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Pitfalls in Using Nonprofits as a Return to Work Option

By Lindsey M. Sands

A key method to reduce exposure on any claim following a work-related injury is to be able to provide the injured employee with accommodated work. This option, when feasible, benefits all involved. It allows employers to limit indemnity costs associated with any injury while getting necessary work done. It also provides earnings to employees all while assisting in faster recoveries with less risk of deconditioning and psychological setbacks which are common for employees who are out of work indefinitely. However, often an employer does not have the ability to bring back a worker to perform necessary work within the employer's organization. For such cases, a crop of third party services have emerged which provides "transitional employment programs" in which employees are placed in either jobs which are not open to the general public or volunteer programs. In both cases, the employer pays the employee to simply keep them acquainted with work experience and in touch with the daily work routine.

These services can still benefit both employers and employees. However, there are risks involved in using such services in the context of litigation as a means to limit an employee's entitlement to workers' compensation benefits. The potential risk was recently highlighted by a case before the Appellate Division, Sylvester v. Marco Petroleum Industries, App. Div. Dec. No. 16-16. Mr. Sylvester was receiving total incapacity benefits per Decree when the employer offered to pay the employee $7.50 per hour to volunteer at Threads of Hope, a non-profit organization under the auspices of Catholic Charities of Maine. Mr. Sylvester accepted this offer and began to volunteer approximately six hours per week. The employer then filed a Petition for Review and Reduce Benefits pursuant to §205(9)(B)(2). After filing the Petition, the Employer reduced benefits based on receipt of the wages the employee was paid for volunteering at the non-profit. Mr. Sylvester then filed a Petition for Penalties with the Abuse Investigation Unit ("AIU") contesting the reduction of benefits and arguing that his income did not represent genuine wages. The employee specifically requested imposition of a fine in the amount of $200 per day pursuant to 39-A M.R.S.A. §324(2) for each day the employer/insurer was not paying him benefits reflecting total incapacity as set forth under the Decree.

The employee requested that the AIU Hearing Officer "take some testimony on this case or, based upon the written submissions, conclude that this is not a real job at all." According to Board Rules, the AIU will not allow testimony on a penalty proceeding absent "extraordinary circumstances." Citing this rule, the AIU Hearing Officer decided the case based upon written submissions and declined to impose a fine under §324(2). He found that the employer's unilateral reduction was proper "based on his earnings at Threads of Hope." The AIU Hearing Officer subsequently declined to issue further findings and the appeal to the Appellate Division followed. The Appellate Division vacated the underlying decision and remanded the matter back to the AIU for other evidentiary hearing, or an order staying the proceedings, until the Administrative Law Judge had decided the employer's pending Petition for Review.

As the Appellate Division pounced on a procedural error of the AIU Hearing Officer only, the case does not give guidance as to whether the employer's reduction of benefits based on Mr. Sylvester's "earnings" was appropriate or not. This case should, however, serve as a reminder to employers as to the risks and potential for litigation when using nonprofit providers as de facto return to work options. Litigation is ripe if the return to work offer is merely a sham with no genuine work being performed.

The Law Court further limited the use of these transitional work assignments in the case of Avramovic v. RC Moore Transportation, 2008 ME 140. In Avramovic, an employer used a vendor to basically create a job for the injured worker. When the injured worker refused the job, the employer argued in favor of forfeiture of benefits for "refusal of a bona fide offer of reasonable employment." The Hearing Officer (now referred to as an Administrative Law Judge) found that forfeiture was not appropriate as the record included "very little evidence offered" about the job or what the employee would be doing. He further found that the employer did not prove that "the position offered is one that is actually available in the competitive labor market." An appeal followed and the Law Court upheld this finding. Avramovic establishes that created jobs and/or assignments which provide no benefit to the employer will not be considered the equivalent of real work for purposes of the forfeiture provision under 39-A MRSA §214(1)(A).

This does not mean that any such program should be viewed as useless. As noted above, there are certainly benefits both mental and physical to providing these accommodated work options. However, the employee's participation (or lack thereof) should not be used as the sole basis for pushing litigation. Moreover, such programs should be considered only when there is no viable return to profitable work with the employer.