THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
MAY 2009 AT A GLANCE
BY MITCHELL I GOLDING, ESQ.
KENNEDY& LIPSKI
(W) 215-430-6362

SUSPENSION/FORFEITURE (REFUSAL TO ACCEPT REASONABLE AND NECESSARY MEDICAL TREATMENT)

- The employer's remedy pursuant to Section 306(f.1)(8) resulting from a claimant's refusal to accept reasonable and necessary medical treatment is not monetary; rather, it is the ability to force a claimant to choose between the recommended medical treatment or foregoing compensation because the medical treatment was refused. There is nothing in Section 306(f.1)(8) that permits an employer to obtain a credit against future earnings.

- Section 306(f.1)(8) is analogous to a Suspension or Termination Petition in which the employer has no right to recovery from the claimant due to the latter's unjust enrichment. Section 306(f.1)(8) does not authorize a deduction from future benefits for noncompliance with the Act.

- The employer is not entitled to request a supersedeas and/or receive reimbursement from the Supersedeas Fund based upon the Petition for Suspension that is filed as a result of the claimant's refusal to accept reasonable and necessary medical treatment.

- An employer seeking forfeiture of benefits under Section 306(f.1) (8) bears the burden of demonstrating that the claimant is no longer entitled to benefits. The question is whether treatment was reasonable, not whether claimant's refusal was reasonable. A claimant who refuses reasonable medical or surgical procedures that would improve his condition and lessen his disability should not be permitted to continue to collect benefits for a permanent loss.

- The employer is entitled to a credit against future compensation under limited circumstances where the claimant received an erroneous overpayment of compensation as a result of a clerical error. However, the credit is only permitted to modify clerical errors in existing agreement. No clerical error is involved where a claimant refuses to accept reasonable and necessary medical treatment under Section 306(f.1)(8).

  Therefore, the employer was not entitled to a prospective credit against the claimant's compensation entitlement where the claimant refused to accept reasonable and necessary medical treatment in the form of shoulder surgery from

December 20, 2005 through the date the surgery was performed upon him December 14, 2006 where the employer filed a Petition To Suspend on October 27, 2006 but the WCJ did not issue a decision granting the petition until April 11, 2007.

Lisanti Painting Company v. WCAB (Starinchak), (decision by Judge McGinley, May 5, 2009). 6/09

SUPERSEDEAS FUND REIMBURSEMENT

- An employer was entitled to reimbursement from the Supersedeas Fund where after litigating a Petition for Suspension and Termination it resolved the issue of future liability with a Compromise and Release Agreement but made clear within the Agreement that the parties intended to keep open the issue of existing liability up to the date the Compromise and Release Agreement was approved and the Judge subsequently granted the employer's Petition for Suspension.

  The facts in this case, which permitted reimbursement from the Supersedeas Fund, were distinguished from the factual scenario where a Compromise and Release Agreement contained broad release language but did not contain any language leaving any particular issues open for determination by the WCJ upon approval of the Compromise And Release Agreement. Under this latter scenario, reimbursement from the Supersedeas Fund was not permitted.

- Each of the following five elements must be satisfied for the employer to obtain reimbursement from the Supersedeas Fund:

  1. A supersedeas must have been requested;
  2. The request for supersedeas must have been denied;
  3. The request must have been made in a proceeding
  under Section 413 of the Act [77 P.S. §§ 771-74];
  4. Payments were continued because of the order denying the supersedeas; and
  5. In the final outcome of the proceedings "it is determined that such compensation was not, in fact, payable.

Department of Labor and Industry, Bureau of Workers' Compensation v. WCAB (Ethan-Allen Eldridge Division), No. 1600 C.D. 2008 (Decision by Judge Cohn Jubelirer, May 6, 2009). 6/09

MEDICAL TESTIMONY

- There are no "magic words" a medical expert must say to establish causation and reviewing bodies are not permitted to pick one or two sentences out of context – rather, the testimony as a whole must contain a requisite level of certainty necessary to deem it unequivocal. Testimony is equivocal when the medical

expert merely assumes that a work-related injury is work-related based on temporal proximity to a work event.

- The claimant's medical expert's testimony was not equivocal where the physician relied on a definite and documented injury at work requiring hospital treatment as well as corroborating medical documents that Claimant had indeed suffered an injury while lifting a heavy object and had sought emergency treatment where the WCJ found the claimant's testimony that he suffered a work injury credible and the doctor's opinion that the injury was work-related was not based upon an assumption that claimant's injuries could have caused such injuries but rather that if the accident occurred as claimant described then it was a cause of those injuries.

Moyer v. WCAB (Pocono Mountain School District), No. 156 C.D. 2009 (decision by Judge Pellegrini, May 21, 2009). 6/09

UTILIZATION REVIEW

- Regulation 127.459(c) provides:

The provider under review, or his agent, shall sign a verification that to the best of his knowledge, the medical records provided constitute the true and complete medical chart as it relates to the employe's work injury.

Because regulation 127.459(c) makes it mandatory that a signed verification form be provided to the URO, the failure to do so is the same a providing no medical records. Without such a form, the URO cannot say with certainty that the records are accurate, and that penalties for false attestation cannot be imposed if knowingly false records are submitted or other records are deleted.

Accordingly, where the URO followed the required procedures in attempting to obtain medical records for review but the provider under review failed to submit a verification with those records, the URO had no choice but to deem the treatment unreasonable and unnecessary because the records were not properly submitted due to lack of the required verification form and the WCAB did not commit an error of law by reversing the WCJ's granting of a Petition Seeking Review Of A UR Determination.

Sexton v. WCAB (Forest Park Health Center), No. 1225 C.D. 2008 (decision by Judge Pellegrini, May 22, 2009). 6/09