THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
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TERMINATION FOR CAUSE/ SUSPENSION

- The WCJ did not commit an error of law by denying the employer's Petition for Suspension that alleged that as of December 3, 2007, Claimant's wage loss was due to his post-injury conduct leading to a criminal convictions where upon the WCJ's acceptance of the credibility of the claimant's medical expert who testified that the claimant was disabled from performing his pre-injury position, notwithstanding the employers argument that the claimant's post-injury criminal convictions precluded him from working again as a campus policeman, which the employer argued meant that his wage loss was no longer related to the work injury.

  Moreover, the employer was not entitled to a suspension by virtue of the post injury conviction where the WCJ found that the statutory provisions of 53 Pa. C.S. §§2161-2171 did not provide for an automatic revocation of Claimant's certification or need for re-certification based on Claimant's criminal convictions and the Employer did not submit evidence that Claimant's certificate had actually been revoked submit a letter terminating Claimant from employment.

  Accordingly, there was insufficient evidence to support a finding that Claimant's loss of earnings was unrelated to his work injury and was related to his convictions

University of Pennsylvania v. WCAB (Hicks) No. 2240 C.D. 2010 (Decision by Judge Pellegrini, April 5, 2011)

UTILIZATION REQUEST/ MEDICAL BILLS

- The employer's failure to file a timely appeal following the receipt of an unfavorable UR Determination issued in response to the employer's prospective UR Request that found a Doctors treatment plan included psychotherapy and certain medications for major depressive disorder to be reasonable and necessary did not impose liability and or collaterally estop the employer from denying recognition of major depressive disorder, which meant the receipt of the unfavorable UR Determination did not mean the NCP was amended to recognize the diagnoses of major depressive disorder where the Notice of Compensation Payable only recognized a "lower back strain."

This is because an employer's voluntary payment of the employee's medical expenses is not an admission of liability. More important, nothing in the case law or applicable cost containment regulations suggests that the mere filing of a UR request imposes liability on an employer for a specific injury.

Moreover, 34 Pa. Code §127.405 recognizes that there is a distinction between paying medical expenses and accepting a work injury by specifically allowing an employer to request utilization review in a medical only case even where there has not been an acknowledgment or determination of liability for a work-related injury, with the caveat that the insurer shall be liable to pay for treatment found to be reasonable or necessary by an uncontested UR determination.

Securitas Security Services v. WCAB (Schuh) No. 349 C.D. 2010 (Decision by Judge McCullough, April 4, 2010) (5/11)

UTILIZATION REVIEW/ COLLATERAL ESTOPPEL

- The fact that the claimant's chiropractic treatment was intended to be palliative in nature did not mean that the provider's petition seeking review of the Utilization Review Determination was compensable where the WCJ did not find credible the testimony of the claimant and her doctors that the claimant needed the treatment.

  It is true that treatment may still be reasonable and necessary even when it is designed to manage the claimant's symptoms rather than to cure or permanently improve the underlying condition. However, the credited evidence must establish the need for the palliative treatment in order for the WCJ to determine that it is reasonable and necessary. In meeting its burden, the employer's medical evidence must address the specific treatment on the review.

  Although the UR examiner recognized the treatment under review was supposed to be palliative in nature, he determined that despite years of the same treatment claimant was not getting any benefit from it and therefore concluded that it was not reasonable and necessary and although the claimant testified the treatment provided "some relief" the WCJ rejected the testimony as neither credible nor persuasive and therefore the WCJ's dismissal of the petition seeking Review of Utilization Determination was affirmed.

- The Commonwealth Court has held that the Utilization Review provisions under the Act did not change the general rule that there has to be a change in the claimant's physical conditions from the last UR determination for collateral estoppel not to apply. The provisions did not vitiate the application of the doctrine of collateral estoppel to allow a constant stream of utilization requests where the treatment and claimant's condition remained the same even though time has passed.

In this matter, the employer's second petition seeking review of Utilization Review Determination not barred by collateral estoppel where five years and six month had passed since the prior Utilization Review Determination had been issued and where there was credible evidence in the record showing a change in claimant's condition.

The substantial difference in the length of time between the two requests satisfied the Court's concern that the UR "does not vitiate the application of the doctrine of collateral estoppel to allow a constant stream of utilization review requests where the treatment and claimant's condition remained the same even though time has passed".

- In all stages of the UR proceeding, the employer, seeking to avoid payments of medical services, carries the burden of proof of demonstrating that the treatment in question is unnecessary and unreasonable.

Gary v. WCAB (Philadelphia School District), No. 1736 C.D. 2010 (Decision by Judge Cohn Jubelirer, April 21, 2011). 5/11

TERMINATION/ MEDICAL TESTIMONY

- The WCJ did not commit an error upon terminating the claimant's compensation after the parties stipulated that the claimant suffered a compensable injury notwithstanding the fact that the employer's medical expert conceded on cross-examination that post work related lumbar surgery the claimant might have back pain with a change in weather down the road, recommended back stretching exercises post surgery and replied, in response to a hypothetical question, that if the claimant was taking Ibuprofen only for residual back pain he could not say it wasn't "the employer's responsibility to take care of that."

  This is because testimony by the employer's medical expert as to the existence of the claimant's complaints of pain does not require the WCJ to find for the claimant. A termination is appropriate where the employer's medical expert unequivocally testifies that the claimant is fully recovered, can return to work without restriction and that there are no objective medical findings which either substantiate the claims of pain or connect them to the work injury.

- The granting of an Employer's Petition for Termination requires (1) medical testimony that the claimant is fully recovered; (2) medical testimony that the claimant can return to work without restrictions; and (3) medical testimony that there are no objective medical findings to substantiate the claim of pain.

  The medical expert is not required to opine that there was no objective evidence to support Claimant's complaints of pain. There are no "magic words" for a medical expert's testimony. Rather, the court considers the expert's testimony in its entirety to determine whether a termination was warranted.

In this matter the medical experts opinion that Claimant may "have some back pain with change in the weather" from time to time did not support an inference that he found objective medical findings for Claimant's pain.

Likewise, the WCJ did not commit an error by finding the medical experts recommendation that claimant perform back strengthening stretching exercises since he made this recommendation to anyone who has undergone back surgery.

Schmidt v. WCAB (IATSE Local 3), No. 1100 C.D. 2010 (Decision by Judge Leavitt, December 15, 2010) 5/11

VOCATIONAL

- The Pennsylvania Supreme Court grants Petition for Allowance of Appeal to review Commonwealth Court decision that held that an employer is not precluded from obtaining a modification of benefits, based upon the performance of the labor market survey, where the claimant unsuccessfully pursued the jobs identified in the labor market survey weeks after they were identified as open and available by the vocational expert.

  The Pennsylvania Supreme Court directs that the issues to be considered are the following:

  a. Did the Commonwealth Court err and misinterpret the meaning of Section 306(b)(2) of the Workers Compensation Act in determining that a job is available to a claimant for the purposes of the Act even when a claimant applies for each job contained in a labor market survey and does not receive a job offer of employment?

  b. Did the Commonwealth Court err in failing to remand the matter to the Workers' Compensation Judge for a determination of whether or not the jobs identified by the employers vocational expert were open and available in light of the fact that the holding of the Commonwealth Court in the within matter altered the status of the law at the time of the decision rendered by the Workers' Compensation Judge

Phoenixville Hospital v. WCAB (Shoap), No. 517 EAL 2010 (Per Curiam). 5/11

VOCATIONAL

- The WCJ did not commit an error of law by suspending the claimant's compensation, following the claimant's receipt a of Service Connected Disability Pension, based upon the belief that the claimant voluntarily withdrew from the workforce, as of the date the employer issued the Notice of Ability to Return to Work (LIBC-757), rather than the date the claimant received his service related

disability pension. This is because it was not until LIBC-757 was issued that the claimant received notice that he was capable of working and then subsequently failed to adequately seek employment.

Likewise, the WCJ also did not commit an error by reinstating the claimant's compensation as of date the claimant's job search efforts began.

This is because the claimant can rebut the presumption that he has voluntarily left the workforce by establishing either that he is seeking employment or that the work related injury forced him to retire. To carry the burden of showing that he was actively seeking employment, the claimant must show that he is engaged in a good faith job search.

- Merely searching the internet and newspaper ads for jobs without more does not constitute a job search. To show that he was engaged in a good faith effort, the claimant has to show that he applied or sent applications for employment or other indicia that he was actively applying for employment.

- Upon determining whether acceptance of a pension should create a presumption that a claimant has terminated her career, it is important to look at the facts involved and the type of pension. For example, there are both retirement pensions and disability pensions. There are also different types of disability pensions. Some disability pensions require only a showing that the recipient cannot perform her time-of-injury job. Accepting this type of disability pension by itself, would not, without more, indicate that the claimant has voluntarily left the entire workforce.

- In order to show that efforts to return a claimant to the workforce would be unavailing because a claimant has retired, an employer must show, by the totality of the circumstances, that the claimant has chosen not to return to the workforce. Circumstances that could support a holding that claimant has retired include: (1) whether there is no dispute that the claimant retired; (2) the claimant's acceptance of a retirement pension; or (3) the claimant's acceptance of a pension and refusal of suitable employment within her restrictions.

  Therefore, receipt of a pension alone will not give rise to the presumption that claimant has voluntarily left the labor market. Rather, an employer must provide sufficient evidence to establish that, under the totality of the circumstances, the claimant had voluntarily left the workforce.

City of Pittsburgh v. WCAB (Leonard), No. 650 C.D. 2010 (decision by Judge Brobson, January 21, 2011). 5/11