THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
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CLAIM PETITION/MEDICAL TESTIMONY/EVIDENCE

- A WCJ has the authority to decide the chronological length of disability depending upon competent evidence presented at the hearing, including the claimant's testimony and the claimant's medical witness.

- What constitutes competent evidence is dependent on the nature of the injury and the time frame in which the disability arises. A claimant must establish a causal connection between the disability and the work-related incident. What is required to establish this causal connection is dependent upon whether or not the injury is obvious in nature.

  An obvious injury is one "which immediately manifests itself while Claimant is in the act of doing the kind of heavy work which can cause such an injury." A classic example would be the laborer who grabs his back in pain after lifting his shovel full with wet concrete. In such a case, the causal connection is so clear that a layperson can see the connection. Under those circumstances, the claimant's testimony is sufficient to connect the injury to the claimant's employment, and additional medical testimony is not required.

  Where there is no obvious causal connection between the disability and a work-related injury, unequivocal medical testimony is required to establish that causal connection. An injury that does not immediately manifest itself while a claimant is performing her job is not an obvious injury and, therefore, is one requiring expert testimony.

  Therefore, although the claimant by her Claim Petition and testimony alleged that she became disabled on October 24, 2002 after Dr. Jacobson told her that she "need to get some rest", the WCJ do not commit an error of law by only granting the claimant indemnity as of December 17, 2003 because claimant's sole medical expert began treating her on December 17, 2003 and testified that the claimant "has not been able to work at a normal position at any time that she has been under my care."

- The failure of an employer's counsel to object to hearsay medical evidence does not affect the claimant's burden to present competent medical evidence. The claimant still needs to corroborate the out of Court statement of her doctor with other competent medical evidence or to depose her doctor to adequately establish a causal connection between the injury and employment.

Albert Einstein Health Care v. WCAB (Stanford), No. 2189 C.D. 2007 (decision by Judge Cohn Jubelirer, August 4, 2008).

HEARING LOSS/NOTICE

- Whether notice provided by a claimant who alleges occupational hearing loss as a result of hazardous occupational noise is timely is dependent upon the claimant's employment status at the time he files his Claim Petition.

  This is consistent with Section 306(c)(8)(ix) that provides that the date of injury caused by occupational hearing loss shall be the earlier of the date on which the claimant filed his Petition or the last date of long term exposure to hazardous occupational noise while employed by the employer against whom the claim is filed.

  Therefore, pursuant to Section 306(c)(8)(ix), employees who continue to be exposed to hazardous occupational noise are not obligated to give notice prior to filing a Claim Petition.

  By contrast, the employees who ceased to be exposed, i.e., retirees, must give notice within 120 days of cessation of the exposure.

- A claimant's belief that his or her hearing loss is work related does not, in and of itself, rise to the level necessary to trigger the notice Period under section 311 of the Act because the mere knowledge or suspicion of a work-related hearing loss is insufficient evidence of a compensable hearing loss.

Crompton Corporation v. WCAB (King), No. 2142 C.D. 2007 (Decision by Judge Smith Ribner, August 5, 2008).9/08

IRE

- A physician conducting an IRE must first determine that the claimant has reached MMI prior to determining his percentage of impairment due to the work-related injury. This is because Section 306(8.2) (1) of the Act clearly provides that when a claimant submits to an IRE, his degree of impairment "shall be determined….pursuant to the most recent addition of the American Medical Association "Guides to the Evaluation of Permanent Impairment." 2.3(c) of the Guides state "only permanent impairment may be rated according to the Guides and only after the status of Maximum Medical Improvement is determined.

  Maximum Medical Improvement refers to a status where patients are as good as they are going to be from the medical and surgical treatment available to them. MMI represents a point in time in the recovery process after an injury when further formal medical or surgical intervention cannot be expected to improve the

underlying impairment. Therefore, the Guides instruct that an individual is at MMI when his condition has become statically stable and that while further deterioration or recovery may occur at some point in the future, one would not expect a change in condition at any time in the immediate future.

Therefore, the claimant had not reached MMI because he suffered a knee injury and the IRE physician opined that a total knee replacement could provide complete pain relief in the future but the claimant was not presently a candidate for a total knee replacement due to his relative young age.

- The Court's holding is consistent with the language of Section 306(a.2)(1) which states:

  The degree of impairment shall be determined based upon evaluation by a physician pursuant to the most recent addition of the American Medical Association "Guides To the Evaluation of Permanent Impairment.

  This decision is also consistent with Section 306(a.2) (8) (i) of the Act that defines "impairment" as a functional abnormality or loss resulting from the work injury that "is reasonably presumed to be permanent.

- Permanency is defined by 2.5(f) of the Guides as the condition whereby impairment becomes static or well stabilized with or without medical treatment and is not likely to remit in the future despite medical treatment, within medical probability

Combine v. WCAB (National Fuel Gas Distribution Corporation), No. 539 C.D. 2008 (Decision by Judge Flaherty, August 14, 2008).

COURSE AND SCOPE

- There is no requirement that a claimant must work for a single employer in order to be considered a traveling employee. The inquiry in any case, including a case where the claimant has multiple employers, is focused on what the claimant was doing at the time of the injury. This may be more complex where claimant works for more than one employer, but there is no reason for an inflexible rule that one who works for several employers cannot be a traveling employee.

- Whether an employee sustained an injury in the course and scope of employment is a question of law and must be based on the findings of fact. An analysis of course of employment cases depends upon whether the claimant is a traveling employee or a stationary employee. What constitutes "scope and course of employment" is broader for traveling employees than for stationary employees, and it includes driving to any appointment for the employer.

The determination of whether an employee is a traveling employee is based on the following factors: Whether the claimant's job duties include travel, whether the claimant works on the employer's premises, or whether the claimant has no fixed place of work.

- When a traveling employee is injured after setting out on the business of his employer, it is presumed that he was furthering the employer's business at the time of the injury.

  The employer bears the burden of rebutting this presumption. To meet its burden, the employer must prove that the claimant's actions were so foreign to and removed from his usual employment that they constitute an abandonment of that employment.

  The focus of the abandonment inquiry is whether the claimant's actions at the time of the injury constituted an abandonment of employment.

  Therefore, the claimant who was employed as a Home Health Nurse by the employer suffered an injury in the course and scope of employment where she was involved in a motor vehicle accident while traveling from her home to her first client's home notwithstanding the fact that the claimant had two other concurrent employers that she also worked for on any given day.

- Under the "going and coming rule" an injury or death sustained by an employee traveling to or from a place of business that does not occur in the course and scope of employment is not compensable. However, an injury may be compensable under the Act according to the following exceptions to the going and coming rule:

  1. The claimant's employment contract includes transportation to and from work;
  2. The claimant has no fixed place of work;
  3. The claimant is on a special mission for employer or;
  4. Special circumstances such that claimant was furthering the business of the employer.

  Thus, one with no fixed place of employment is a traveling employee and exempt from the going and coming rule. A nurse such as the claimant who went to work at various assigned work places had no fixed place of employment and was exempt from the going and coming rule.

Jamison v. WCAB (Gallagher Home Health Services), No. 399 C.D. 2008 (Decision by Judge Leavitt, August 19, 2008).

Res Judicata/Collateral Estoppel/Termination/Reinstatement

- The WCJ's decision of March 27, 2002 that granted the employer's Petition for Termination finding that the claimant had fully recovered from her work injury on October 20, 1997 did not bar the claimant's subsequent Petition for Reinstatement that alleged that as of January 3, 2005 the claimant had suffered recurrence for work related disability by the doctrine of *res judicata* or collateral estoppel because the issue raised by both petitions were not identical.

  The ultimate and controlling issue decided in employer's termination petition, which was granted by the WCJ, was whether the claimant was fully recovered from her work related injury. The ultimate controlling issue of the claimant's Reinstatement Petition was whether the claimant's work injury recurred as of January 3, 2005. These issues were not identical because they involved factual questions about claimant's condition at two unrelated time periods.

- The doctrine of *res judicata* prevents the re-litigation of claims and issues that have previously been decided. The doctrine of *res judicata* encompasses two related, but distinct principles:

  1) Technical *res judicata*, which is sometimes called claim preclusion. Claim preclusion prevents a future suit between the same parties on the same cause of action after final judgment is entered on the merits of the action:

  2) Collateral estoppel, which is sometimes called issue preclusion. Collateral estoppel prevents re-litigation of an issue of fact or law between the same party based upon the different claim or demand.

  It is often difficult to distinguish between *res judicata* or collateral estoppel. However, the important thing for the Court to consider is whether the ultimate and controlling issues have been decided in a prior proceeding in which the parties actually had the opportunity to appeal and assert their rights.

- A claimant seeking a reinstatement of benefits following a termination carries a heavy burden because the claimant has been adjudicated to be fully recovered. Because the termination order affectively establishes that the claimant has fully recovered from the work injury, the claimant must prove that her disability has increased or recurred since the prior decision and that her physical condition has changed in some manner.

  Moreover, a claimant seeking a reinstatement of benefits must produce medical evidence that demonstrates this change in physical condition by precise and credible evidence of a more definite and specific nature and upon which the initial compensation was based. This change in physical condition must be shown to have recurred after the date of her physical recovery.

- In the context of a reinstatement of benefits following a termination, the medical expert who bases his or her opinion on the factual assumption that is inconsistent with the previously decided medical fact may be ruled incompetent. The claimant can show change in physical condition by showing a return of symptoms previously found to have ceased. The claimant met this burden where her medical expert accepted the Judge's finding that the claimant had fully recovered in 1997 but testified that her carpal tunnel syndrome had recurred because it was present when he saw her in 2005.

- Claimant was entitled to a reinstatement of compensation following her termination where, although she testified that her symptoms had persisted since 1994, she was found to have credibly testified that her carpal tunnel syndrome began to become worse in 2002 and by 2004 she experienced even more pain, numbness and tingling in her thumb, index, middle and ring fingers in both hands. The date of this increased pain was subsequent to the date of the termination.

- Orders to pay workers' compensation benefits have immediate effect. Thus, an award must be paid immediately unless the WCJ's order is stayed.

National Fiberstock Corporation v. WCAB (Grahl), No. 1456 C.D. 2007 (Decision by Judge Leavitt, August 29, 2008).