Humphrey), 852 A.2d 459 (Pa. Cmwlth. 2004) – Claimant, Humphrey, was injured while violating positive work order to safety-tie-off while trimming trees. WCJ found violation occurred while furthering employer's interest and thus violation of positive work order defense was inapplicable to bar benefits. WCAB affirmed, Commonwealth Court affirmed.

Nevin Trucking v. WCAB (Murdock), 667 A.2d 262 (Pa. Cmwlth. 1995) – Claimant, Murdock, was injured while changing truck tire despite work regulations forbidding drivers from ever doing so and providing monetary reimbursement to call tow-truck to change tires. WCJ granted benefits finding claimant was injured during course of employment. WCAB affirmed. Commonwealth Court reversed finding the regulation was known, explicit and formulated to avoid the exact injury which occurred and thus the claimant, when acting as explicitly forbidden, was not in the course of employment when injured.