**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:**
**MARCH 2008 AT A GLANCE**
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## LOSS OF USE

- Section 413(a) will time bar a Petition Seeking Specific Loss Benefits where the petition was filed outside the 500-week suspension period.

  The limitations of period in the second paragraph the Section 413(a) applies to new claims for specific loss arising where an employer's liability has been established.

- The 500-week limitation period set forth by the second paragraph of Section 413(a) barred a claim for Specific Loss notwithstanding the language of the first paragraph of Section 413(a) that states that WCJ may ***at any time*** review, modify or set aside a supplemental agreement "under any petition pending before such as WCJ, if it be proved that such agreement was in any material respect incorrect."

*Romanowski v. WCAB (Precision Coil Processing), No. 1174 C.D. 2007 (Decision by Judge Simpson, March 12, 2008).*

## MEDICAL EXPENSE/MEDICAL BENEFIT

- The Pennsylvania Supreme Court reverses the Commonwealth Court and holds that under proper circumstances a Van and the modification of the van to make it wheelchair assessable, does qualify as an orthopedic appliance, and the employer/carrier would be responsible for payment of the Van and its required modification. Proper circumstances would exist where the need for the purchase of the modified van is a direct result of the claimant's work injury and the van directly addresses the lack of mobility caused by that work injury.

  The entire van and not just the cost of retrofitting the van to be wheelchair accessible must be borne by the employer as a compensable orthopedic appliance. The court reasons that to hold that the employer is not responsible for the cost of van but only for its retrofitting would result in two classes of claimants: Those claimants who can afford to purchase a van would receive the retrofitting benefits that allow them to become mobile while those less financially fortunate, who lack the funds to purchase a van, would not be able to avail themselves to the retrofitting benefit.

  The extent of the employee's liability to purchase a van may and should vary depending on the particular circumstances affecting the claimant. Nothing in the Act would require that the van be brand new. In addition, the claimant prior lifestyle and resources may be relevant in fixing the proper expense borne by the

employer to secure an appropriate vehicle. Thus, the circumstances of the claimant who already owned a van prior to his injury will be different from circumstances of the claimant who owned a smaller vehicle not suitable for wheelchair accessible modification or a claimant who owned no car at all but relied upon walking, public transportation and other means of travel. Therefore, the van in its entirety and not just the cost of retrofitting the van will be compensable where the claimant did not have access to a vehicle that was adequate to transport him and his wheelchair.

- The Pennsylvania Supreme Court further reverses the Commonwealth Court and holds that the employer/carrier is responsible for payment of 100% of the cost of the Van and its retrofitting.(The Commonwealth Court had that held that the employer was only obliged to pay for 80 percent rather than 100 percent the cost of retrofitting the van because pursuant to Section 306(f.1)(3)(i) there was an 80 percent limitation for products and services that are not calculated under the Medicare program.) The Pennsylvania Supreme Court reasons that the 80 percent limitation set forth in Section 306(f.1)(3)(i) solely only applies to services offered by a provider, who is defined as a healthcare provider by Section 109. By contrast, Section 306(f.1)(1)(ii), which is the section that requires the employer to pay for an orthopedic appliances, does not require the existence of a healthcare provider.

  Accordingly, whereas services/devices proscribed by a healthcare provider, which are not identified in the Medicare reimbursement schedule, must be reimbursed at 80 percent of their value. By contrast, the 80 percent limitation will not apply to an orthopedic appliance for which a provider does not seek reimbursement. The employer would have to pay 100 percent of the cost of both the van and the cost of retrofitting the van because the retrofitted van is an orthopedic appliance, acquired from an entity that is not a healthcare provider. An automobile dealer does not provide healthcare services within the meaning of the definition.

- The term orthopedic appliance as used in the Act is a broad one. Webster's New World Dictionary defines orthopedics as the branch of surgery dealing with the treatment of deformities, disease, and injuries of the bones, joints and muscles, etc. Appliance, a commonly understood word, is defined in the same source as a device or machine for the performing a specific task, especially one that is worked mechanically or by electricity.

Griffiths v. WCAB (Seven Stars Farm, Inc.) 148 MAT 2005 (Decision by Chief Justice Castille, Decided March 19, 2008).

**URO/MEDICAL BILLS**

- Section 306(f.1)(6) of the Workers' Compensation Act (Act) permits an employer to seek Utilization Review to determine if the medical treatment provided to a claimant is reasonable and necessary by having that treatment peer reviewed by health care professionals. The regulations governing the UR process are found in 34 Pa. Code §§127.401-479. Under those regulations, UR

must be completed within 30 days of a request for Utilization Review. Once the request for UR is filed, the appointed URO is required to request medical records from the provider under review in writing. A medical provider whose treatment is under review is required to mail those records to the URO within 30 days. If the medical provider does not mail the records within the 30 days, the treatment will automatically be found to be unreasonable or unnecessary.

- The standard of whether a provider has conformed to the 30 day requirement of 34 Pa. Code §127.464(a) is whether within 30 days of the date of request of the records, the provider ***mailed*** those records. It is ***not*** whether the URO received those records from the provider within 30 days.

  Moreover, since this regulation does not contain a provision detailing how to calculate when a document is to be received i.e. the requirement that the mailing must contain an official United States postmark, the provider timely provided its records where it mailed its records to the URO using a privately metered postmark on the 30th day from the request of the records.

*Sueta v. WCAB (City of Scranton), No. 1905 C.D. 2007 (Decision by Judge Pellegrini, March 7, 2008)*

**RETIREMENT/VOCATIONAL**

Normally, to establish a claimant's earning power, an employer must demonstrate suitable employment was made available to the claimant. However, an employer is not required to offer suitable alternative employment when a claimant has left the workforce having no intention of working because the claimant would not accept it when proffered.

Where a claimant voluntarily accepts a pension the claimant is presumed to have left the workforce unless the claimant can establish that (1) he is seeking employment or (2) the work-related injury forced him to retire. Once the claimant establishes either, the employer can only modify benefits by offering suitable alternative employment but the employer will not be able to suspend the claimant's compensation based upon a finding that the claimant has voluntarily removed himself from the workforce due to retirement.

To show that he has not left the workforce under the second prong of this test, the claimant has to establish that he was incapable of working at any job in the entire labor market, not just that he was incapable of performing his pre-injury position. The claimant can also prove that he has not left the workforce by showing that he is seeking employment by engaging in a good faith job search. The claimant does not have to show that he has attempted to secure employment in all areas, but only those jobs that are within his physical limitations or unsuitable for valid reasons.

Moreover, when a claimant does not accept suitable alternative employment offered by the employer, that does not necessarily mean that the claimant has left the workforce. All that means is that the claimant failed to apply for those jobs because he found those jobs personally unappealing. If evidence accepted by the WCJ leads to the conclusion that a claimant, whose work-related injury forced him to accept pension, is otherwise engaged in a good faith job search, then the claimant cannot be found to have left the workforce and cannot allow for suspension of benefits. Nonetheless, because the claimant is not entitled to refuse a job otherwise suitable because he finds it unappealing, an employer is entitled to a modification of benefits if the claimant refuses to apply to take a personally unappealing job.

*Mason v. WCAB (Joy Mining Machinery), No. 1906 C.D. 2007 (Decision by Judge Pellegrini, March 18, 2008).*

## STATUTE OF LIMITATIONS/PETITION FOR REINSTATEMENT

- Section 413(a) contains two limitation provisions.

  First, a claimant may file a Petition To Modify or Reinstate Benefits from a Notice of Compensation Payable within three years of the most recent payment of compensation.

  Second, when the claimant's compensation has been suspended, the claimant must seek benefits by petition filed within 500 weeks of the first day of suspension.

- Section 413(a) will time bar a Petition Seeking Specific Loss Benefits where the petition was filed outside the 500-week suspension period.

- The time bar of 413(a) would render untimely a Petition for Reinstatement filed outside the 500 week suspension period even where the clamant alleges he was entitled to partial disability during the period his compensation was suspended because his pre-injury average weekly wage was inaccurately calculated.

- The 500-week limitation period set forth by the second paragraph of Section 413(a) barred both the claim for Specific Loss and the Reinstatement notwithstanding the language of the first paragraph of Section 413(a) that states that WCJ may ***at any time*** review, modify or set aside a supplemental agreement "under any petition pending before such as WCJ, if it be proved that such agreement was in any material respect incorrect."

*Romanowski v. WCAB (Precision Coil Processing), No. 1174 C.D. 2007 (Decision by Judge Simpson, March 12, 2008).*