THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
JANUARY 2008 AT A GLANCE
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ATTORNEY FEES

- The employer presented a reasonable contest in defense against the claimant's Claim Petition where the employer acknowledged the claimant sustained a work injury but contested the nature of the claimant's disability and the claimant needed to hire an attorney to litigate a more severe and permanent injury then was acknowledged by the employer. This is because the employer's physician described claimant's work injury as a mild ankle sprain and temporary aggravation of a preexisting degenerative condition, from which he was recovered, whereas the claimant's medical experts diagnosed the claimant as having a chronic ankle strain, which prevented him from performing his pre-injury position.

Gumm v. WCAB (Steel), No. 599 CD 2007 (Decision by Judge Simpson, January 20, 2008). 2/08

COMPROMISE AND RELEASE AGREEMENT

- The WCJ did not commit an error of law by denying a widow's Claim Petition seeking approval of a Compromise and Release Agreement where the parties reached a resolution but there was a delay in bringing the Agreement before the WCJ because employer denied wanted to first obtain Medicare approval and the claimant died before Medicare approval was received.

  This is because to have a valid Compromise and Release Agreement the parties must agree to all of the terms of the settlement. With the exception of the resolution hearing before WCJ, workers' compensation settlements otherwise possesses all of the other characteristics and legal implications of a civil settlement. As with any contract, it is essential to the enforceability of a settlement agreement that the minds of the parties should meet upon all the terms, as well as the subject matter, of the Agreement. These principles apply equally to Compromise and Release Agreements.

  Because the parties did not agree whether it was necessary to protect the Medicare's interest and the conditions of the settlement, the Agreement was never finalized and there was no Compromise and Release Agreement for the WCJ to approve under Section 449 of the Act.

- The plain language of Section 449(b) of the Act clearly specifies the requirements of a valid Compromise and Release Agreement. The employer and insurer are the

only parties that may submit a Compromise and Release Agreement to the WCJ for approval and such agreement must be signed by both parties. The Court has also held that the statutory requirements of Section 449 are not satisfied by an oral agreement. The Act specifically mandates every Compromise and Release Agreement must be in writing and signed by the parties. The plain terms of the Act admit of no exceptions, not even for an understanding claimant.

Miller v. WCAB (Electrolux), No. 552 C.D. 2007 (Decision by Judge McGinley, January 4, 2008). 2/08

COURSE AND SCOPE

- The personal animus exception is an affirmative defense available to the employer to rebut the presumption that an injury that occurs on employer's premises is work related. The defense may be used to establish that a claimant's injuries do not arise out of the course of the claimant's employment.

- For the personal animus exception to apply there must be some intention on the part of the assailant to inflict the injury for personal reasons.

  The party asserting the personal animus exception must:

  1) Establish that the assailant had a preexisting relationship with or a preexisting animosity toward employee; and
  2) That he or she intended to injure the employee for reasons personal to the assailant.

  Thus, if a claimant is simply an innocent victim of an attack, the attack will be considered an unexpected happening that arose in the course of employment.

  Therefore, the employer was not entitled to the personal animus defense where the claimant suffered a psychiatric disability because she was inappropriately touched and subjected to inappropriate comments by a hotel guest where she worked because she had no prior history with the guest and the guest did not intend to harm her.

- The Commonwealth Court reiterates that its prior decision in *Heath vs. WCAB (Pennsylvania Board of Probation and Parole)*, 811 A.2d 90 (Pa. Cmwlth. 2002) (Heath I) may not be cited as authority for any proposition relating to the allegation of sexual harassment and the personal animus exception because the decision was vacated. It will be recalled that when *Heath I*, which is no longer good law, the Court held that even if a claimant's allegation of sexual harassment at work are true, any resulting mental injury would not be compensable under the Act because Section 301(c)(1) operates to remove any claim for that injury from the purview of the Act.

M&B & Partners, Inc v. WCAB (Petriga), No. 1201 C.D. 2007 (Decision by Judge Friedman, January 18, 2008). 2/08

- The fact that the claimant suffered an injury because of horseplay and there was a standing order against horseplay does not mean that the employer can avoid compensability based upon the argument that the claimant's injury resulted from a violation of a positive work order. Horseplay injuries have been found to be compensable even where there was a standing order against horseplay.

- An employer who raises the affirmative defense of violation positive work order has the burden to prove that the claimant's actions were in violation of a positive work order. The employer must prove that the injury was:

  1) In fact caused by the violation of the work rule;
  2) The employee actually knew of the order or rule; and
  3) The rule implicated in activity not connected with the employee's duties.

  Denying benefits based on the violation of a positive work order is a very rare exception to the broad general principle that all injuries sustained by an employer arising in the course of his employment and causally related thereto are compensable under Section 306(c)(1). Indeed, the claimant must have been involved in an activity at the time of his injury in an activity so disconnected with his regular work duties as to be considered, with respect to the employer, nothing more than a "stranger" or "trespasser."

- Where claimant's injury is a result of horseplay and the employer argues that the horseplay constituted a violation of positive work order the main issue is whether the horseplay was so disconnected connected with the claimant's regular duties so as to render him nothing more than a "stranger" or "trespasser" with respect to the employer. The claimant's injury that occurred as a result of horseplay was compensable because there was joking around with no intent to injure anyone and the claimant was in the area where he was required to be at the time he sustained his injuries.

Sysco Food Services of Philadelphia v. WCAB (Sebstiano), No. 817 C.D. 2007 (Decision by Judge Flaherty, January 23, 2008). 2/08

CREDIT

- Pursuant to the plain language of Section 204(a) the employer is entitled to a credit for Old Age Security received by a claimant where the claimant became eligible for the Old Age Security subsequent to his work injury even though the claimant initially received Social Security Disability and the Social Security Disability automatically became converted into old Age Benefits, which happens once the claimant attains the age of 65 years and six months.

The Court rendered this holding notwithstanding the fact that the claimant did not seek the transfer from Social Security Disability to old Age Social Security and he did not voluntarily remove himself from the work force.

Ropoch v. WCAB (Commonwealth of PA/DPW), No. 1638 C.D. 2007 (Decision by Judge McCloskey, January 14, 2008). 2/08

MEDICAL TESTIMONY

- A medical opinion that does not recognize the work relatedness of an injury previously determined to be work related is insufficient to support a termination of benefits. At a bare minimum, the expert must know what the accepted work-related injury was to be confident to testify that the claimant has fully recovered from a work-related injury. It would be sufficient if the employer's physician considered the established facts, regarding the nature of the claimant's injury, upon offering his opinion.

Westmoreland County v. WCAB (Fuller), No. 1277 C.D. 2007 (Decision by Judge Simpson, January 24, 2008). 2/08

MEDICARE

- The Medicare Secondary Payer Act (MSPA), codified at 42 U.S.C.§1395y(b)(2)(A)(ii), and Medicare regulations, require that all parties in a workers' compensation case protect Medicare's interests when resolving claims involving *future* medical expenses. Medicare is a secondary payer to workers' compensation and the MSPA prohibits Medicare from making any payment if payment "has been made or can reasonably be expected to be made by the primary payer." To the extent that Medicare has, in the past, made any "conditional payments," Medicare will recover those payments pursuant to 42 C.F.R. §411.45 and §411.47. Whenever *future* medical expenses are a component of a Compromise and Release Agreement, Medicare's interests must also be considered.

  Pursuant to the guidelines of the Center for Medicare and Medicaid Services (CMS) Medicare does not pay for an individuals workers' compensation related medical expenses when the individual receives a workers' compensation settlement that includes funds for future medical expenses. If Medicare's interests are not considered, CMS has a priority right of recovery against any entity that received a portion of a third party payment even directly or indirectly. Medicare may also refuse to pay for medical expenses related to the workers' compensation injury until the entire settlement is exhausted.

  CMS has advised to avoid future overpayment negotiations and to protect the injured worker's future Medicare benefits, it is in the best interests of all parties to

work together, including Medicare, the WC agencies, attorneys, WC carriers, and claimants.

Miller v. WCAB (Electrolux), No. 552 C.D. 2007 (Decision by Judge McGinley, January 4, 2008). 2/08

NOTICE OF TEMPORARY COMPENSATION PAYABLE/NOTICE OF DENIAL

- The employer did not improperly used the Notice of Temporary Compensation Payable, which was followed by a Notice of Compensation Denial with Box 4 checked off, where the employer following the issuance of the Notice of Temporary Compensation Payable issued the Notice of Compensation Denial to controvert the claimant's claim on the basis that disability did not result from the uncontested work injury but rather resulted from preexisting ankle problems.

  When an employer properly issues the Notice of Compensation Denial to deny liability, a violation of the Act does not occur. Therefore, where the employer assigned the grounds for denial of the claim based on one of the five printed options on the Notice of Compensation Denial there was a valid ground for denial of the claim after issuance of the Notice of Temporary Compensation Payable. In this matter, the reason for denying the claim that was no disability resulted from the injury.

Gumm v. WCAB (Steel), No. 599 CD 2007 (Decision by Judge Simpson, January 20, 2008). 2/08

PENALTY

- A violation of the Act or its regulations must appear in the record for a penalty to be appropriate No penalty may be imposed under Section 435 absent proof of a violation of the Act or the rules of the department or board. Further, a claimant who files a penalty petition bears the burden of proving a violation of the Act occurred. If the claimant meets his or her initial burden of proving a violation, the burden then shifts to the employer to prove it did not violate the Act.

  The employer did not violate the Act justifying the imposition of penalties where upon stopping claimant's temporary compensation and denying liability for his injury the employer complied with requirements in Section 406.1 of the Act. Section 435 of the Act does not specify any discrete responsibilities of an employer.

- The WJC committed an error of law where she assessed penalties against the employer because the employer issued a Notice of Compensation Denial following the issuance of a Notice of Temporary Compensation Payable based upon her belief that the employer failed to file permanent document of record to accept that the claimant sustained a work injury. Section 406.1(d) permits an

employer, in cases where it is uncertain as to the compensability of the claim or the extent of liability under the Act, to file a Notice of Temporary Compensation Payable without admitting liability under the Act.

Gumm v. WCAB (Steel), No. 599 CD 2007 (Decision by Judge Simpson, January 20, 2008). 2/08

POSITIVE WORK ORDER (VIOLATION)

- An employer who raises the affirmative defense of violation positive work order has the burden to prove that the claimant's actions were in violation of a positive work order. The employer must prove that the injury was:

  1) In fact caused by the violation of the work rule;
  2) The employee actually knew of the order or rule; and
  3) The rule implicated in activity not connected with the employee's duties.

  Denying benefits based on the violation of a positive work order is a very rare exception to the broad general principle that all injuries sustained by an employer arising in the course of his employment and causally related thereto are compensable under Section 306(c)(1). Indeed, the claimant must have been involved in an activity at the time of his injury in an activity so disconnected with his regular work duties as to be considered, with respect to the employer, nothing more than a "stranger" or "trespasser."

- Where claimant's injury is a result of horseplay and the employer argues that the horseplay constituted a violation of positive work order the main issue is whether the horseplay was so disconnected connected with the claimant's regular duties so as to render him nothing more than a "stranger" or "trespasser" with respect to the employer. The claimant's injury that occurred as a result of horseplay was compensable because there was joking around with no intent to injure anyone and the claimant was in the area where he was required to be at the time he sustained his injuries.

Sysco Food Services of Philadelphia v. WCAB (Sebstiano), No. 817 C.D. 2007 (Decision by Judge Flaherty, January 23, 2008). 2/08

REMAND

- The WCAB has the broad power to remand a case when justice requires. The WCAB did not abuse its power of remand where, in interest of justice, it reversed and remanded a WCJ's Order that granted the employer's Termination Petition where the WCJ led the claimant to believe his testimony was not necessary and subsequently made an adverse inference because the claimant had not testified.

Westmoreland County v. WCAB (Fuller), No. 1277 C.D. 2007 (Decision by Judge Simpson, January 24, 2008). 2/08

REVIEW

- Where the claimant's injury was recognized by the employer as being a lumbar strain but the WCJ, upon denying the employer's first Termination Petition, found that the claimant suffered a herniated L4-5 disc and lumbar radiculopathy, those became the accepted injuries. By denying a termination petition based on injuries not accepted in the Notice of Compensation Payable (NCP), the WCJ implicitly amended the notice under Section 413 of the Act to include the injuries as part of the NCP. Therefore the NCP was effectively amended whether or not the claimant filed a Petition to Review a Notice of Compensation Payable.

- Under Section 413(a) of the Act, a Notice of Compensation Payable could be amended two ways:

  One way is for a claimant who is claiming benefits should not be terminated based on injuries that are related to, but distinct from a recognized injury, to file a petition to modify the NCP pursuant to Section 413, which is treated the same as if such petition were an original claim petition.

  The second way to modify an NCP does not require a petition to modify be filed; rather, a WCJ is authorized to modify an NCP in the course of proceedings under any petition pending if it is established the NCP was materially incorrect when issued and the claimant, who has the burden, establishes she suffered additional work-related injuries. However, the WCJ does not have the authority under this approach to include injuries that developed over time as a result of the injury; instead, only injuries that existed at the time the NCP was issued may be addressed.

  The only exception to these two methods is where the claimant's added disability arises as a natural consequence of the work injury. Where the later injury is similar in kind to that described in the NCP, the employer still bears the burden of disproving the causal relationship even where the precise injuries are not listed in the NCP.

Westmoreland County v. WCAB (Fuller), No. 1277 C.D. 2007 (Decision by Judge Simpson, January 24, 2008). 2/08

VOCATIONAL

- The WCJ did not commit an error of law by granting the employer's Petition for Modification predicated upon her acceptance of the employer's labor market survey that identified jobs available in Wheeling, West Virginia, which is where

the claimant lived, rather than the location of the injury in Pittsburgh, Pennsylvania. The Court rendered its holding notwithstanding Section 306(b) (2) of the Act that states an earning power assessment is required to be performed in the "usual employment area where the injury occurred".

Based upon the facts of this case the Court concluded that where the claimant had residence in Wheeling, West Virginia, stayed with his father in Ohio, and held a driver's license, employer should not be precluded from attempting to establish job availability in Wheeling, West Virginia area, as well as other areas of Ohio, Pennsylvania, rather than location of injury.

Riddle v. WCAB (Allegheny City Electric, Inc.), No. 1390 C.D. 2007 (Decision by Judge Collins, January 8, 2008). 2/08