THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
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Credit

- Pennsylvania Supreme Court holds that a furlough allowance is not a severance benefit pursuant to Section 204(a) of the Act and therefore an employer is not entitled to a credit against the workers' compensation payment for the furlough allowance it paid to the claimant.

  Severance benefits are occasioned by severance from employment. They are payable only when a worker's employment has been completely and permanently terminated. According to Black's Law Dictionary, the term "severance pay" means "money (apart from back wages or salary) paid by an employer to a dismissed employee."

  By contrast, furlough is defined as "a leave of absence from military or other duty." Therefore, according to Black's Law Dictionary, a severance benefit, unlike a furlough, is contingent on the dismissal of an employee.

Moreover, the Bureau has defined "severance benefit" at 34 Pa. Code Section 123.2 as follows:

> *Severance benefit -- A benefit which is taxable to the employe and paid as a*
> *result of the employe's separation from employment by the employer liable for the payment of workers' compensation, including benefits in the form of*
> *tangible property. The term does not include payments received by the employe based on unused vacation or sick leave or otherwise earned income.*

Thus, the regulatory definition of severance benefits specifically excludes unused vacation or sick leave or otherwise earned property. The Court views the furlough benefit as analogous to vacation and sick leave and as "otherwise earned income."

The furlough allowance, like sick or vacation leave, is something to which claimant would have been entitled regardless of whether he had been injured. An employer of an employee injured at work cannot pay for the resulting disability with the claimant's sick or vacation pay. Similarly, an employer cannot force the

employee to bear the cost of his work-related injury by exhausting his accrued furlough allowance.

- The Courts have a long history of prohibiting employees from taking a credit against workers' compensation for payments made for these forms of earned benefits. It is repugnant to the intent of the Act to require an employee to expend benefits which he labored to accrue, and which are payable, exhaustible, and, again, accruable, like sick and vacation pay to compensate himself after a work injury.

- Section 204(a) provides that the employer is entitled to credit against workers' compensation benefits for four specific narrowly defined types of payments: unemployment compensation, old age benefits under the Social Security Act, pension benefits and severance benefits Furlough benefits are different from severance benefits because severance benefits require a permanent separation from employment whereas a furlough allowance simply means that the employment relationship is held in abeyance.

- The Court offers an analysis of the following payments that are not subject to offset because they constitute payment of accrued benefits or earned income:

  - Death and disability insurance payments made to a disabled employee where those payments were from an accrued benefit similar to a sick leave.

  - Sick leave, which like vacation pay and wages, is an entitlement for services performed as opposed to payments in lieu of compensation. Sick pay received by an injured employee during the same period that disability benefits were paid where the claimant would lose a right to equivalent sick time upon his return to work.

  - Vacation pay

  - Disability pension, if it is an accrued entitlement which has been built up as a result of services for the employer or if the claimant would be entitled to the disability pension regardless of whether he had suffered a compensable injury.

  - Supplemental Unemployment Benefits, where those benefits were in the nature of wages, being an accrued entitlement and receipt of such payments required claimant to expend an exhaustible benefit.

Kelly v. WCAB (US Airways Group, Inc.) No. 50WAP 2008. (Decision by Justice Baer, April 9, 2010.) 5/10

INTOXICATION DEFENSE/NOTICE OF TEMPORARY COMPENSATION PAYABLE/MEDICAL TESTIMONY

- The General Assembly's use of the term "but for" in Section 301(a) in relation to an employer's intoxication defense means that an employer asserting an employee's intoxication as an affirmative defense must establish "that intoxication was a cause in fact of an injury".

  The employer's sole burden is to convince a fact finder by competent and substantial evidence that claimant would not have fallen and sustained his injuries had he not been intoxicated. It is up to the fact finder to infer from the evidence as a whole whether a claimant's intoxication caused his injury.

  This burden is distinguished from the causation or cause in fact standard in negligence cases that requires a direct causal connection between the individual's negligence and the injury sustained, meaning that "the harmful result would not have come about but for the negligent conduct."

- Upon delivering a causation opinion in a workers' compensation case, a doctor or medical expert is not required to use magic word such as "substantial contributing factor," "materially contributed," or "cause in fact". Rather, it is only necessary that the doctor's testimony permit a valid inference that such causation was present.

- Section 406.1 mandates that in order for a Notice Stopping Temporary Compensation Payable (NSTCP) to be timely, must be sent or filed no later "in five days after last payment."

  Where an employer pays benefits in advance, the relevant day for calculating the date of the last payment is the last date through which the claimant is scheduled to receive benefits.

  Therefore, where the claimant received his last payment on February 11, 2003 but the last date of payment cycle for which he was receiving benefits was February 20, 2003, the employer did not violate Section 406.1 of the Act by issuing the NSTCP on February 21, 2003. This was because the claimant was paid through February 20, 2003 and the NSTCP was issued one day later.

Thomas Lindstrom Company, Inc. v. WCAB (Braun), No. 1815 C.D. 2009 (decision by Judge Pellegrini, April 13, 2010). 5/10

UTILIZATION REVIEW

- The provider, who was the subject of a UR request, failed to provide his records to the URO within 30 days of the date their request, thereby justifying a determination that the treatment under review was not reasonable and necessary pursuant to Regulation 127.464(a), where the provider timely mailed an encrypted CD-Rom to the URO purportedly containing claimant's medical records but failed to inform URO of the password and provide direction to the URO on how it could gain access to those records.

  The failure to provide the URO the password to the CD-Rom rendered the records contained therein useless because, without access to those records, the URO could forward the records to a peer review. This rendered the CD-Rom received by the URO the equivalent of a blank CD-Rom.

- Neither a WCJ nor the Board has jurisdiction to determine the reasonableness of medical treatment unless and until a report is issued by a Reviewer and the URO issues a determination. None of these review procedures are possible, and the purpose behind 34 Pa. Code § 127.464 is thwarted, if a Provider fails to send usable and readable medical records to the URO.

- Although there is no rule or regulation prohibiting a provider from sending medical records on a CD-Rom and the provider did nothing improper by securing the content of the CD-Rom by password, the provider acted unreasonably by failing to inform the URO about how it could open the file.

- Although Regulation 127.464 does not specifically address the format in which medical records must be supplied to the Utilization Review Organization upon request, it is implicit in the regulations the requirement for the provider to supply the records of a claimant in a useable format that allows the URO to engage in the review process. The review process is set forth in the regulations, which require the URO to forward the medical records from the provider to Reviewer, licensed and specialized in the same area as the provider under review, so that the Reviewer may make a determination on the merits of the claimant's medical treatment.

Shaw v. WCAB (Melgrath Gasket Co.), No. 1871 C.D. 2009 (decision by Judge Cohn Jubelirer, April 21, 2010). 5/10

VOCATIONAL/ EVIDENCE

- The issue of whether the employer provided the claimant with "prompt written notice" of its obligations under Section 306(b) (3) by its issuance of the LIBC-757

is determined based upon the impact upon the claimant. "Prompt written notice" requires an employer to give the claimant notice of the medical evidence it has received a reasonable time after its receipt lest the report itself becomes stale. It also requires an employer to give notice to the claimant a reasonable time before the employer acts upon the information.

The employer provided the claimant with "prompt written notice" that it had received medical evidence that the claimant was physically capable of returning to work in some capacity where it issued LIBC-757 to the claimant one and a half months following the date of its independent medical examination meaning that the medical information had not gone stale.

- The determination in this matter was distinguished from the Court's holding in a prior decision where LIBC-757 was not promptly issued because five and a half months had passed before the employer supplied the claimant with the LIBC-757, thus the medical report was deemed stale at that time it was issued. This problem had been compounded by the fact that the employer sought to modify the claimant's benefits prior to the issuance of LIBC-757.See Melmark Home v. WCAB (Rosenberg), 946 A.2d 159 (Pa. Cmwlth. 2008).

- The claimant bears the responsibility of raising the issue of a vocational expert's alleged failure to supply him or her with a copy of the Earning Power Assessment/Labor Market Survey and other documents required by regulation 123.204(a-d) as a defense to a modification for the WCJ.

  Moreover, the claimant should raise as a defense any claim that the required documents were not sent to him or his counsel "simultaneously" as that term may be defined when it was sent to the employer or its insurer. Once the issue is raised by the claimant the burden should shift to the employer to establish the Labor Market Survey/Earning Power Assessment was timely and appropriately supplied to the claimant and his counsel.

- Where the claimant failed to raise the issue of the timeliness of his receipt or lack thereof of the Labor Market Survey/Earning Power Assessment in the evidentiary record, the burden never shifted to the employer to establish that this document was appropriately provided. The WCJ was therefore not precluded from considering the results of their earning power assessment interview pursuant to regulation 123.203(c).

  Upon reaching this conclusion, the Court drew an analogy to a holding in a prior case where it held that while Section 306(b) (2) provides that the employer shall offer a claimant a specific job if it has one available, it does not require proof of the absence of specific jobs available with the employer as a prerequisite to pursuing modification. The claimant has a duty to place into the record *prima facie* evidence that a position was available with employer that he was physically capable performing during the time period between the issuance of the Notice of

Ability to Return to Work (LIBC-757) and a filing of the Modification Petition. Once the claimant has done that the employer bears the burden of proof. See Rosenberg v. WCAB (Pike County), 942 A.2d 245 (Pa. Cmwlth. 2008)

- The claimant and claimant's counsel's statement during the vocational interview that they had previously received copies of LIBC-757 was admissible into evidence as an admission by party opponent, which is an exception to the hearsay rule pursuant to Section 803(25) of the Pennsylvania Rules of Evidence

Kleinhagan v. WCAB (KNIF Flexpak Corp.), No. 2009 C.D. 2009 (decision by Judge Flaherty April 22, 2010). 5/10