**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION: JANUARY 2011 AT A GLANCE**

## AVERAGE WEEKLY WAGE

- Pennsylvania Supreme Court grants Petition from Allowance of Appeal to address the issue:

  *What is the proper calculation of a claimant's average weekly wage under Section 309(d) of the Workers' Compensation Act, 77 P.S. § 582(d), when the claimant incurs a period of zero wages due to a voluntary furlough during the relevant look-back period?*

*Hiler V. WCAB (US Airways Group, INC.) No. 785 MAL 2009 (PER CURIAM, January 3, 2011). 2/11*

## REASONED DECISION / RETIREMENT

- The WCJ's determination that the claimant did not voluntarily remove himself from the workforce was supported by substantial evidence where the judge, though not specifically discussing the issue of voluntary withdrawal from the workforce, found that the claimant had been totally disabled from coal workers' pneumoconiosis and had had zero earning power since April 18, 2002.

- A disability which forces a claimant out of the workforce and into retirement is compensable under the Act. But where the claimant suffers a disability which has no effect upon his earning power, no entitlement to benefits arises under the Act.

  Where the claimant has not engaged in the light-duty work which was found to be available and consistent with his physical limitations in connection with the award of compensation for partial disability, his burden will be greater. First, depending upon the circumstances, the claim may be vulnerable to denial on the basis of voluntary retirement. Second, the claimant will not be afforded the benefit of the presumption of total disability from an inability to perform an existing light-duty job. Rather, the claimant is in the position of having to prove a negative - that there are *no* jobs available in which he could work consistent with his physical limitations. In this setting, medical testimony which concedes that a claimant retains the physical ability to accomplish light-duty work, with no vocational or other form of assessment as to why such work is not available, will be deemed fatal to the claim.

- Absent the circumstance where a credibility assessment may be said to have been tied to the inherently subjective circumstance of witness demeanor, some articulation of the actual objective basis for the credibility determination must be offered for the decision to be a 'reasoned' one which facilitates effective appellate review.

  The reasoned decision section of Section 422(a) does not permit a party to challenge or second-guess the WCJ's reasons for credibility determinations. Unless made arbitrarily or capriciously, a WCJ's credibility determinations will be upheld on appeal. The WCJ is free to accept or reject, in whole or in part, the testimony of any witness including medical witnesses.

*Shannopin Mining Company v. WCAB (Sereg), No. 1185 C.D. 2010 (Decision by Judge Butler, January 6, 2011). 2/11*

## PSYCHIATRIC INJURY / EVIDENCE

- The claimant, who was employed as a member of the Forensic Services Unit and participated in investigations of graphic murders, including the graphic death of children, was not entitled to the granting of his Claim Petition alleging posttraumatic stress disorder because the claimant was not subjected to abnormal working conditions.

  Although it was unusual for the claimant to view photographs and attend the autopsy of a maimed cadaver of an infant, such activities did not constitute the requisite abnormal working conditions to support an award for compensation benefits due to the nature of the claimant's work.

- Although testimony may be presented that certain officers such as the claimant never witnessed horrible trauma and/or death, that testimony is not dispositive. The determining factor is what is extraordinary or abnormal for a person in the same line of work. When an individual claimant employed as a police office has not previously encountered a particular type of event one may expect the police officer to become involved in, that experience is merely subjectively abnormal for the claimant.

- A party filing a claim petition for workers' compensation benefits must prove that the alleged injury is both work-related and disabling. Because psychological injuries are highly subjective, the occurrence of the injury and its cause must be adequately established. Where the alleged psychological injury was not precipitated by physical injury, the claimant must establish by objective evidence that he suffered a psychological injury and that the injury was more than a subjective

reaction to normal working conditions.

Even if a claimant adequately identifies actual (not merely perceived or imagined) employment events which have precipitated psychiatric injury, the claimant must still prove the events to be abnormal before he can recover.

Whether the working conditions are or are not abnormal is a question, which relates to the cause of the injury. Case law in Pennsylvania makes clear that while abnormal working conditions may be sufficient to link the injury to the employment, subjective reactions to normal working conditions will not. The rationale for this rule is that while some circumstances by their nature may cause psychic injury, others would not work such an injury on a healthy psyche unless there were other elements at play. Accordingly, the court directs its attention to distinguishing between what actually took place at the work place and what was a subjective reaction to those real events. Only when the court is satisfied that the actual events could cause a psychic injury, have they held the awarding of benefits was proper.

Psychic injury cases are highly fact-sensitive and for actual work conditions to be considered abnormal, they must be considered in the context of the specific employment. Whether findings of fact support a conclusion that the claimant has been exposed to abnormal working conditions is a question of law that is fully reviewable on appeal.

The job of police officer is one, which is inherently highly stressful. Although a claimant in a normally highly stressful working environment such as a police officer may not have a higher burden of proof, it is often more difficult to establish abnormal working conditions in a job, which by its very nature, is highly stressful. The claimant must establish that the incident which caused his mental injury is so much more stressful and abnormal than the already stressful incidence of that position.

- A claimant who alleges an aggravation of a preexisting psychiatric condition is still required to demonstrate by objective evidence that his post-traumatic stress disorder is more than a subjective reaction to normal working conditions in order to recover benefits under the Act.

- The WCJ did not commit an error of law for refusing to admit into evidence autopsy photographs taken by the claimant. It is well-settled that the admission of evidence is within the sound discretion of the WCJ. In addition, a WCJ may properly exclude evidence which is irrelevant, confusing, misleading, cumulative, or prejudicial. The WCJ's determination regarding the admission of evidence will not be reversed without a showing of abuse of discretion.

In this matter, the WCJ did not abuse his discretion because the admission of actual photographs taken by the claimant would have been merely cumulative of his oral testimony offered before the WCJ.

*Washington v. WCAB (Commonwealth of Pennsylvania State Police), No. 476 C.D. 2010 (Decision by Judge Kelley, January 5, 2011). 2/11*

**MEDICAL BILL / FEE PETITION**

- Section 306(f.1)(5) may be reasonably interpreted to provide two distinct alternative time periods for filing an Application for Fee Review: (1) 30 days following notification of a disputed treatment, or (2) 90 days following the original billing date.

- Pursuant to Section 306(f.1)(5) of the Act a provider must file an Application for Fee Review no more than 30 days following notification of the disputed treatment or 90 days following the original billing date of the treatment, whichever is later.

  Although the time limitation in 306(f.1)(5) may have passed based on the original billing date, if the insurer denies payment of a resubmitted bill, a provider still has days following the notification of an insurer's denial of the resubmitted bill to file an Application for Fee Review.

- Moreover, a provider, under certain circumstances, may file an Application for Fee Review more than 90 days after the original billing date when the provider receives notification of dispute, giving effect to the first prong of Section 306(f.1)(5) of the Act.

  If an insurer disputes payment of a resubmitted bill, the provider still had thirty (30) days following the notification of the dispute to seek review of the fee dispute. Thus, if the Act's 90-day limitation had passed, provider still has 30 days following the insured's notification of denial of the resubmitted bill to file an Application for Fee Review.

  Therefore, the provider's Application for Fee Review was timely where: 1) it submitted its original bill for payment on January 18, 2007; 2) on February 21, 2007, the insurer mailed a check to the provider at a lower amount than that billed together with a Notification Of Disputed Treatment dated February 7, 2007, and; 3) the provider filed an Application for Fee Review within 85 days of the original billing date, which was the date of submission of a clean bill. (A clean bill is a bill submitted on proper forms.)

*Fidelity & Guaranty Insurance Company v. Bureau of Workers' Comp. (Community Medical Center), No. 1766 C.D. (Decision by Judge Brobson, October 29, 2010). 2/11*

**REVIEW PETITION / STATUTE OF LIMITATIONS**

- The employer filed a Petition for Termination within three years of the last payment of compensation. The Claimant's Petition to Review was filed more than three years after the last compensation payment. The first paragraph of Section 413 permits the WCJ to amend a Notice of Compensation Payable in the course of proceedings under **any petition** pending before him, if the petition is in any material way incorrect. Thus, the WCJ did not commit an error of law by amending the Notice of Compensation Payable to add the additional injuries which existed at the time said Notice was originally issued because this is permitted by the provision of Section 413 noted above which references "corrective amendments."

  This should be distinguished from the second paragraph of Section 413 which applies to consequential injuries, i.e., injuries that occurred as a result of the work injury after the issuance of the Notice of Compensation Payable.

  The second paragraph of Section 413 does not contain the same language that would permit the WCJ to amend the Notice of Compensation Payable in the course of proceedings under any petition pending before him. The second paragraph of Section 413 specifically states "no Notice of Compensation Payable, agreement or award shall be reviewed, or modified or reinstated, unless the petition is filed with a department within three years after the date of the most recent payments of compensation made prior to the filing of such petition."

- The language of the first paragraph of Section 413, which is the premise for this Court's holding, states:

  > *A workers' compensation judge may, at any time, review and modify or set aside a notice of compensation payable and an original or supplemental agreement or upon petition filed by either party with the department, or in the course of the proceedings under any petition pending before such workers' compensation judge, if it be proved that such notice of compensation payable or agreement was in any material respect incorrect.*

- This is contrasted by the second paragraph of Section 413, which states:

  > *A workers' compensation judge designated by the department may, at any time, modify, reinstate, suspend, or terminate a notice of compensation*

> *payable, an original or supplemental agreement or any award of the department or its workers' compensation judge, upon petition filed by either party with the department, upon proof that the disability of an injured employe has increased, decreased, recurred, or has temporarily or finally ceased, or that the status of any dependent has changed. . . . Provided, That, except in the case of eye injuries,* ***no notice of compensation payable, agreement or award shall be reviewed, or modified, or reinstated, unless a petition is filed with the department within three years after the date of the most recent payment of compensation made prior to the filing of such petition****. . . . And provided further, That* ***where compensation has been suspended*** *because the employe's earnings are equal to or in excess of his wages prior to the injury that* ***payments under the agreement or award may be resumed at any time during the period for which compensation for partial disability is payable****, unless it be shown that the loss in earnings does not result from the disability due to the injury.*

The first paragraph of Section 413 applies when a party is seeking to correct a Notice of Compensation Payable to add injuries that existed at the time the Notice of Compensation Payable was issued, and the second paragraph applies when a party is seeking to expand a description of work injury to include consequential injuries, i.e., injuries that occur as a result of the work injury after the issuance of the Notice of Compensation Payable. In either case, the petition must be filed within three years of the most recent payment of compensation.

*Pizza Hut, Inc. v. WCAB (Mahalick), No. 996 C.D. 2010 (Decision by Judge Friedman, January 20, 2011). 2/11*

## MEDICAL TESTIMONY / EVIDENCE

- The WCJ relied upon incompetent and hearsay evidence where he found that the claimant suffered an aggravation of a pre-existing degenerative condition on the basis of the employer's medical expert's original report notwithstanding the fact that the medical expert testified that his original report contained a typographical error that he corrected upon being contacted by employer's counsel to reflect that the claimant did not suffer an aggravation of a pre-existing degenerative condition.

  Even if the uncorrected sentence were deemed to represent the medical expert's actual opinion, that opinion was recanted. Thus, the so-called "original" opinion is equivocal and, as such, worthless.

  As a matter of law, a recanted opinion is equivocal and, therefore, incompetent to support an award. The WCJ cannot accept an earlier opinion but reject the medical expert's subsequent repudiation of that opinion.

- If a medical expert recants his opinion, his/her testimony is equivocal and cannot support a finding.

- Although the WCJ is the sole arbiter of credibility, the issue raised by relying upon a recanted report is that of competency and not credibility.

- Mistakes in medical reports are routinely corrected at deposition. A WCJ's focus on one sentence and refusal to accept the correction of that sentence "borders on whim" and is an example of a WCJ taking a few words out of context to support a decision, which is impermissible.

- It is of no moment that employer's counsel brought the mistake to his medical expert's attention. There is nothing untoward about a lawyer questioning his expert to get a clarification. Critically, the expert testified that counsel in no way influenced his medical opinion or asked him to change that opinion.

- Unequivocal medical evidence is required where it is not obvious that an injury is causally related to the work incident. Whether medical evidence is equivocal is determined by reviewing the entire testimony of the medical witness, not just one sentence.

- The WCJ's factual findings based upon on the employer's medical expert's first uncorrected report, which was not admitted into evidence, violated the hearsay rule. The expert's testimony about his "original" written report, which was not admitted, was hearsay on hearsay.

  Uncorroborated double hearsay cannot support a factual finding. Further, even if the uncorrected report had been admitted into the record, the report itself is hearsay and cannot, standing alone, provide competent evidence to support a finding that Claimant suffered an aggravation of her disc disease. This is why medical reports are followed by deposition testimony.

  *City of Pittsburgh V. WCAB (Wilson), No. 235 C.D. 2010 (Decision by Judge Leavitt January 20, 2011). 2/11*