THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
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BY MITCHELL I GOLDING, ESQ.
KENNEDY& LIPSKI
(W) 215-430-6362

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- Where an employer modifies the claimant's compensation from total to partial as a result of a WCJ's granting of its Petition for Modification, which was filed because the request for an IRE was made more than 60 days following the 104th week of total disability, the effective date of modification is the date of the IRE physician's examination and not the date of the WCJ's decision or 60 days thereafter. This is so even if total disability is to continue through the date of adjudication.

  This holding is consistent with Section 123.102 of the regulations that states

  > *If the evaluation is scheduled to occur during this 60-day time period, the adjustment of the benefit status shall relate back to the expiration of the employee's receipt of 104 weeks of total disability benefits. In all other cases, the adjustment of the disability status shall be effective as of the date of the evaluation or as determined by the evaluating physician.*

- Subsections 1 and 2 of Section 306(a.2) of the Act provide for a self-executing, automatic modification of benefits where the employer request an IRE within 60 days after the claimant receives 104 weeks of total disability.

  An employer that does not comply with the time frame established by Section 306(a.2)(1) is not forever barred from requesting that a claimant submit to an IRE at a later time. Subsections 5 and 6 of Section 306(a.2) permits an employer to request the claimant to submit to an IRE although the results are not self-executing.

- Section 306(a.2)(2) provides that a claimant's benefits should not be reduced to partial disability based upon an impairment rating of less than 50 percent until claimant is given 60 days notice of the modification. However, Section 306(a.2)(2) is only applicable to cases where an employer seeks to obtain a self-executing relief by requesting a claimant to submit to an IRE within the appropriate time frame upon receipt of 104 weeks of disability.

Section 123.105(d)(2) also references the fact that a claimant must be given 60 days notice prior to his benefits being modified from total to partial disability. This provision delineates information that must be provided to a claimant in form LIBC-764 "Notice of Change in Workers' Compensation Disability Status" This provision is also not applicable to cases brought under Sections 5 and 6 of Section 306(a.2) of the Act.

Ford Motor/Visteon Systems v. WCAB (Gerlach) No. 1914 C.D. 2008 (decision by Judge Flaherty, April 1, 2009).

INCARCERATION/STATUTORY CONSTRUCTION

- Pursuant to the plain meaning of Section 306(a.1) an employer is only entitled to suspend a claimant's compensation where the claimant's incarceration has followed his conviction. This means that pre-trial incarceration prior to conviction is not the equivalent to voluntarily moving oneself from the work force. Accordingly, Section 306(a.1) does not permit the unilateral discontinuance of workers' compensation benefits for periods of incarceration prior to conviction.

- It is well-settled that the plain language of a statute is the best indicator of the legislature's intent. The basic tenet of statutory construction requires a Court to construe the words of a statute according to their plain meaning. When the words of the statute are clear and unambiguous the Court cannot disregard them under the pretext or pursuant to spirit of the statute. Courts may not supply words omitted by the legislature as a means of interpreting a statute. The Court's duty to interpret statutes does not include the right to add words or provisions that the legislature has left out.

Rogele, Inc. v. WCAB (Mattson) No. 1206 C.D. 200a (decision by Judge McGinley, April 2, 2009).

SUPERSEDEAS

- Retroactive payments made after the employer was found to be in violation of the Act are not reimbursable from the Supersedeas Fund. This is consistent with the policy that the Act does not give the employer the right to self-help, i.e. the right to ignore the requirements of the act.

  Therefore, the employer was not entitled to reimbursement from the Supersedeas Fund where it unilaterally suspended the claimant's compensation on September 11, 2001, based upon the mistaken belief that the claimant had signed a Supplemental Agreement, and did not reinstate the claimant's benefits until April 12, 2005, which was after the claimant filed a Petition for Penalties. That notwithstanding the fact the WCJ subsequently granted the employer's Petition for Suspension as of September 11, 2001 noting that the claimant had returned to

record wages greater and equal to its pre-injury average weekly wage on that date and had been subsequently discharged for violating the employer's drug policies.

- The following prerequisites must be met in order to entitle the employer to reimbursement from the Supersedeas Fund:

    1. Supersedeas must have been requested;
    2. The request for supersedeas must have been denied;
    3. The request must have been made in a proceeding under Section 413 of the act;
    4. Payments were continued because of the Order denying supersedeas and;
    5. In the final outcome of the proceedings it was determined that compensation was not, in fact, payable.

Henkels & McCoy, Inc. v. WCAB (Barner) No. 1396 C.D. 2008 (decision by Judge Smith-Ribner, April 15, 2009).

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- Commonwealth Court holds that an employer who seeks an IRE following the expiration of the 60-day window must obtain agreement from the claimant or an adjudication that the claimant's condition improved to an impairment rating of less than 50 percent. The employer is not required to prove earning power or job availability.

  Therefore, where the WCJ concluded that employer met its burden of proving that claimant had an impairment rating of 28 percent the employer was entitled to a modification of claimant's benefit status from total to partial as of November 8, 2008, the date of the IRE, notwithstanding the fact it did not prove job availability.

- An employee who seeks to modify a claimant's compensation from total to partial on the basis of an IRE requested outside the 60-day window is not required to prove earning power or job availability. The compensation may be modified by agreement or following an adjudication that the claimant's condition improved to an impairment of less than 50 percent.

  Changing a claimant's disability status from total to partial does not effect the amount, or rate of compensation. The claimant continues to be paid at the total disability rate. Changing the claimant's benefit status to partial disability, however, limits the claimant to 500 weeks of compensation, as is the case with all persons with partial disability status, regardless of the reasons therefor.

The timing of the employer's IRE request affects how the claimant's change in disability status will be affected where the claimant's impairment is found to be less than 50 percent.

The so called "self-executing" provision at Section 306(8.2)(2) allows the employer to change the claimant's disability status unilaterally after giving 60 days notice to the claimants so long as the employer has requested the IRE within the 60-day window.

On the other hand, if the employer has requested the IRE after expiration of the 60-day window, the employer may not affect the change unilaterally. Rather, the employer will have to obtain approval of a WCJ before changing the claimant's disability status. To obtain this approval, employer must establish an impairment rating via the traditional administrative process. The traditional administrative process would require an adjudication before a WCJ where the employer produces evidence that the claimant's condition improved to an impairment rating of less than 50 percent. Proof of earning power and job availability is not required.

Diehl v. WCAB (IA Construction), No. 1507 C.D. 2007 (Decision by Judge Leavitt, April 22, 2009).

EVIDENCE/SUSPENSION/SURVEILLANCE

- A claimant who refuses to provide financial information necessary to ascertain whether a claimant is working, may have his indemnity benefits suspended until such information is provided

  Therefore, the WCJ did not commit an error of law by suspending the claimant's compensation where the claimant by his testimony denied that he worked for an auto painter subsequent to his work injury but in his affidavit he admitted that he had on at least one occasion painted a vehicle and both the claimant and his supposed employer stated that when payments were made they were made in cash and there was no record of any transactions. Accordingly, based upon that factual scenario, the WCJ was left with no choice but to suspend the claimant's benefits.

- The claimant whose compensation was suspended because he provide to provide the employer records of his earnings could have his suspension lifted by presenting evidence of earnings. Alternatively, he could present evidence that his medical condition has changed to the point where reinstatement of benefits is warranted.

- The Court has traditionally approached surveillance films with distrust. It has been reasoned that films taken by one party to a lawsuit are necessarily suspect.

Nevertheless, although surveillance films on their own are not sufficient to satisfy a party's burden, such evidence is admissible to help establish facts.

- An admission of an opposing party can be used as substantive evidence. Therefore, the claimant's statements in his affidavit in opposition to supersedeas that he earned less part-time income performing auto body work constituted an admission and fell within an exception to this hearsay rule that the claimant did work post injury.

- Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. "Double hearsay" is present when there is an out-of-court declaration contained in another out-of-court declaration. In order for these declarations to be admissible, the reliability and trustworthiness of each declarant must be independently established. This requirement is satisfied when each statement comes within an exception to the hearsay rule.

  The employer's investigator's statement that the claimant's alleged employer stated that the claimant painted cars for him constituted double hearsay and was not admissible.

- Hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding if it is corroborated by any competent evidence of record. But a finding made solely on hearsay will not stand. This legal precedent has deemed the "Walker rule" and is applicable on workers' compensation cases. See Walker v. Unemployment Compensation Board of Review, 367 A.2d 366 (Pa. Cmwlth. 1976) and Rox Coal Company v. WCAB (Snizaski), 807 A.2d 906 (2002).

Alessandro v. WCAB (Precision Metal Crafters, LLC). (Decision by Judge Flaherty, April 30, 2009).