THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
MAY 2008 AT A GLANCE
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AGGRAVATION/RECURRENCE

- Whether a disability is an aggravation or recurrence depends upon the factual determination by the WCJ as to whether or not the later incident materially contributed to the condition causing disability at issue. If so, it is an aggravation; if not, it is a recurrence.

- Where the claimant suffered an initial injury to his right elbow on July 17, 1997 when employed by Pope and then suffered a second injury on July 21, 1999 when employed by Plainwell, who had purchased the business from Pope, the WCJ was not precluded from finding Plainwell liable for his 1999 injury solely because Plainwell was not named as a defendant by the claimant in his Claim Petition. This is because Plainwell had filed a Petition for Termination and its Petition for Termination was consolidated along with the claimant's Claim Petition against Pope and therefore it was a party to the litigation.

Pope & Talbot v. WCAB (Pawloski), No. 1193 C.D. 2007 (Decision by Judge Leavitt, May 21, 2008).

ATTORNEY FEES

- Under the Act, the WCJ is given the authority in the first instance to determine what constitutes a reasonable sum for attorney's fees. Consistent with the directives of Section 440(b) of the Act, the WCJ is required to consider an acceptable level of time and effort required to litigate a claim on a claimant's behalf. As long as the amount and difficulty of the work performed by claimant's attorney is reasonably related to the fee awarded, the Court will not disturb the WCJ's appeal.

City of Philadelphia v. WCAB (Andrews), No. 1915 C.D. 2007 (Decision by Judge Flaherty, May 12, 2008).

ATTORNEY FEES/ PENALTIES

- The Security Fund is not subject to attorney fees for unreasonable contest pursuant to Section 440(a) because the Security Fund is not an insurer as the term is defined by the Act. The Security Fund is a statutorily created entity that pays workers' compensation benefits.

- Likewise, the Security Fund is not subject to penalties for violations of the Act because it is not included in the definition of the term insurer in Section 401 of the Act.

Lebanon Valley Brethren Home v. WCAB (Flammer), No. 2016 C.D. 2007 (Decision by Judge Leavitt, March 11, 2008).

BANKRUPTCY

- The administration of workers' compensation claims by the Commonwealth of Pennsylvania is a valid exercise of its police power and, thus, exempt from the automatic stay pursuant to 11 U.S.C. §362(b) (4) of the federal bankruptcy code. The outcome of an employer's Chapter 11 bankruptcy is also irrelevant to a workers' compensation matter because the claims of injured workers are guaranteed by statutory funds. These funds assume the obligation to make workers' compensation payments to claimants by either their employer or the employer's insurer becomes insolvent.

- A claimant is protected where an insurer has become bankrupt by the Workers' Compensation Security Fund. A claimant is protected from a bankrupt self insured employer by the Self Insurance Guarantee Fund

Pope & Talbot v. WCAB (Pawloski), No. 1193 C.D. 2007 (Decision by Judge Leavitt, May 21, 2008).

CLAIM PETITION/LITIGATION COSTS/ MEDICAL EXPENSES

- The WCJ's decision that denied the claimant's Claim Petition that sought payment of ongoing total disability was supported by substantial evidence where the Employer's answer admitted that the injury took place and agreed to pay reasonable and necessary medical expenses but denied that claimant was disabled because of the injury. This is because the WCJ found the posted panel physician who saw the clamant one-day following her injury credible to the extent he testified that work injury occurred but rejected all testimony indicating claimant suffered a compensable disability.

- In a claim proceeding the claimant bears a burden of proving all elements necessary for an award. The claimant must establish she sustained an injury during the course and scope of her employment and that the injury is casually related to the employment. In addition, the claimant must prove the work injury resulted in a disability, which is defined into wage loss, that continues for the period for which benefits are sought.

  The claimant failed to meet her burden to prove she suffered a compensable injury with the disability lasting to more than seven days where the WCJ found credible the employer's panel of physician who examined the clamant the day following her injury and testified based upon the claimant's history, physical and neurological examination and CAT scan, that the claimant could have returned to work three days after the work injury occurred.

- A claimant who files a Claim Petition carries the burden of proving not only that medical expenses are causally connected to the work injury, but also that they are reasonable and necessary. This includes demonstrating the ongoing nature of the injury during the period for which medical benefits are sought. The claimant did not prove that her medical treatment was reasonable and necessary subsequent to the June 20, 2006, which was the date the employer's independent medical examiner opined that claimant had fully recovered from all neurologic injuries and required no further medical treatment.

- Litigation costs are properly denied where the claimant does not prevail on any disputed issue before the WCJ. Therefore, the WCJ properly did not order reimbursement of litigation costs where the employer's responsive pleadings to the Claim Petition admitted claimant was "entitled to reasonable, necessary medical expenses related to a contusion of the head" and the WCJ found the claimant credible that she suffered a work injury could but found the claimant suffered no disability, defined as wage loss, as a result of that injury because she was not disabled more than three days.

Watson v. WCAB (Special People in Northeast and East Trust Management), No. 1924 C.D. 2007 (Decision by Judge Simpson, May 30, 2008).

CREDIT

- For injuries occurring prior to the 1996 amendments to the Act, known as Act 57, a credit was allowed for pension benefits paid in lieu of compensation. The factors under this prior analysis varied in response to the facts of each case. These factors include the employee's contribution to the pension, if any; whether the benefits could be depleted; whether pension payment amounts would vary depending on years of service; whether the pension ceased upon recovery from the disability, and the pension vesting period. The most critical factor, however,

was whether the disability pension was an accrued entitlement that has been built up as a result of services for the employer, and represents deferred compensation, or payments in relief of inability to labor.

Section 204(a) of the Act was amended by Act 57 and this section provides that the benefits of the pension plan shall be credited against the workers' compensation award to the extent fully funded by the employer directly liable for the payment of compensation received by the employee. This section applies only to injuries sustained after the effective date of Act 57. The employer may take a credit pension benefits received from a defined benefit and defined contribution plan to the extent it funded those benefits.

The employer's right to a pension offset granted Act 57 case is no longer dependent upon whether the pension constitutes payment in lieu of compensation. Nor does it matter that the pension is a service connected disability. In order to obtain a pension offset pursuant to Section 204(a) of the Act the employer must present evidence of the extent to which it funded the pension plan.

- There are generally two types of pension plans:

  1. A Defined-Contribution Plan is a plan that provides for an individual account for each participant and for benefits based solely upon the amount of accumulated contributions and earnings in the participant's account. Because the account is individualized, employer contributions to the employee's pension are easily ascertained.

  2. A Defined-benefit plan is a pension 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. Where there is a defined-benefit plan, an employer cannot meet its burden of establishing the amount of its offset absent actuarial testimony

  With respect to either plan, the employer bears the burden of proving the extent to which it funded the pension plan in question. Once the employee's contribution to claimant's monthly pension is determined, that number will be divided by 4.34 to obtain its weekly offset pursuant to regulation 84 Pa. Code Section 123.9(a).

- An employer who unilaterally ceased paying claimant workers' compensation benefits in 2002 and did not resume making any amount of indemnity payments until a stipulation entered into in 2005 violated the Act irrespective of the fact that the employee took the credit for a Service Connected Pension. This is because an employer cannot cease paying a claimant workers' compensation benefits absent some event that relieves the employer of its obligation. Unilateral cessation of claimant's benefits triggers the penalty provisions of the Act. Prior to taking a credit for a pension offset a Notice of Workers' Compensation Benefit Offset

must be provided to the claimant at least 20 days prior to taking any offset for pension benefits. The Notice of Workers' Compensation Benefit Offset must be filed even where the claimant is receiving a service connected disability pension.

- An employer is subject to penalties whether it violates a statute of the Act or a regulation that interprets the Act. The employer who violated Bureau Regulation 123.4(b) that states a claimant must be provided with a Notice of Compensation Benefit Offset at least 20 days prior to taking any offset for pension benefits was subject to penalties where it failed to do so.

- Under the Act, the WCJ is given the authority in the first instance to determine what constitutes a reasonable sum for attorney's fees. Consistent with the directives of Section 440(b) of the Act, the WCJ is required to consider an acceptable level of time and effort required to litigate a claim on a claimant's behalf. As long as the amount and difficulty of the work performed by claimant's attorney is reasonably related to the fee awarded, the Court will not disturb the WCJ's appeal.

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JOINDER

- An employer can pursue the defense that the claimant's injuries are the liability of another employer without having to join that second employer. The filing of a Joinder is permissive and not mandatory under the claim language of the Act. Moreover, in the context of the Claim Petition the claimant bears the burden of proving all the elements required for an award of workers' compensation benefits. The employer is free to defend against the Claim Petition by alleging that it is the prior employer who is liable for the recurrence. It is the claimant who should commence litigation of both his present and prior employer by filing a Claim Petition and either a Reinstatement or Review Petition.

- Where the claimant suffered an initial injury to his right elbow on July 17, 1997 when employed by Pope and then suffered a second injury on July 21, 1999 when employed by Plainwell, who had purchased the business from Pope, the WCJ was not precluded from finding Plainwell liable for his 1999 injury solely because Plainwell was not named as a defendant by the claimant in his Claim Petition. This is because Plainwell had filed a Petition for Termination and its Petition for Termination was consolidated along with the claimant's Claim Petition against Pope and therefore it was a party to the litigation.

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LITIGATION COSTS

- Litigation costs are properly denied where the claimant does not prevail on any disputed issue before the WCJ. Therefore, the WCJ properly did not order reimbursement of litigation costs where the employer's responsive pleadings to the Claim Petition admitted claimant was "entitled to reasonable, necessary medical expenses related to a contusion of the head" and the WCJ found the claimant credible that she suffered a work injury could but found the claimant suffered no disability, defined as wage loss, as a result of that injury because she was not disabled more than three days.

Watson v. WCAB (Special People in Northeast and East Trust Management), No. 1924 C.D. 2007 (Decision by Judge Simpson, May 30, 2008).

NOTICE OF MODIFICATION/SUSPENSION/ SUBSTANTIAL EVIDENCE

- Substantial evidence supported the WCJ's finding that the claimant filed a timely Challenge to the employer's Notice of Modification where the Notice of Modification was issued on November 22, 2004, which was the same date that the claimant returned to work, and the claimant filed the challenge on December 20, 2004. This was because the Act specifies that the time period to file a challenge runs from the date of the receipt of the notification by the claimant and substantial evidence supported the claimant's testimony that the notice was received by him on November 29, 2004 and therefore claimant timely challenged the Notice of Modification within 20 days of receipt.

- Upon performing a substantial evidence analysis, the Commonwealth Court must view the evidence in light most favorable to the party who prevailed before the fact finder. Moreover, the Commonwealth Court is to draw all reasonable inferences, which are deducible from the evidence in support of the fact finder's decision to favor that prevailing party.

  The WCJ's inference that the claimant did not receive the Notice of Modification until November 29, 2004 was supported by the unascertained beginning point for the document to travel, the unknown time of the day and manner of mailing, the uncertain distance to be covered by the document, the ultimate out of state destination (the claimant lived in Virginia), the intervening holiday (Thanksgiving), and the lack of direct evidence to the contrary. Moreover, no party offered direct evidence of the date of receipt, although both parties had an equal opportunity to inquire of the claimant regarding that issue.

WAWA v. WCAB (Seltzer), No. 2292 C.D. 2007 (Decision by Judge Simpson, May 22, 2008).

OCCUPATIONAL DISEASE/STATUTE OF LIMITATION/STATUTE OF REPOSE

- A Fatal Claim Petition was barred by the statute of repose where the decedent's underlying Claim Petition was granted on July 11, 2000 by a decision that found on October 13, 1997 the claimant was injured and disabled as a result of work-related non-Hodgkin's lymphoma as a result of exposure to solvents at work and the decedent died on April 4, 2005, which was more than 300 weeks after the date of injury. Because decedent's death occurred more than 300 weeks after the injury, claimant's fatal Claim Petition was barred by Section 301(c)(1).

- The decedent's non-Hodgkin's lymphoma, though disease like, is not a disease within the scope of Section 108 of the Act. It is true that a claimant can establish a right to benefits for an injury in the nature of a work-related disease. However, the fact that the Courts recognize a work-related disease as an injury under Section 306(c)(1) does not mean that all work-related diseases are recognized as occupational diseases under Sections 108 or 301(c)(2) of the Act.

Brockway Pressed Metals v. ACE USA v. WCAB (Holben), No. 43 C.D. 2008 (Decision by Judge Friedman, May 12, 2008).

SUBROGATION

- A determination of whether an employer or its insurer is entitled to subrogation falls within the exclusive jurisdiction of the workers' compensation authorities. The Common Pleas lacks the jurisdiction to adjudicate the right of subrogation. Since the Common Pleas Court cannot decide subrogation rights and where there was no indication when the claimant's Abuse of Process Action, pending in the Court of Common Pleas, would be resolved, the WCJ's refusal to grant an indefinite stay of the litigation resulting from the employer's petition seeking payment of its subrogation lien was not grounds for reversal.

  (The claimant had argued that a successful determination on it Abuse of Process claim would support its argument that the employer engaged in deliberate bad faith precluding its right to Subrogation pursuant to the Pennsylvania Supreme Court decision of Thompson v. WCAB (USF&G Co.), 566 Pa. 240, 781 A.2d 1146 (2001) that stated that although right to subrogation under Section 319 is absolute, subrogation may be inappropriate in the face of deliberate bad faith conduct by the employer.)

- Although the Supreme Court in Thompson stated in dicta that subrogation would not be appropriate in the face of deliberate bad faith conduct on the part of employer, the claimant did not prove bad faith of the employer where it merely offered into evidence Complaints and other filings pertaining to abuse of process action that he had filed in Civil Court against the employer and its carrier.

- Pursuant to Section 401 of the Act, the term employer includes the insurer if such an insurer has assumed employer's liability. Where the insurer assumed liability for the claimant's work injury the insurer was entitled to subrogation awarded against the claimant's third-party recovery.

Stout v. WCAB (Pennsbury Excavating, Inc.), No. 1969 C.D. 2007 (Decision by Judge Simpson, May 22, 2008).

REASONED DECISION

- To constitute a reasoned decision within the meaning of Section 422(A) a WCJ's decision must permit adequate appellate review. Section 422(A) does not require the WCJ to discuss all of the evidence presented. The WCJ is only required to make the findings necessary to resolve the issues raised by the evidence and relevant to the decision.

Stout v. WCAB (Pennsbury Excavating, Inc.), No. 1969 C.D. 2007 (Decision by Judge Simpson, May 22, 2008).

VOCATIONAL

- Pursuant to Kachinski a job is actually available to a claimant only if the job can be performed by the claimant having regard for the claimant's physical restrictions limitations and other relevant considerations. Other relevant considerations include factors such as geographic accessibility of a referred position in relation to the claimant's place of residence.

- Where the claimant had lost his license due to a DUI conviction, the employer had the burden of proving that the claimant could commute to the job by showing access to some form of transportation such as public transportation or a car pool arrangement. The employer failed to meet its burden where it submitted into evidence a bus schedule and the WCJ determined, based upon her review of the schedule, that none of the offered jobs were accessible by public transportation.

- The Commonwealth Court adds a comment in a footnote that the fact that the claimant was not able to drive to and from work because of a DUI conviction and not because of the work injury did not relieve the employer of its burden to show that the claimant had available transportation.

PA Department of Corrections/SCI – Greensburg v. WCAB (Cvara), No. 1614 C.D. 2007 (Decision by Judge Smith Ribner, Decided May 12, 2008).

- An employer is not required to offer suitable alternate employment to a claimant when the claimant has left the work force having no intention of working because the claimant would not accept the job when offered. Where the claimant has accepted a pension, the claimant is presumed to have left the work force entitling an employer to a suspension of benefits unless the claimant establishes that 1) he is seeking employment or 2) the work-related injury forced him to retire.

- The duty of good faith has been defined as honesty and fact in conduct or transaction occurred. To show good faith then the claimant has to show that he has honestly undertaken efforts where an employer knows he is seeking employment.

- Where the claimant did not contend that his work injury forced him to retire the only question was whether the claimant sustained his burden of showing that he was actively seeking employment. To show that he was actively seeking employment, claimant has to show that he engaged in a good faith job search. Searching the internet and newspaper ads for jobs, without more, does not constitute a job search; it constitutes "surfing" the web and reading the newspaper – it is window shopping. To show that he was engaged in a good faith job effort, a claimant has to show he applied for or sent applications for employment or other indicia that he was actively applying for employment.

The Pennsylvania State University v. WCAB (Hensal), No. C.D. 2007 (Decision by Judge Pellegrini, May 19, 2008).

PENALTIES

- An employer is subject to penalties whether it violates a statute of the Act or a regulation that interprets the Act. The employer who violated Bureau Regulation 123.4(b) that states a claimant must be provided with a Notice of Compensation Benefit Offset at least 20 days prior to taking any offset for pension benefits was subject to penalties where it failed to do so.

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