THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
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COLLATERAL ESTOPPEL/RES JUDICATA

- The termination of the claimant's Act 632 benefits following an administrative proceeding, which involved the claimant's testimony and presentation of medical evidence, that found that the claimant was fully recovered from her compensable posttraumatic stress disorder collaterally estopped the claimant from asserting that she was not fully recovered in defense against a Petition for Termination filed in a workers' compensation proceeding.

  This is because an agency adjudication can, and will, have effect in another agency's proceeding, or even a judicial proceeding, so along as the amount in controversy is comparable and each proceeding involves procedures sufficiently formal to allow each litigant to develop a complete record on a disputed fact.

- Collateral estoppel, also known as issue preclusion, is designed to prevent relitigation of questions of law or issues of fact that have already been litigated in a court of competent jurisdiction. The doctrine of collateral estoppel applies where the following factors are met:

  (1) when the issue in the prior adjudication was identical to one presented in the later action;

  (2) when there was a final judgment on the merits;

  (3) when the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication;

  (4) when the party against whom it is asserted has had a full and fair opportunity to litigate the issue in a prior action;

  (5) when the determination in the prior proceeding was essential to the judgment.

  In this matter, the issues in the 632 termination proceeding were identical to those in the workers' compensation proceeding. In both matters, proof of claimant's recovery from the work related disability was germane for purposes of either statute. The Supreme Court has held that a fact is a fact regardless of public policy. This means that the dispositive factual finding, full recovery from claimant's disability, was identical in each proceeding.

The second issue of whether the claimant had the full opportunity to litigate the extent of her recovery in the Act 632 proceeding requires two inquires: The amount at risk financially and type of procedural rules governing each proceeding.

In this matter, Act 632 is more generous because it provides full salary where by contrast workers' compensation disability is limited to two-third's of the pre-injury average weekly wage. The amount in controversy was also comparable: Potential lifetime compensation for lost wages caused by work related injury.

Commonwealth of Pennsylvania, Department of Corrections v. WCAB (Wagner - Stover), No. 1133 C.D. 2008 (decision by Judge Leavitt, October 1, 2010.) 11/10

CREDIT/IRE/APPEAL/PENALTIES

- The claimant was not under the obligation to inform the employer that she was receiving Old Age Social Security, notwithstanding the fact she had received LIBC-756 prior to her receipt of Old Age Social Security, until she received the subsequent LIBC-756 subsequent to the date that she began receiving Old Age Social Security.

- The employer is required to supply the claimant with a new LIBC-756 every six months to remind and to require her to update the reporting of benefits subject to offset. This bi- annual requirement prevents a claimant from being subjected to large retrospective offsets if several years passed since he last received a form from an employer and it would be unrealistic to expect unsophisticated claimants to file a new LIBC-756 on their own every six months.

  Therefore, the employer was not entitled to its 50 percent offset for the receipt of old Age Social Security until the claimant received the second form.

- A WCJ may award Penalties under the Act where there was a violation of the Act or rules and regulations promulgated under the Act. When a violation of the Act occurs, it was within the discretion of the WCJ to impose penalties. An abuse of discretion is not merely an error of judgment but occurs when the law is misapplied in reaching a conclusion.

- An issue not raised in the appeal documents to the Workers' Compensation Appeal Board is not preserved even if the party raises that issue in its brief to the board.

- Where an IRE takes place more than 60 days following the 104th week of total disability and therefore the employer needs to file Petition for Modification in order to obtain the modification on the basis of the IRE, the date for modification

resulting from an IRE impairment of less than 50 percent is a date the IRE was performed and not 60 days from the date of the Judge's decision.

Muir v. WCAB (Visteon Systems, LLC), No. 274 C.D. 2010. (Decision by Judge McGINLEY, October 1, 2010) 11/10

PSYCHIATRIC CLAIM

- The claimant, who was a state trooper, did not suffer a compensable psychiatric injury, diagnosed as posttraumatic stress disorder, where he struck and killed a woman who, dressed entirely in black, stepped in front of his car while he was traveling on Interstate 81 resulting in the death to the woman and where, following the accident the Police Officer attempted to resuscitate the woman through mouth-to-mouth resuscitation notwithstanding the fact that woman was bleeding profusely from the mouth.

  This is because the claimant was required to show that his psychiatric injury resulted from an extraordinary event or an abnormal working condition. Inasmuch as claimant was employed as a Police Officer, he was engaged in employment that is by its very nature highly stressful and a Police Officer can be expected to witness horrible tragedy. This includes, as was acknowledged by the claimant, responding to motor vehicle accidents in an emergency capacity.

  The claimant's event was not extraordinary or abnormal. Indeed, it is not beyond the realm of possibility for an officer to have to take someone's life.

- A claimant seeking workers' compensation benefits because of a mental stimulus resulting in a disabling psychic injury must show (1) that actual extraordinary events occurred at work that caused the trauma and that these specific events can be pinpointed in time, or, (2) that abnormal working conditions over an extended period caused the psychiatric injury.

  In classifying working conditions as normal or abnormal, there is no bright line test or generalized standard. Psychic injury cases are highly fact sensitive, and the determination as to whether working conditions are normal or abnormal must be considered in the context of the specific employment. Consequently, compensation is denied for events that are expected in the relevant working environment, whether it is an office worker's change in job title or responsibility or a Police Officer's involvement in life threatening situations.

- Although a claimant in a normally highly stressful working environment such as a police officer may not have a higher burden of proof, it is often more difficult to establish abnormal working conditions in a job that is, by its nature, highly stressful. The claimant must establish that the incident that caused his mental injury is so much more stressful and abnormal than the already highly stressful incident of that position.

- Although testimony may be presented that certain Police Officers have never witnessed horrible trauma and/or death, that testimony is not necessarily dispositive. The determining factor is what is extraordinary or abnormal for a person in the same "line of work". When an individual claimant employed as a police officer has not previously encountered a particular type of event one may expect a police officer to become involved in, that experience is merely "subjectively abnormal for the claimant."

Payes v. WCAB, (Cmwlth. of PA/State Police) (Decision by Judge Flaherty, October 6, 2010). 11/10

RETIREMENT/SUSPENSION

- When an employer alleges a claimant's compensation should be suspended due to retirement, the employer bears the initial burden of showing that the claimant is no longer suffering from a loss of earnings due to the work related injury. The employer does this, not by using Kachinski or Section 306(b) (2) standards, but by showing "by the totality of the circumstances, which the claimant has chosen not to return to the workforce."

  Only after the employer has carried its burden of showing that the claimant has retired does the burden shift to the claimant to rebut the presumption that he has voluntarily withdrawn from the workforce.

  This does not mean that the claimant's burden to show that he is looking for work is analogous to the burden to show that suitable work is available. An employer cannot be expected to show that a claimant who has retired "has no intention of considering to work." Thus, a claimant whom an employer had shown to have retired may rebut that showing by manifesting an intent to remain connected to the workforce by seeking employment within his limitations. The burden on the claimant is only to look for suitable work; he will not be denied benefits if he cannot find it.

  Therefore, the WCJ properly suspended the claimant's compensation based upon the determination the claimant had retired from the workforce where the claimant, following his lay off from a light duty job, applied for Unemployment Compensation Benefits, thereby demonstrating that he was capable of or available to work, and once the Unemployment Compensation benefits ran out the claimant testified that he stopped looking for work and applied for and received a pension from employer and Social Security.

Day v. WCAB (City of Pittsburgh), No. 2495 C.D. 2009 (decision by Judge Cohn Jubelirer, October 18, 2010). 11/10

PENALTIES

- Whether a claimant suffers economic harm is not relevant to the determination whether an employer may have penalties imposed upon it. A WCJ has authority to impose penalties to assure compliance with the Act. Therefore, a claimant who filed a Penalty Petition has a burden of proving a violation of the Act. When there has been a violation of the Act the assessment of penalties and the amount of the penalty are within discretion of the WCJ.

- Addressing the issue of timeliness of payment, the Supreme Court in Snizaski v. Workers' Compensation Appeal Board (Rox Coal Company), 586 Pa. 146, 891 A.2d 1267, (2006) held that notwithstanding the language of Section 428 of the Act, which gives employers 30 days to pay a compensation award, Section 435 of the Act authorizes penalties without addressing grace periods. Thus, a penalty is at least theoretically available if an employer's refusal to pay compensation persists for single day. However, the penalty should be tied to some discernable and avoidable wrongful conduct.

  Although an employer's obligation to pay an award is immediate, the instantaneous payment is not a practical possibility. Absent regulations setting forth a bright line period within which payments must follow compensation awards, it would appear that the legal issue will henceforth depend on the facts of each case, as does the discretionary issue regarding imposition of penalties.

  The Commonwealth therefore adopts a rule of reason as the appropriate standard for measuring timelines of payment in compliance for the Act.-i.e. whether employer acted with reasonable diligence.

  Therefore, the WCJ's granting of the 35 percent penalty where there was a delay in the claimant's receipt of a check because the claimant's check was sent to her prior address was not appropriate where WCJ made no finding whether the carrier was given notice of the claimant's correct address. If not, employer did not violate the Act since the employer could not have avoided mailing the check to the wrong address.

Allegis Group & Broadspire v. WCAB (Coughenaur), No. 977 C.D. 2010 (decision by Judge Friedman). 11/10