THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
AUGUST 2010 AT A GLANCE
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MEDICAL TESTIMONY/UTILIZATION REVIEW/TERMINATION

- A medical expert does not necessarily believe that a particular work injury actually occurred. The expert's opinion will be competent if he assumes the presence of an injury and finds it to be resolved by the time of the IME.

- The employer was still entitled to a termination of compensation where the Notice Of Compensation Payable recognized the work injury as "lumbar/***thoracic***/cervical strain and sprain" even though the employer's medical expert did not examine the claimant's thoracic spine because the claimant made no complaints during the IME involving that area and the claimant's medical expert's most recent examination did not include a diagnosis to the thoracic spine.

  Courts must examine the entire record to determine whether a burden of proof has been met and a party can meet its burden with evidence "introduced by his adversary."

- Section 127.464(a) of the Medical Cost Containment Regulations that require the provider to mail the appropriate medical records to the URO within 30 days of their request. It is the date the records are mailed, not the date they are received by the URO that is critical.

  Therefore, the WCJ did not have jurisdiction to rule upon the claimant's Petition Seeking Review of a Utilization Review Determination where the URO requested the records on February 22, 2006 and the provider under review was required to mail his records no later than March 24, 2006 but those records were not received by the URO until April of 2006.

  The provider/claimant did not demonstrate that the records were sent timely where the claimant's expert testified that the records request was marked "complete" on March 2, 2006 but she had no personal knowledge of whether or when the records were mailed to the URO. The claimant did not produce a certified mail receipt to show that the records were mailed on a timely basis.

- Benefits may be terminated where the employer proves that the claimant is fully recovered from the work injury and has no remaining disability that relates to the work injury. An employer proves full recovery with unequivocal, competent medical evidence.

In a termination petition, the employer may not relitigate the nature of the accepted work injury. Accordingly, a medical expert's opinion will not support a termination if that medical expert does not acknowledge the accepted work injuries and does not opine full recovery from those injuries.

Hall v. WCAB (America Service Group) No. 404 C.D. 2009 (decision by Judge Leavitt, August 13, 2010). 9/10

PENALTY/COMPROMISE AND RELEASE AGREEMENT

- The Insurer/Carrier do not violate the Act by failing to proceed before the WCJ on an executed Compromise and Release Agreement where the claimant was an employee of the subcontractor but the General Contractor, Turner Construction Company, who purchased the coverage for the subcontractor informed the carrier not to proceed on the Compromise and Release Agreement unless the claimant agreed not to reapply for a position with Turner Construction Company, which the claimant refused to do..

  This holding is mandated by Section 449 of the Act that provides that an employer or insurer may submit a petition for approval of a Compromise and Release Agreement. The provisions did not prohibit an employer or insurer from withdrawing a petition for approval. Moreover, under Section 489 of the Act, settlement agreements are not valid until they are proved by the WCJ. Thus, the Compromise and Release Agreement, although executed, was not final, conclusive and binding under Section 449 of the Act. The employee did not violate Section 449 by attempting to modify an agreement that was not final, conclusive or binding.

- It is true that the common law concept of "mutual mistake" applies in cases where a party seeks to set aside and approve i.e. final, conclusive and binding Compromise and Release Agreement. The concept of mutual mistake did not apply here since the Compromise and Release Agreement did not go forward because the parties could not agree to modify the Compromise and Release Agreement to indicate that the claimant would not seek reemployment with Turner.

  The Court has held that where there is no mutual mistake of the parties at the time that Compromise and Release Agreement was approved, a party cannot later refuse to comply with the agreement, based upon a desire to add new terms to change existing terms. That was not the case here because the Carrier tried to add additional terms before the Agreement was approved by the WCJ.

McKenna v. WCAB (SSM Industries, Inc.), No. 454 C.D. 2010 (decision by Judge Friedman, July 16, 2010). 9/10

REINSTATEMENT/VOCATIONAL

- Pennsylvania Supreme Court reverses the Commonwealth Court by holding that a claimant remains eligible for reinstatement of suspended benefits where the claimant's employment with the post-injury employer is terminated, even where the claimant had previously performed modified post-injury duties from the time of the injury employer.

- A claimant seeking reinstatement of suspended benefits has the burden of proving that his earning power is once again adversely affected by his disability, and that such disability is continuation of that which arose from his or her original claim. The claimant need not be proof that the disability resulted from a work-related injury during his or her original employment.

  Once the claimant meets this burden, the burden shifts to the employer opposing the reinstatement petition. In order to prevail the employer must show that the claimant's loss of earnings is not caused by disability arising from the work-related injury. This burden may be met by showing that the claimant's loss of earnings is, in fact, caused by the claimant's bad faith rejection of available work within the relevant required medical restrictions or by some circumstance barring receipt of benefits that is specifically described under provisions of the Act or the Court's decisional law.

- A claimant seeking reinstatement of benefits many months or years following the initial suspension of benefits must prove two points: First, he must prove that through no ***fault*** on his own his earning power is once again adversely affected by the disability. Second, the disability that gave rise to the original claim, in fact, continues.

  The concept of "***fault***" is tied to the availability of work. It is the employer's burden to show the availability of work.

  Therefore, the claimant was entitled to reinstatement of benefits where the claimant returned to light-duty work with the employer, resulting in a modification of benefits, then voluntarily left the employer to obtain employment in similar field at a greater wage, resulting in a suspension of benefits, and then four and a half years thereafter was laid off by his new employer for economic reasons. It was also relevant that the claimant's pre-injury employer closed a facility out of which the claimant had worked and it no longer maintained a work presence in the area where the claimant lived.

- A claimant seeking reinstatement of "terminated" benefits must show causal connection between his or her current condition and the prior work-related injury.

  Where benefits have been suspended, the causal connection between the claimant's condition and the work-related injury is presumed.

Bufford v. WCAB (North American Telecom), No. 2 MAP 2009 (decision by Judge McCaffery, August 17, 2010.). 8/10

SUBROGATION

- Pursuant to Section 319, the employer is obliged to pay its pro rata share of attorney fees and costs upon calculation of its net lien and upon calculation of monies it is required to pay the claimant over the resulting grace period.

  In the event the claimant returns to work at a wage equal to or in excess of his pre-injury average weekly wage the employer's obligation to pay its pro rata share attorney fees and cost changes in proportion to the claimant's partial disability entitlement.

  Therefore, where claimant's compensation rate was $644.00 per week and the employer's obliged reimbursement rate was 33.67 percent, the employer was obliged to pay the claimant $216.88 in payments of its pro rata share of attorney fees and costs.

  However, where the claimant returned to work at a loss of earnings in June of 2006, the employer was obliged to pay the claimant the reimbursement rate of 33.67 percent of what the claimant partial disability rate would be. This means that where the claimant returned to work at a loss of earnings, resulting in a partial disability rate of $276.80 per week, the employer was obliged to pay its prorate share of attorney fees and costs at the reimbursement rate of 33.67 percent, which resulted in a payment of $93.22 per week

  In the event that claimant returned to work at no loss of earnings, the employer would be obliged to pay the claimant $0.

- Reimbursement of fees and expenses from third-party settlements are compensation under the Act and employers who overpay them would be entitled to reimbursement from the supersedeas fund.

  Therefore, where the employer overpaid the claimant its pro rata share of attorney fees and costs as of June 22, 2006, which was date the claimant returned to work with loss of earnings, but did not file a Petition For Modification until February 12, 2007, the employer was solely entitled to recoup its overpayment by applying for reimbursement from the Supersedeas Fund for overpayment made after it filed its petition on February 12, 2007.

Aston Township v. WCAB (McPartland), No. 2553 C.D. 2009 (decision by Judge Pellegrini, August 19, 2010). 8/10