THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
NOVEMBER 2009 AT A GLANCE
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VOCATIONAL/ CLAIM PETITION

- Where the employer issued a Notice Stopping the Notice of Compensation Payable and a Medical-Only Notice of Compensation Payable, which stated that the claimant's benefits were suspended because she failed to return to a modified position the employer offered her beginning on August 29, 2007, the WCJ committed an error of law where she found the employers offer of modified duty was not valid where the modified job offer contained a proviso that the receipt of the "job description does not imply nor create a promise of employment, nor an employment contract of any kind, and that my employment is at will." The job offer also stated, "Job duties, tasks, work hours, and work requirements may be changed at any time."

  This was a valid job offer, notwithstanding the cited language, because the "at-will" proviso was of no moment to the question of whether the employer made a modified duty job available to the claimant. Pennsylvania is an at-will employment State, meaning that absent a statutory or contractual provision to the contrary, either party may terminate an employment relationship for any or no reason. Employer could terminate claimant's modified duty position for any number of reasons that have nothing to do with her workers' compensation claim, such as downsizing or her own misconduct. No job, including claimant's modified duty job, or her pre-injury job, is guaranteed for life. Employer did not act in bad faith by including language that affected his job description.

  Similarly, employer did not negate the availability of the modified duty position by reserving the right to change claimant's job duties, tasks, and work requirements. It is implicit that any subsequent modification to the essential duties of the position must also fit within claimant's restrictions. If, in the future, employer imposes duties on claimant that exceed her limitations, she is not without recourse; claimant could file a Petition to Reinstate total disability benefits.

- It is true that the Court has held that the offer of a job to a claimant for a time certain, i.e. 90 days, only entitled the employer to a modification and/or suspension for the period that the job was made available to the claimant. See General Electric Company v. WCAB (Myers), 578 Pa. 94, 849 A.2d 1166 (2004). However, even in this case the claimant was obliged to show a good faith upon being offered such a job.

In this matter, the WCJ committed an error by finding that the employer acted in bad faith because the job description stated that the job was at-will. This was not correct as a matter of law because in Pennsylvania all employment relationships are at-will in the absence of a contractual agreement to the contrary. General Electric stands for the proposition that a modified duty job should be deemed temporary only when it becomes unavailable on a certain date. Moreover, the claimant is still expected to accept this temporary position. The job offer by the employer in this matter was not temporary and even it was, the claimant was required to accept it.

- In a proceeding on a Claim Petition, the claimant bears the burden of establishing a work-related injury rendering the claimant incapable of performing the time of injury job. If the employer asserts that the claimant can perform some work within her medical restrictions, the employer bears the burden of proving that suitable employment is available.

Presby Homes & Services v. WCAB (Quiah) No. 978 C.D. 2009 (decision by Judge Leavitt, November 5, 2009). 12/09

MEDICAL/SUSPENSION/FORFEITURE PETITION

- It is within the sound discretion of the WCJ to decide whether to suspend both indemnity and medical benefits where a claimant failed to attend a defense medical examination ordered by the WCJ pursuant to Section 314(a) of the Act.

- Although, the Court has held that the definition of compensation is to be made on section-by-section basis, the Court has also stated that in cases where the employer's liability ***has already been determined***, "medical expenses and compensation are considered to be separate." (Emphasis added) Accordingly, since liability had already been determined in this matter, the term "compensation" could refer to wage loss benefits only.

  Accordingly, the WCAB did not commit an error where it affirmed the Judge's order that only the claimant's indemnity benefits but not medical benefits would be suspended during the period that the claimant failed to attend the IME pursuant to Section 314(a).

- A WCJ who intends to order suspension of both wage loss benefits and medical benefits, because of a failure to attended a medial exam in violation of an order pursuant to Section 314, must expressly state that medical benefits and wage loss benefits are suspended.

Giant Eagle, Inc. v. WCAB (Gibner), No. 813 C.D. 2009 (decision by Judge Butler, November 18, 2009). 12/09

COURSE AND SCOPE OF EMPLOYMENT/JURISDICTION

- An injury sustained during an employee's commute to and from work is compensable if any of the following apply:

    1. The employment contract included transportation to and from work;
    2. The employee has no fixed place of work;
    3. The employee is on a special assignment for the employer; or
    4. Special circumstances are as such that the employee was furthering the business of the employer.

- To satisfy the employment contract exception set forth by exception number one, a claimant must satisfy two elements.

  First, the claimant must prove that a travel allowance is related to the actual expense and time involved in the claimant's commute. And Second, the claimant must prove that the employer provided or controlled the means of the commute.

- To satisfy the special circumstances exception set forth by exception number four, the claimant must show that he or she were involved an act "in which the employee was engaged … by order of the employer, express or implied, and not simply for the convenience of the employee."

  There is no exception to the coming and going rule for the employee injured while commuting to an unattractive job or location. Rather, the employee must be acting under orders of the employer for the commuting injury to be work related.

  It is a universal, not special, interest of employers that is served by an employee coming to work. It does not matter that the job pays more because it is unattractive.

- The fact that the claimant was paid workers' compensation benefits for six years under the Delaware Workers' Compensation Law did not estopp the employer from taking the position that under Pennsylvania Law a claimant's injury did not occur in the course and scope of employment. This is because a claimant's receipt of a benefit under another State's workers' compensation system does not preclude an employer from defending against a claim under the Pennsylvania Act.

Leisure Line Adventure Trails, Coach USA Company v. WCAB (Walker v. WCAB (Walker)), No. 2230 C.D. 2008 (Decision by Judge Leavitt, November 18, 2009). 12/09

VOCATIONAL/LITIGATION COSTS

- Determining what "prompt written notice" means as used by Section 306(b) (3), which mandates the issuance of the Notice Of Ability To Return To Work (LIBC-757) upon receipt of restrictions but prior to a job offer, requires an examination of the facts and time line in each case to determine if the claimant has been prejudiced by the timing of the notice. There is no requirement that the WCJ find that notice was sent on a specific date. It is only required that the notice be sent before the employer modifies the benefits. It is also clear that the claimant must be given the notice before the employer attempts to modify his or her benefits.

- Upon performing a labor market survey under Section 306(b) (2) the employer must show that the jobs are in the "usual employment area" in which the claimant lives. Jobs are available to a claimant if they are within the geographic area where others in the claimant's community would accept employment. There is no requirement that the vocational witness used magic words as to where the usual geographic area would be. It was sufficient that the employer's vocational expert, found credible by the Judge, testified that she searched for jobs within a 25 mile radius of claimant's home, which is the industry standard for a geographic area.

- A modification becomes effective on the date of job availability as opposed to the date on which claimant was found by physician to be capable of working. Accordingly, the WCAB was correct upon modifying the WCJ's granting of the modification petition from January 22, 2003, which was the date the FCE was performed, to May 5, 2003, which was the date jobs became available to the claimant.

- Section 440(a) authorizes an award to a claimant for litigation costs where the claimant prevails in whole or in part. The claimant was not entitled to litigation costs where the employer filed a Petition For Modification seeking modification as of January 22, 2003 but the use of that date constituted a technical error because January 22, 2003 was actually the date of the FCE but no jobs were made available to the claimant until May 5, 2003, which was the date modification was granted. This is because the correction of the WCJ's technical error had nothing to do with the claimant's costs of litigating before the WCJ.

- In order to be awarded litigation costs the claimant must prevail on an issue that was actually contested before the WCJ thus distinguishing this case from the facts of Minicozzi v. WCAB (Industrial Metal Plating, Inc.), 873 A.2d 25 (Pa. Cmwlth. 2005) where the claimant delayed the onset of modification through the evidence he presented to the WCJ.

Bentley v. WCAB (Pittsburgh Board of Education), No. C.D. 2008 (Decision by Judge Leavitt, November 18, 2009). 12/09

CHILD SUPPORT

- Superior court permits DPW to enforce child support lien of $957.00 against claimant's third party recovery of $3,083.83, notwithstanding the fact the recovery was under $5,000.00 and the language of Pennsylvania Domestic Relations § 4308.1 (a) (i) defines Net proceeds as" Moneys in excess of $ 5,000 payable to a prevailing party or beneficiary…."

  This is because although Section 4308.1, by its explicit terms, imposes a lien "by operation of law" upon the recovery of a monetary judgment in excess of $ 5,000.00 , it is a separate device intended to insure that an obligor notifies the "Pennsylvania child support enforcement system" of any new or unexpected assets.

  By contrast, section 4305 of the Pennsylvania Domestic Relations grants statutory powers pursuant to a designated "domestic relations" agent, which in Philadelphia is the Office of the Philadelphia District Attorney acting on behalf of DPW, to affirmatively act to collect arrears *in any amount,* without regard to a statutory minimum sum, from defaulting obligors.

Campbell v. Earl r. Walker, jr. Appeal of: Department Of Public Welfare, 2009 PA Super 198; 2009 Pa. Super. LEXIS 3963) (Decision by Judge McEWEN) 12/09