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

REINSTATEMENT/ CAPRICIOUS DISREGARD

- A claimant whose compensation was previously modified based upon the failure to accept a job within his restrictions in June 1997 and then filed a Petition for Reinstatement following the expiration of his partial disability benefits had the burden of establishing that his medical condition worsened to the point that he could no longer perform the employment previously found available. Claimant did not fulfill his burden where both he and his medical expert testified credibly that the claimant suffered from pain and was on medication but failed to offer evidence proving the work restrictions established in the prior modification proceedings were no longer valid.

- Capricious disregard is a deliberate disregard of competent testimony and relevant evidence which one of ordinary intelligence could not possibly have avoided in reaching a result. This limited aspect of review only serves to ensure that an administrative adjudication is conducted within lawful boundaries; it is not be applied in such a manner to intrude on the WCJ's fact finding role and discretionary decision-making authority.

Ward v. WCAB (City of Philadelphia) No. 1755 C.D. 2008 (decision by Judge Simpson, March 2, 2009).

TERMINATION/DIAGNOSTIC STUDY/MEDICAL TESTIMONY

- The WCJ did not commit an error of law by granting the employer's Petitioner for Termination notwithstanding the fact that the claimant underwent a provocative discogram, which the claimant's medical expert testified was an objective study that corroborated the claimant's pain as a result of the work injury, because a discogram is a diagnostic test that has both objective and subjective components and the WCJ has a discretion to resolve a factual issue and resolve conflicts in the evidence.

  In this matter, the WCJ credited the employer's medical expert's testimony that claimant has fully recovered from a lumbar strain and the WCJ as the final arbitrator of witness credibility may accept or reject the testimony of any witness in whole or in part.

- The lack of an objective basis for pain does not, in and of itself, mean that disability has ended that termination is warranted.

- An employer is entitled to a termination of benefits when its medical expert unequivocally testifies that it is his opinion, within a reasonable degree of medical certainty, the claimant is fully recovered, can return to work without restrictions, and that there are no objective medical findings to substantiate claims of pain or connect them to the work injury.

- A medical expert's opinion is rendered incompetent if it is based on inaccurate or false information.

Michael v. WCAB (United States Steel Corporation) No. 2045 C.D. 2008 (decision by Judge Flaherty, February 26, 2009).

CREDIT

- Whether a defined contribution plan is a multiple employer pension plan or multi employer pension plan an employer may meet its burden of proof with expert actuarial testimony that it is entitled to a credit pursuant to Section 204(a) because where a defined benefit plan is at issue, the employer cannot provide evidence of actual contributions for the use of an individual member of the defined benefit pension plan. Therefore, the WCJ did not commit an error of law where it denied the claimant's Petition for Review of Compensation Benefits Offset based upon the employer's expert actuarial testimony that the employer's credit was determined based upon a "service based" methodology which determined the total service the claimant had worked with the employer and then analyzed benefit rate applicable for each of the years claimant worked for the employer.

- A Defined Benefit Plan is a plan where the assets of the plan are available to pay the benefits of all the participants.

  By contrast, A Defined Contribution Plan is a plan where the assets were earmarked for a specific participant and put into a special account attributable only to that person.

- A Multi Employer Pension Plan is a plan in which "more than one employer is required to contribute and it is maintained under one or more collective bargaining agreements between one or more employer organizations and more than one employer."

  A Multiple Employer Pension Plan is maintained by one or more employers where participation is not linked to a collective bargaining agreement.

Consolidation Coal Company v. WCAB (Albani) No. 2216 C.D. 2007 (decision by Judge Jubelirer, March 5, 2009).

CLAIM PETITION/TERMINATION FOR CAUSE/LITIGATION COSTS

- If in the context of a Claim Petition an employer who alleges that the claimant's loss of earnings was the result of a post injury involuntary discharge bears the burden of proving that suitable work was available or would have been available but for circumstances which merit allocation of the consequences of discharge to the claimant, such as the claimant's lack of good faith.

  The rule is different where a pre-injury misconduct causes the discharge. In such a case, the employer must prove a job available to the claimant within his restrictions. When the claimant has proven a disabling work injury i.e. a loss of earnings caused by a work injury, then a pre-injury grounds for firing him cannot act as a superseding cause of the claimant's loss of earnings and relieve employer of having to show job availability in order to obtain suspension of benefits.

  The employer proved that the claimant's loss of earnings resulted from his misconduct where the misconduct occurred one day prior to the work injury but the employer only learned of the misconduct after the claimant was injured and the employer acted immediately. This is further true where the employer testified that it would have attempted to accommodate any work restrictions claimant had after the accident.

- The employer is not obliged to reimburse claimant counsel's litigation costs where upon denying the claimant's Claim Petition the employer issued the Notice of Compensation Denial with box 4 checked off and the Denial did not dispute medical benefits because the WCJ granted the claimant's Claim Petition but only with respect to medical benefits by finding that the claimant's loss of earnings were caused by the claimant's willful misconduct and not by the work injury.

  This is because a claimant, in order to be entitled to reimbursement for litigation costs, must prevail on the contested issue. Although the employer filed a general denial, which denied all allegations, pursuant to Section 131.35(a) of the Special Rules of Administrative Practice and Procedure before the Workers' Compensation Judges a party has the right to amend the pleading at any time in a proceeding before a Judge, unless the Judge determines that another party has established prejudice as a result of the amendment.

  In this case, the issues were properly identified as being whether the claimant's wage loss resulted from willful misconduct. Since the claimant did not prevail in that issue, litigation costs were not compensable.

Reyes v. WCAB (AMTEC), No. 643 C.D. 2008 (Decision by Judge Leavitt March 16, 2009).

AGGRAVATION/NOTICE

- An aggravation of a preexisting condition is new injury for the purpose of the Act and the claimant bears the burden of establishing each element necessary to support an award for compensation following an aggravation. Notice under Section 311 of the Act is one such element. When notice of the work injury is not given to the employer within 120 days of its occurrence, a claim for compensation must be denied.

  Accordingly, the claimant's Claim Petition was properly denied where she failed to give the employer notice within 120 days of the date she alleged that she developed a disabling embolism as a result of her involvement in a motor vehicle accident that occurred on her way to physical therapy for her work injury.

- Under Section 313 of the Act, notice may be given to the employer, or any agent of the employer regularly employed at the place of employment of the injured employee..

  Defense counsel who upon cross-examining the claimant learned that claimant was alleging that she was on her way to physical therapy at the time of her motor vehicle accident, was not an agent regularly employed at the place of employment of the injured employee for purposes of giving notice pursuant to Section 313.

Matthews v. WCAB (Elwyn Institute), No. 1413 CD 2008 (Decision by Judge Leavitt, March 12, 2009).

SUSPENSION/VOCATIONAL

- In order for the employer to obtain a suspension where a claimant is able to return to work without any restrictions whatsoever but is not fully recovered from his work injury the employer must demonstrate that a job is available to the claimant.

- The Supreme Court's decision in Harle v. WCAB (Telegraph. Press, Inc.), 658 A.2d 766 (1995) entitled the employer to suspend a claimant's compensation where the claimant had returned to work to identical employment with a different employer. The Harle decision merely recognized that the employer need not show job availability when the employee actually returns to work because a claimant is not entitled to receive benefits if the loss of earning power is does not result from the work-related injury.

In this matter, the claimant had not returned to identical work with a different employer. Since there was no dispute by the employer that the claimant was not fully recovered, the employer was obliged to show job availability in order to obtain a suspension despite medical evidence the claimant was able to perform not only his pre-injury job but also any job without restrictions.

Consol PA Coal Company v. WCAB (Whitfield), No. 971 C.D. 2008 (decision by Judge Cohn Jubelirer, January 8, 2009).

CUMULATIVE TRAUMA, MEDICAL TESTIMONY

- Courts have consistently regarded carpal tunnel syndrome as a condition that arises as a as a classic cumulative trauma or repetitive stress injury that may result from use of the hand in a variety of job settings. They have never limited benefits for carpal tunnel syndrome to cases involving a use of "significant vibratory tools" over long periods.

- The Act specifically contemplates that compensable injuries under the Act include aggravation injuries. Therefore, the employer's medical expert's opinion that the claimant's carpal tunnel syndrome was not caused by work in part because "an aggravation is not the cause of something" was contrary to Pennsylvania Law.

- It is well settled that a WCJ is not competent to make independent medical determinations. Therefore, the WCJ committed an error of law because it constituted her own medical where she found there was "no clinical correlation for EMG findings" where the claimant's medical expert testified to the contrary.

- Although whether an injury is work-related is a crucial concern in workers' compensation cases often requiring expert medical evidence to establish, whether it is compensable is the ultimate legal determination that is to be made by the workers' compensation authorities in accordance with Pennsylvania Law, not by the medical experts.

- A doctor's testimony should be considered as a whole, and a determination of whether it is unequivocal should not rest upon a few words taken out of context.

Livering House v. WCAB, (ADECCO) No. 1639 C.D.2008 (decision by Judge Smith-Ribner, March 19, 2009).

Subrogation

- The employer has an absolute right to subrogation even where the claimant obtains his third-party recovery from a government tortfeasor.

- The fact that Sections 23 of Act 44 makes the government immune if it does not protect an employer's subrogation interests, does not impinge on an employer Section 319 right to be reimbursed the compensation payments from a tort recovery from a governmental body.

Fox v. WCAB (Peco Energy Company), No. 1774 C.D. 2008 (decision by Judge Pellegrini, March 23, 2009).

CONCURRENT EMPLOYMENT/PENALTIES

- The claimant was not entitled to wages based upon concurrent employment where at the time of his work injury in April 2004 he was concurrently employed with AM-GARD but he resigned his employ with AM-GARD in June of 2004, in anticipation of accepting a job working for Leonard, and the claimant continued to work for the employer until September 13, 2004 at which time he underwent surgery on his foot which meant that he was no longer able to accept the job offer with Leonard in October of 2004.

  This is because the claimant had voluntarily terminated his employment with his first concurrent employer for reasons unrelated to his work injury. The claimant was not entitled to concurrent wages from the second potential concurrent employer because the potential employment offered by the potential employer did not occur before or at the time the claimant injured his foot. Accordingly, the claimant could not regard the second employer as his concurrent employer.

- It is true that when employee has concurrent positions at the time of an injury, he is entitled to the calculation of an average weekly wage that includes wages from both jobs, even if the employee was temporarily laid off at the time of the injury. However, in this matter the claimant established no work history that would substantiate his claim that he had concurrent employment with the second potential employer. The potential employer did not actually take the step of hiring the claimant or simply offering him a job so there is no basis to conclude that this opportunity would have provided a continuum of employment such as the claimant had with his initial concurrent employer.

- Certain factors are important considering the question of whether concurrent employment should be considered in calculating the average weekly wage: The period of employment preceding the injury, whether periods of layoffs were frequent, whether a concurrent employer terminated an employee during a layoff and whether a laid off employee returned to work following such employment. While the reality of the claimant's pre-injury concurrent employment was obvious, he terminated his position with that concurrent employer for reasons unrelated to the work injury. Accordingly, the potential employment the claimant had with the second potential employer constituted no basis to include potential wages from that employment in calculating the claimant's average weekly wage.

- A WCJ considering claim for penalties has sole discretion to decide whether or not to award penalty for a violation of the Act. Therefore, the WCJ did not abuse its discretion by not awarding penalties against the employer because of its failure to pay the claimant concurrent wages where the claimant voluntarily left his concurrent employer two months following his work injury for reasons unrelated to the work injury.

Ostrawski v. WCAB (UPMC Braddock Hospital), No. 497 C.D. 2008 (Decision by Judge McCloskey, March 26, 2009). 4/09

MEDICAL TESTIMONY/MEDICAL BILLS

- There is no requirement that a medical expert review all medical records. The fact that a medical expert does not have all of a claimant's medical records goes to the weight given the expert's opinion, not its competency. Therefore, the WCJ did not commit an error by finding the claimant's medical expert credible where the claimant experienced neck pain soon after his truck accident even though complaints of neck pain were not corroborated by claimant's medical records.

- The case of Newcomer v. WCAB (Ward Trucking Corporation), 692 A.2d 1062 (1997) stands for the proposition that a medical expert's opinion cannot be based upon false or inaccurate information about an accident.

- The Court's decision Long v. WCAB (Integrated Health Service, Inc.), 852 A.2d 424 (Pa. Cmwlth. 2004) requires that an expert not recant when given correct information about an accident.

- Section 306(f.1) of the Act governs the sum total of an employer's obligation for medical compensation, and it does not include payment of premium for a health insurance policy that covers any and all illnesses and injuries no matter what they are, even where that policy was purchased for a work-related injury. The employer would be liable for the cost of medical treatments related the work injury which may include the claimant's co-payments and deductibles imposed by the claimant's private health insurance. Therefore, the claimant was not entitled to reimbursement for his COBRA premium payments.

Calex, Inc. and Inservco v. WCAB (Vantaggi), No. 1788 C.D. 2008 (Decision by Judge Leavitt, March 26, 2009). 4/9

CREDIT

- If any injury occurs on or after the effective date of Act 57, which was June 24, 1996, pursuant to Section 204(a) an employer is entitled to an offset/credit for any

type of pension benefits paid to a claimant, but the amount of the offset/credit which an employer may take is limited to the extent the employer funded such benefits.

This is true even where the claimant, who was a recipient of a service connected disability pension, had the option of withdrawing his contributions or using his contributions to purchase survivorship benefits and the claimant did use his contributions to purchase survivorship benefits. The Court has never held that an employer must be using an employee's pension fund contributions to satisfy its workers' compensation obligations in order for amended Section 204(a) to be applicable. Section 204(a) expressly limits the amount of the offset/credit which employer is entitled to take to the extent that employer funded claimant's service-connected disability pension benefits.

- Prior case law that held that an employer was entitled to a credit for payments made in lieu of compensation is still good law but only if the injury occurred prior to the effective date of Act 57. The employer's rights to pension offset in post Act 57 cases does not depend on whether the pension constitutes payments in lieu of compensation.

- In cases which involve a defined benefit plan, an employer cannot provide evidence of actual contributions for the use of an individual member and therefore must meet its burden of proof with expert actuarial testimony.

A defined benefit plan is a plan in which the benefit level is established at the commencement of the plan and actuarial calculations determine the varying contributions necessary to fund the benefit at an employee's retirement.

City of Philadelphia v. WCAB (Greby), No. 924 C.D. 2008 (Decision by Judge Cohn Jubelirer, March 27, 2009).

CREDIT/PENALTY/UNREASONABLE CONTEST

- Where the claimant suffered a compensable work injury prior to the enactment of Act 57 the employer was allowed to take an offset/credit for pension benefits as long as those benefits were paid in lieu of workers' compensation and not in the nature of the deferred compensation.

- Prior to the enactment of Act 57 the test for whether pension benefits could be offset against workers' compensation benefits depended upon whether the pension payments were made as a result of the claimant's inability to work. If payments were made only due to an accrued entitlement buildup as a result of claimant's employment, such as wages, no offset was permitted. If, however, the payments were made in lieu of workers' compensation, the employer was entitled to the offset.

- Even before the enactment of Act 57 the Court limited the amount of offset/credit to which an employer was entitled based on how much the benefits were paid for by the employer.

- The imposition of a penalty and the amount of the penalty to be imposed if left to the sound discretion of the WCJ. Therefore, the WCJ's decision to impose the penalty will not be overturned on appeal absent an abuse of discretion. The employer was subject to a penalty pursuant to Section of 413(b) where it unilaterally suspended the claimant's compensation to take the pension credit offset. Section 413(b) specifically provides that an insurer who suspends, terminates, or decreases the payments of compensation without submitting an Agreement or Supplemental Agreement or without filing a petition to obtain the appropriate order is subjected to penalties.

- The employer was subjected to unreasonable contest attorneys in defense against the claimant's Penalty Petition where it unilaterally suspended the claimant's workers' compensation benefits without following the proper procedures, which was a clear violation of 413(b) of the Act.

City of Philadelphia v. WCAB (Calderazzo), No. 923 C.D. 2008 (decision by Judge Cohn Jubelirer, March 27, 2009).