THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
JUNE 2008 AT A GLANCE
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DISFIGUREMENT

- The WCAB's authority to review and modify a WCJ's award of disfigurement benefits is limited in scope. The Board may modify a WCJ's award only if it concludes that the WCJ capriciously disregarded competent evidence by entering an award significantly outside the range of benefits that most of the WCJ's would select for a particular scar. In so concluding, the Board must adequately explain its increase of an award to allow for meaningful appellate review.

  An adequate explanation means that the Board must indicate what range is acceptable under the circumstances, what most WCJs would award within that range or how the WCAB reached its conclusion that most WCJs would award greater compensation.

- The Pennsylvania Supreme Court in Hastings Industries v. WCAB (Hyatt), 531 Pa. 186, 611 A.2d. 1187 (1992) allowed the Board limited authority to review the amount of WCJ awards for disfigurement in order to promote uniformity in awards throughout the State. Evidence of the physical appearance of the claimant and the unsightliness of disfigurement are difficult to preserve with accuracy in the record. The Supreme Court further observed that translation of the initial impact of disfigurement into monetary award involves a legal element of uniformity, and it allowed the Board to conduct its view of the claimant's scar in order to modify an award where necessary to insured that it is reasonably consistent with other similar disfigurement awards in Pennsylvania.

City of Pittsburgh v. WCAB (McFarren), No. 1701 C.D. 2007 (decision by Judge Smith-Ribner, cited June 4, 2008).

CHILD SUPPORT

- Pursuant to 23 Pa.C.S.A. § 4308.1(i)., the first $5,000 of net proceeds are not subject to attachment. Net proceeds refer to the proceeds that an injured individual is entitled to, after attorney's fees and costs.

  This means if the claimant is behind on child support and he is due to recover less than $5,000, his moneys are not subject to attachment. However, if the claimant's settlement is in excess of $5,000 it will be reduced by the child support arrearages.

Faust v. Walker, No. 1166 MDA 2007(Decision by Judge Colville, March 11, 2008)

UTILIZATION REVIEW/JURISDICTION

- The Court's decision in County of Allegheny v. WCAB (Geisler), 875 A.2d 122 (Pa. Cmwlth. 2005), which held that a WCJ lacks jurisdiction to entertain a claimant's Petition Seeking Review of a Utilization Petition when a provider under review fails to supply his medical records to the URO for the purpose of facilitating review, did not apply where the employer sought Utilization Review for all treatment it provided to the claimant by provider from August 5, 2004 and ongoing and the provider under review only submitted one progress note dated August 5, 2004.

  The Court in reaching this determination followed its holding in Loc, Inc. v. WCAB (Graham), 936 A.2d 1213 (Pa. Cmwlth. 2007) where the Court declined to apply Geisler to instances where the provider under review failed to supply all of medical records. The Court further noted that although it would have been preferable for more records to be provided, the URO examiner was made aware by the report of the provider's diagnosis.

- Jurisdictional issues may be raised sua sponte and at any time by an Appellate Court.

Lindtner v. WCAB (Acme Markets), No. 2080 C.D. 2008(Decision by Judge Flaherty, June 11, 2008)

TERMINATION PETITION

- The Supreme Court decision of Lewis v. WCAB (Giles & Ransome, Inc.), 591 Pa. 490, 919 A.2d 920 (2007) stands for the proposition that an employer who files a Petition for Termination must show a change in physical condition since the proceeding disability adjudication. The court's decision relied upon the earliest Supreme Court determination of Hebden v. WCAB (Bethenergy Mines, Inc.), 534 Pa. 327,632 A.2d 1302 (1993) wherein Supreme Court held that when the claimant has been previously adjudicated disabled due to a reversible injury, an employer may, in a later action, assert that the claimant is no longer suffering from the injury or is suffering to a lesser extent. However, an employer can not, in a later action, concede that the claimant is still suffering from previously adjudicated injuries but that those injuries are not work related.

  The earlier opinions of doctors who treated the claimant, prior to the date that the employer's independent medical examiner examined the claimant and opined the claimant has fully recovered, are not prior to determinations of the nature and extent of the injury as contemplated in Lewis and Hebden. Therefore, the WCJ did not commit an error of law by granting the employer's Petition for

Termination where the WCJ found credible the employer's medical expert opinion that the claimant was fully recovered from his work injury notwithstanding the opinions of multiple other doctors who had previously treated the claimant and who had issued multiple diagnosis.

- To succeed in a Termination Petition, the employer bears the burden of proving that the claimant's disability has ceased and/or that any current disability is unrelated to the claimant's work injury. An employer may satisfy this burden by presenting unequivocal and competent medical evidence of the claimant's full recovery from his or her work related injuries. Where an employer alleges the existence of an independent cause of claimant's continuing disability unrelated to the work injury, the burden remains on employer to prove that such cause exists. Furthermore, in order to terminate benefits, an employer must address all of the claimant's injuries.

Paul v. WCAB (Integrated Health Services), No. 16 C.D. 2008 (decision by Judge McCloskey, June 11, 2008).

ILLEGAL AGREEMENT/CLAIM PETITION

- Pursuant to Section 407 of the Act, agreements which vary the amount or time for payment of compensation benefits are "wholly null and void" and, thus, unenforceable.

  Therefore, regardless of the fact that the employer may have bargained for the right to establish a policy requiring an employee to provide a medical excuse to support the need to be absent from work as of the first date of missed work, such an Agreement could not be used to limit the period compensation would be otherwise payable under the Workers' Compensation Act even if the employee fails to comply with such policy.

- Notwithstanding the fact that for Workers' Compensation purposes the employer's policy that required the claimant to produce a medical excuse for missing work as of the first date of disability was null and void, the employer was not precluded from taking disciplinary action if an employee failed to follow its own rules. A termination from employment is a possible disciplinary measure and such action may ultimately impact a claimant's entitlement to Workers' Compensation if the claimant's continued entitlement to benefits turns on whether he was terminated for conduct tantamount to bad faith.

- The WCJ did not err by granting the claimant's Claim Petition as of the first date of disability where the claimant failed to produce a medical report confirming disability as of the first day. The claimant's medical expert is not required to be an eyewitness to the claimant's disability status throughout the pendency of the Claim Petition. A WCJ is free to determine the chronological length of the

claimant's disability based on all evidence presented, including claimant's own testimony.

Therefore, the WCJ's decision granted the claimant's Claim Petition as of the first date of disability was not reversed where the claimant suffered his injury on September 3, 2004 and the claimant testified that he did not believe he was able to work from the date of his injury through the date he first treated with his treating physician on September 8, 2004.

YDC New Castle-PA DPW v. WCAB (Hedland) No. 230 C.D. 2008 (Decision by Judge Flaherty, June 11, 2008).

IRE

- The Commonwealth Court grants reargument and vacates decision written by Judge Kelley and published on April 20, 2008.

  This means Judge Kelley's decision, that held that an employer who files a Petition For Modification/Suspension 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, is no longer good law.

Diehl v. WCAB (IA Construction), No. 1507 C.D. 2007 (June 24, 2008, Order by Judge Leadbetter)