

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
APRIL 2008 AT A GLANCE
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AVERAGE WEEKLY WAGE

- The determination of whether a claimant's gross income or net income most accurately reflected his earnings was a question of fact for the WCJ, where the claimant was the President and Director of the Employer Chapter S Corporation of which he and his wife were sole shareholders. Therefore, the WCJ did not commit an error of law when she determined that the claimant's net income, which was calculated by reducing his gross profits by net loss, was supported by substantial evidence where WCJ found the employer's expert, a Certified Public Accountant, was more credible than the testimony of the claimant and the claimant's expert.
- An S corporation does not pay income tax; rather, the shareholders are taxed. In this matter, the WCJ found the claimant's salary was paid out of an S corporation, so that all income from employer passed through to claimant's personal tax return, since he was the sole shareholder of that corporation. The WCJ further found that in addition the employer reported a net loss which passed through to claimant's 1040 for 1993. Accordingly, the WCJ found the net of those two numbers represented the claimant's earnings from this business.
- The term "wages" is not specifically defined by the Act, but is generally recognized as compensation given to a hired person for his or her services, based on time worked or output of production. The term should be broadly defined to include periodic monetary earnings, and all compensation for services rendered with regard to the manner in which the compensation is computed.

With respect to calculating a claimant's average weekly wage, the Act intends the average weekly wage to reflect the economic reality of the claimant's pre-injury earning experience. The overall legislative purpose of Section 309 is to provide an accurate measurement of the average weekly wage.

- The Court has adopted an economic reality analysis for questions of calculating the average weekly wage. The Court has further encouraged consistent treatment of income for purposes of calculating both the pre-injury and post-injury average weekly wage.
- Where the claimant refuses to produce his complete tax records, including actual W-2s, meaning that the claimant failed to present credible evidence

of his actual earnings, the WCJ may rely on evidence of the claimant's actual earnings provided by the employers expert.

Mullen v. WCAB (Mullen's Truck and Auto Repair), No. 1461 C.D. 2007 (Decision by Judge Simpson, April 3, 2008).

NOTICE OF ABILITY TO RETURN TO WORK (LIBC-757)

- Although Section 306(b)(3) of the Act states that the insurer must provide "prompt written notice" on a form prescribed by the Department (LIBC-757), upon receipt of medical evidence that the claimant is able to return to work in any capacity, the Act itself does not state what prompt written notice is, and the WCJ committed an error of law where he construed, based upon the review of other sections of the Act, that prompt written notice means within 30 days of receipt of the medical evidence.

Rather than carve a time certain in stone, the Commonwealth Court holds 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. This necessarily requires an examination of facts and timeline in each case to determine if the claimant has been prejudiced for the timing of the notice.

Whether the issuance of a notice is prompt depends not on number of days but, rather, upon its impact upon a claimant.

- Applying the reasoning of its holding, where an employer obtained medical evidence on June 16, 2005, but did not issue the Notice of Compensation Payable until November 29, 2005, the notice was untimely because it was not issued until many months after the date on which the employer claimed that the claimant was able to work. However, where the employer issued the LIBC-757 on May 9, 2005 or April 4, 2005, following receipt of a medical report on January 28, 2005, such notice was given reasonably in advance of the date on which employer sought to modify claimant's benefits, before July 15, 2005.

Melmark Home v. WCAB (Rosenberg), No. 899 C.D. 2007 (Decision by Judge Leavitt, April 2, 2008).

STATUTORY CONSTRUCTION

- Under Section 1903(a) of the Statutory Construction Act of 1972, a word must be construed according to its common and approved usage and in cases where the legislature use the general term, the Court will not impose a more restrictive meaning than the common one when there is no indication that the General Assembly intended the word to be narrowly construed. Further, Courts have no power to insert words into statutory provisions where the legislature had failed to supply them. Therefore, the WCJ committed an error of law by finding prompt

written notice, set forth in Section 306(b)(3), meant 30 days merely because other sections of the Act, such as Section 311.1, contains a 30 day requirement.

Melmark Home v. WCAB (Rosenberg), No. 899 C.D. 2007 (Decision by Judge Leavitt, April 2, 2008).

PETITION TO COMPEL

- A physical examination includes all reasonable medical procedures and tests necessary to permit a provider to determine the extent of an employee's disability. Where the employer petitions a WCJ to compel an employee to undergo diagnostic testing, it bears the burden to demonstrate that the test is necessary, involves no more than minimal risk, and is not unreasonably intrusive. To determine whether a claimant should be compelled to undergo a diagnostic test, the WCJ must balance the goal of accurately assessing the claimant's injuries against the goal of protecting his or her right to be free from nonconsensual contact.
- The WCJ did not commit an error of law upon dismissing the employer's petition seeking to compel the performance of an EEG, made at the request of the employer's independent medical examiner, to discern whether the claimant is having legitimate seizures versus pseudo seizures, notwithstanding the fact that the EEG was of minimal risk, where the WCJ accepted the opinion of the claimant's medical expert and concluded that the test would be of little to no diagnostic value, meaning the employer had failed to meet its burden to prove that the diagnostic test was reasonable and necessary.

Peters Township School District v. WCAB (Anthony) No. 2084 C.D. 2007 (Decision by Judge McGinley, April 2, 2008).

IRE/VOCATIONAL

- An employer who filed a Petition for Modification premised upon an IRE that was performed upon the claimant more than 60 days following 104th week of total disability must still satisfy either the traditional Kachinski work availability analysis and concomitant burden, or the traditional analysis and burden required under a Labor Market Survey approach.
- The Court notes that an employer who requested the IRE be performed upon the claimant within 60 days of the 104th week of total disability is entitled to a self-executing reduction of the claimant's disability upon receipt of the IRE. The Commonwealth Court refuses to accept employer's argument that the traditional administrative process mandated for a self-executing status change required merely the filing of the Modification Petition supported by an authenticated IRE rating in the proceeding before a WCJ and nothing more.

Diehl v. WCAB (IA Construction), No. 1507 C.D. 2007 (Decision by Judge Kelley, April 20, 2008).

REVIEW NOTICE OF COMPENSATION PAYABLE/WCJ

- A WCJ may amend a Notice of Compensation Payable in the context of issuing a determination denying the employer's Petition for Termination in the absence of a claimant's filing of the Petition to Review the Notice of Compensation Payable.

Therefore, the WCJ did not commit an error of law upon affirming a WCJ's denial of the employer's Petition for Termination where the Notice of Compensation Payable recognized the injury of lumbar strain and the WCJ, upon issuing its second determination following a remand, determined that the Notice of Compensation Payable was materially incorrect at the time it was issued and amended the Notice of Compensation Payable to include "posttraumatic lumbar radiculopathy and two herniated discs at L5-S1" as part of the original injury".

City of Philadelphia v. WCAB (Smith), No. 768 C.D. 2007 (Decision by Judge Leavitt, January 4, 2008).