THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
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ATTORNEY FEE

- WCJ did not abuse discretion where WCJ awarded claimant's prior counsel a 20% attorney fee up to the date the claimant entered into a C&R negotiated by her new counsel and awarded her new counsel the entire 20% fee against the C&R amount. Upon resolving this fee dispute the WCJ denied prior counsel a quantum meruit fee against the portion of the C&R amount that he had rejected upon attempting to negotiate a resolution of the claimant's claim before his discharge.

  The fact that initial counsel had represented the claimant unsuccessfully in defense against a Termination Petition in 1987 but successfully litigated a Petition for Reinstatement in 1989 and collected a 20% up to 2012 of approximately $60,000.00 versus the fact that the claimant, who testified initial counsel went 20 years without performing legal work for her, decided to discharge initial counsel and choose to retain new counsel, which was her right. The WCJ's balance was also reflected by the fact WCJ awarded initial counsel 7 months of contingent fees following his discharge up to the date the C&R, which was negotiated by new counsel, was approved

- Pursuant to Section 442 of the Workers' Compensation Act a WCJ has the authority to resolve fee disputes between two successive attorneys in a WC case when the fee agreement or petition was filed before claimant discharges the attorney. The resolution of a fee dispute in the Worker's' Compensation context must balance the attorney's legitimate expectations of a reasonable legal fee with the right of a claimant to be represented by counsel of his or her choice. While a claimant has the absolute right to be represented by counsel of her choice, that right does not allow her to unilaterally negate her liabilities toward her former counsel.

  Bierman v. WCAB (Philadelphia National Bank), No. 1336 C.D. 2014 (Decision by Judge Cohn Jubelirer, April 1, 2015) 4/15

DEATH CLAIM/ EVIDENCE

- The legislature amended Section 1103 of the Marriage Law effective January 24, 2005, statutorily abolishing common law marriages in Pennsylvania. Section 1103 provides:

"No common-law marriage contracted after January 1, 2005, shall be valid. Nothing in this part shall be deemed or taken to render any common-law marriage otherwise lawful and contracted on or before January 1, 2005, invalid."

This means, a Common Law Marriage in the context of a Fatal Death Claim for Widow/Widower benefits will be recognized if the Claimant proves that she and Decedent entered into a valid common-law marriage contract on or before January 1, 2005.

- In Pennsylvania, a marriage is a civil contract.

  There are two kinds of marriage: (1) ceremonial and (2) common law, if entered into prior to January 1, 2005.

  A ceremonial marriage is a wedding or marriage performed by a religious or civil authority with the usual or customary ceremony or formalities.

  A common-law marriage can only be created by *verba in praesenti*, i.e., an exchange of words in the present tense, spoken with the specific purpose of creating the legal relationship of husband and wife.

  A common-law marriage contract does not require any specific form of words; all that is essential is proof of an agreement to enter into the legal relationship of marriage at the present time.

  There are two ways to prove a common- law marriage:

  1) A party claiming a common-law marriage bears the burden of producing clear and convincing evidence of the exchange of words creating the marriage contract.

  2) If a party is unable to testify as to the exchange of verba in praesenti but proves constant cohabitation and a reputation of marriage which is not partial or divided but is broad and general, a rebuttable presumption arises in favor of a common law marriage.

  The validity of a common-law marriage is a mixed question of law and fact.

- Because common-law marriage claims are discouraged and not favored by the courts and are reviewed with great scrutiny, however, a party claiming the existence of a common-law marriage has the heightened burden of proving the marriage by "clear and convincing evidence

Clear and convincing evidence is evidence that is so clear, direct, weighty, and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts of the issue.

The clear and convincing standard falls between the most stringent beyond-a-reasonable-doubt standard and the preponderance-of-the-evidence standard.

- The Dead Man's Statute did not preclude the decedent's widow from testifying in support of her argument that she was the common law wife of the decedent.

  This is because the purpose of the Dead Man's Act is to prevent the injustice that would result from permitting a surviving party to a transaction to testify favorably to himself and adversely to the interest of a decedent, when the decedent's representative would be hampered in attempting to refute the testimony or be in no position to refute it, by reason of the decedent's death.

  The application of the Dead Man's Act, therefore, requires that the interest of the proposed witness be adverse to the interest of the decedent's estate.

  In this matter Claimant's testimony was not subject to the Dead Man's Act because nothing in the record suggested that her interest was in any way adverse to the interest of Decedent's estate.

  Elk Mountain Ski Resort, Inc., v, WCAB (Tietz, deceased, and Tietz-Morrison), No. 1017 C.D. 2014 (Decision by Judge Leadbetter, April 7, 2015) 4/15

LOSS OF USE/ CREDIT/ SOCIAL SECURITY

- The WCJ's granting of the claimant's Petition Seeking Specific Loss of the left hand, which did not suffer an amputation, was supported by substantial evidence where the WCJ found credible claimant's medical expert whose testimony included the opinion that the claimant had permanent impairment that precluded him from using his left hand to pick an item up from a table, to use a knife or fork, or to press a common button, had difficulty dressing.

- The WCJ finding per the specific loss was supported by the law which states:

  A specific loss is either (1) the loss of a body part by amputation or (2) the permanent loss of use of an injured body part for all practical intents and purposes.

  When a claimant alleges that his injury has resolved into a specific loss, he has the burden of proving that he has permanently lost the use of his injured body part for all practical intents and purposes. A specific loss requires more than just limitations upon an injured worker's occupational activities; a loss of use for all

practical intents and purposes requires a more crippling injury than one that results in a loss of use for occupational purposes.

However, it is not necessary that the injured body part be one hundred percent useless in order for the loss of use to qualify as being for all practical intents and purposes.

Whether a claimant has lost the use of a body part, and the extent of that loss of use, is a question of fact for the WCJ.

Whether the loss is for all practical intents and purposes is a question of law.

- The WCJ's findings that the claimant's loss of use was separate and distinct from the loss of use where the WCJ found credible testimony that Claimant experienced increased sweating and pain, and numbness in his left arm from the neck into his hand, with increased swelling in his hand.

  Therefore the record evidence supported the WCJ's finding that but for Claimant's loss of use of his left hand, he would still be disabled by Complex Regional Pain Syndrome of his left upper extremity and suffered the specific loss of the hand separate and apart from his accepted work injuries

- The WCJ's finding that the claimant still had a disability separate and apart from the loss if use was supported by the law which states:

  A claimant who sustains an injury that is compensable under Section 306(c) of the Act, (relative to specific loss calculations), is not entitled to compensation beyond that specified in that section even though he may be totally disabled by the injury.

  The exception to this rule, found in Section 306(d), is when a claimant may receive benefits for injuries which are separate and distinct from those which normally flow from the specific loss injury.

  Section 306(d) of the Act permits a claimant to prove that he sustained either disability or specific loss for each separate injury, provided that payment of specific loss benefits is withheld until after all disability benefits are terminated.

  Where it is claimed that some other part of the body is affected, it must definitely and positively appear that it is so affected, as a direct result of the permanent injury; the causal connection must be complete, and, further the disability must be separate and distinct from that which normally follows an injury under Section 306(D) and must endure beyond the time therein mentioned. There must be a destruction, derangement or deficiency in the organs of the other parts of the body.

While injuries that flow from the specific loss injury are considered compensated under specific loss benefits, injuries that are separate and distinct from the specific loss injury are eligible for their own benefits.

- Pursuant to Section 204(a) of the Act, compensation benefits otherwise payable shall be offset by 50% of the net amount received in Social Security (old age) benefits and offset shall only apply to amounts which an employee receives subsequent to the work-related injury

- The WCJ did not commit an error of law where she denied the employer a credit for claimant's receipt of Old Age Social Security where: 1) The Claimant applied for Social Security retirement benefits in 2009, which was before he turned 62-years-old.; 2) Claimant sought the benefits as of his date of eligibility , which was when he turned 62 years old on January 2, 2010; 3) Claimant received a Notice of Award from the Social Security Administration (SSA) approving his application, stating: "Your entitlement date is January 2010, and that his payments would be based upon his current monthly benefit rate of $1,135.70.; 4) SSA in its entitlement letter told the claimant "We are withholding $1,135.00 of your benefits for January 2010 because of your work and earnings"; 5)Claimant suffered his work injury on January 20, 2010; and 6) On February 10, 2010, SSA issued his first monthly payment in the amount of $1,135.00.

  This is because where a Claimant was entitled to his Social Security retirement benefits prior to his work-related injury, Employer is not entitled to a credit and/or offset.

  The court justified its holding based upon Section 402(a) of the Social Security Act, which states one becomes entitled to Social Security Old Age benefits upon ***application for those benefits after attaining retirement age***. (Emphasis added) The pertinent Social Security Regulations further provide :

  1) To apply means to sign a form or statement that SSA accepts as an application for benefits
  2) SSA publicizes that application can be made "when you are at least 61 years and 9 months of age," and encourages applicants to "apply three months before they want their benefits to start.
  3) To be "entitled" to benefits, an individual must have "applied and proven his or her right to benefits. 20 C.F.R. § 404.303
  4) The entitlement requirements are: (a) You are at least 62 years old; (b) You have enough social security earnings to be fully insured; and (c) You apply. 20 C.F.R. § 404.310

  In this case because Claimant had applied for benefits in advance of his eligibility and had been approved, he was entitled to Social Security retirement benefits when he turned 62 on January 2, 2010, which was 18 days before his work injury occurred. See R.R. at 40a.

That fact that Claimant's payments did not commence until February 10, 2010, which was 21 days after his work injury was irrelevant. That Claimant's payments did not commence until February 10, 2010, which was 21 days after his work injury is irrelevant. The undisputed Notice of Award stated that Claimant was entitled to benefits in January 2010.

Pocono Mountain School District v. WCAB (Easterling) No. 548 C.D. 2014, No. 663 C.D. 2014 (Decision by Judge Covey, April 10, 2015) 4/15

TNCP/ TERMINATION PETITION

- The employer did not violate the Act where in May 2011 it issued a Medical Only Temporary Notice of Compensation Payable, later converted to become a Medical Only Notice of Compensation Payable that agreed to pay for Claimant's medical treatment for her alleged work injuries identified as left knee, left shoulder, and left hand contusions and then subsequently in August 2011 issued TNCP recognizing a left labrum and bicep tear, that paid indemnity but was stopped by the employer on October 17, 2011.

  This is because the Act does not specifically allow for or disallow the of subsequent temporary acceptance documents.

  Therefore, pursuant to Section 406.1 of the Act, the employer was not precluded from issuing a Medical Only TNCP, converted to be a Medical Only NCP and then upon receiving information that Claimant was suffering disability as a result of the shoulder injury issuing a NTCP indicating that it would make payments for both medical and wage loss.

  Pursuant to Section 406.1(d)(1) of the Act, by issuing this second , Employer was not admitting liability for this injury. Furthermore, since it did file a NCD and Notice Stopping Compensation within 90 days of issuing that second NTCP, was not admitting liability for those additional injuries or for wage loss as a result of those injuries.

  Since Claimant had not lost any time from work until after July 19, 2011 and did not have a diagnosis for her shoulder which required the surgery until around that time period, there was no violation of the Act in Employer's issuance of a second NTCP in August of 2011.

- The case of Mosgo v. Workmen's Compensation Appeal Board (Tri-Area Beverage, Inc.), 480 A.2d 1285 (Pa. Cmwlth. 1984) did not estop the employer from stopping the second indemnity only TNCP although it was paying meds for a different diagnoses per a Med Only NCP that was converted from a Med Only TNCP.

Mosgo, which was decided before the Act was amended to allow for the issuance of a TNCP, stands for the proposition that payments in lieu of workers' compensation without the issuance of Bureau documents results in an admission of liability.

Mosgo, therefore, cannot support a conclusion that, once an employer issues a NTCP, any subsequently issued NTCP results in a de facto acceptance of the injuries identified in the subsequently issued NTCP

- It is true that the testimony of a medical expert that fails to acknowledge or accept injuries an employer has accepted as work related is incompetent to support an employer's termination petition.

  In this matter, the employer's medical expert testimony was competent where he address the injuries on the Med Only NCP, converted from a Med Only TNCP, but did not address the injuries recognized on a subsequently issued indemnity TNCP that was properly stopped by the employer.

Aldridge v. WCAB (Kmart Corporation), No. 494 C.D. 2014(Decision by Judge Brobson, decided January 26, 2015, publication ordered April 16, 2015)4/15

SUBROGATOIN/SUSPENSION/REASONED DECISION

- The WCJ did not err upon suspending the claimant's compensation because the Claimant failed to disclose the amount of monies recovered in the third-party tort action emanating out of the claimant's compensation work injury.

  The employer's obligation to pay the compensation awarded by the WCJ remained awaiting satisfactory documentation concerning the claimants' settlement of the Third Party Action in the Court of Common Pleas of Philadelphia.

- This is because the right to subrogation conferred by Section 319 of the Act does more than confer a 'right' of subrogation upon the employer; rather, subrogation is automatic.

  The text of the statute clearly and unequivocally establishes the contour of the employer's burden.

  An employer must demonstrate that it is compelled to make payments for a claimant's work-related injury by reason of the negligence of a third party and that the funds the employer is seeking to recover were paid to the claimant for the same compensable injury for which the employer is liable under the Act.

After an employer's burden has been satisfied, subrogation is automatic. The statute does not make subrogation contingent upon an employer demonstrating the amount of recovery.

Once the WCJ concluded that Employer met its burden under Section 319 of the Act, triggering automatic subrogation, the burden was on Claimant to establish the amount of the recovery, which the WCJ found the claimant failed to do.

- The reasoned decision provision of Section 422(a) of the Act aids meaningful appellate review by requiring the WCJ to issue a reasoned decision containing findings of fact and conclusions of law based upon the record as a whole and clearly stating the rationale for the decision. When the WCJ is faced with conflicting evidence, section 422(a) of the Act requires the WCJ to state the reasons for rejecting or discrediting competent evidence. The reasoned decision requirement does not permit a party to challenge or second-guess the WCJ's reasons for credibility determinations; determining the credibility of witnesses remains the quintessential function of the WCJ as the finder of fact.

  However, the WCJ may not capriciously disregard evidence. A "capricious disregard" of evidence is a deliberate disregard of competent evidence which one of ordinary intelligence could not possibly have avoided in reaching a result.

Joseph Reed, deceased, Donna Palladino, Executor of the Estates of Joseph Reed and Alice Reed deceased v. WCAB (Allied Signal, Inc. and it's successor in interest Honeywell) No. 879 C.D. 2014(Decision by Judge Colins, April 21, 2015) 4/15