THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
AUGUST 2009 AT A GLANCE
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COLLECTIVE BARGAINING AGREEMENT/CREDIT/MEDICAL TESTIMONY

- Pursuant to Section 450(a)(1) of the Act an employer and employee's union may agree to a Collective Bargain Agreement (CBA) to establish certain binding obligations and procedures related to workers' compensation benefits, as long as the scope of the agreement is limited to, *inter alia* benefits supplementary to those provided in Section 306 and Section 307 of the Act.

  An employer was not entitled to a credit for a holiday pay and vacation pay paid to the claimant where the claimant did not received the holiday/vacation pay solely because he was receiving workers' compensation but would have been entitled to those benefits even if he had not been injured. Since employer negotiated the terms of the CBA with the employee union and agreed to pay those benefits to employee receiving workers' compensation benefits, the employer was not permitted to receive a credit for a holiday and vacation payments.

  Here, holiday and vacation pay under the CBA were based on the years of service an employee had and whether he was considered on the payroll. Claimant was considered on the payroll pursuant to the CBA even though he was receiving workers' compensation. Therefore, the employer was not entitled to a credit for holiday and vacation payments made.

- When holiday or vacation pay is an entitlement that arises from the performance of services for the employer during some stated preceding period, the Commonwealth Court has explicitly refused to allow credit to the employer for such pay.

- Competency when applied to medical evidence, is merely a question of whether the witnesses' opinion is sufficiently definite and unequivocal to render it admissible. The Court have often observed that medical evidence is unequivocal as long as the medical expert, after providing a foundation, testifies that in his professional opinion he believes or thinks the facts exist. Even if the witness admits to uncertainty, reservation, doubt or lack of information with respect to scientific or medical details, as long as the witness does not recant the opinion first expressed, the evidence is unequivocal.

ESAB Welding & Cutting Products v. WCAB (Wallen) No. 60 C.D. 2009 (decision by Judge Butler, May 22, 2009). 9/09

PSYCHIATRIC /PSYCHOLOGICAL INJURY

- A SEPTA bus driver who suffered posttraumatic stress disorder after being accosted by a passenger with a gun on his SEPTA bus did not suffer a compensable injury because the incident with the gun did not constitute an abnormal working condition.

  The claimant drove the bus in a high crime area and the WCJ credited SEPTA witnesses who testified to the high frequency of assaults on operators and the company's efforts to train operators in methods of dealing with dangerous passengers. The WCJ also reviewed and summarized SEPTA's incident reports and noted that life-threatening situations occurred with enough frequency to lead the WCJ to conclude that a threat with a gun was not an abnormal working conditions for employees in the claimant's classification.

  Psychic injury cases are highly fact sensitive and for actual working conditions to be considered abnormal they must be considered in the context of specific employment. In this matter, SEPTA offered evidence showing that such incidents did occur with enough regularity that handling them had been built in to their operator's training program. Therefore, the WCJ did not commit an error of law by holding that the claimant's psychic injury did not result from an abnormal working condition.

McLaurin v. WCAB (SEPTA), No. C.D. 2009 (decision by Judge Smith-Ribner, June 5, 2009). 9/09

SUSPENSION/VOCATIONAL

- The employer was not required to show earning capacity or perform job availability or meet the Kachinski requirement of a change in condition in order to obtain a suspension of the claimant's compensation where the claimant removed himself from the workforce upon choosing to reside in Portugal for more than seven years.

Mendes v. WCAB (Lisbon Contractors, Inc) No. 154 C.D. 2009 (Decision by Judge Mcginley, May 29, 2009) 9/09

FEE REVIEW APPLICATION/MEDICAL BILL

- A Provider's Application for Fee Review filed pursuant to Section 306(f.1)(5) was untimely where:1) The provider's bill was submitted to the employer on November 21, 2006, 2) On December 27, 2006 the employer communicated to the provider in the form of an Explanation Of Review that it did not pay the entire bill because of the results of an audit summary; 3) The provider, rather than file an Application For Fee Review within 30 days of December 27, 2006, submitted additional documentation to the provider on January 8, 2007; 4) On March 15, 2007 the employer advised the provider that they were declining to reprocess provider's claim because the claim had already been reviewed in a line by line audit, and 5) The provider did not file its Application for Fee Review until March 30, 2007.

  The Explanation of Review forwarded to the provider on December 27, 2006 did advise the provider that if it felt that the bill have been paid incorrectly and untimely it may file a fee review with the Bureau of Workers' Compensation.

- Section 306 (f.1)(5) of the Act states that an Application for Fee Review must be filed no more than 30 days following notification of disputed treatment. There was nothing in the plain language of Section 306 (f.1) (5) that supports the assertion that notification means final notification.

- It was significant that the employer did not allege that the provider failed to comply with the Acts reporting requirements and did not dispute the provider's bill on that basis. Accordingly, the Commonwealth Court's decision of Harburg Medical Sales Company v. Bureau of Workers' Compensation (PMA Insurance Company), 784 A.2d 866 (Pa. Cmwlth. 2001) did not apply to this matter. The Court in Harburg held that the 30 days that the provider had to file a fee Review Petition arose only after it submitted a bill that complied with the acts reporting requirements.

- The doctrine of equitable estoppel applies in situations where a party, through its acts, negligently misrepresents material facts while knowing or having reason to know that the party will justifiably rely on the misrepresentation to its detriment and the other party does so rely. Equitable estoppel did not apply in this matter because the employer notified provider that any dispute should be handled through the Fee Review process but provider chose to submit additional documents and request reconsideration of denied charges.

Pittsburgh Mercy Health System v. Bureau of Workers' Compensation, Fee Review Hearing Office (US. Steel Corporation) No. 2104 C.D.2008 (decision by Judge Friedman, May 29, 2009). 9/09