THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
DECEMBER 2009 AT A GLANCE
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- The mere filing of a penalty petition against a claimant does not present an unreasonable contest as a matter of law. This is because the Act authorizes the imposition of a penalty against a claimant, and the Board's regulations permit any party to avail itself of the penalty procedures.

  Nevertheless, the Act limits the penalty which may be imposed against a claimant to the forfeiture of interest. The forfeiture of interest is limited to interest owing on disability benefits. Moreover, the Act does not authorize a WCJ to turn over interest on a claimant's third party settlement to an employer.

  Therefore the employer, who filed a penalty petition due to non payment of its lien, which was subject to the WCJ's prior order that the lien and resulting credit was only available when the claimant's third party settlement was released to her for payment, would not be entitled to a penalty in the amount of 50% of claimant's share of the personal injury proceeds in its penalty petition..

- Another sanction which may be imposed against a claimant is found in the Board's regulations at Section 131.101, relating to briefs and findings of fact. Where the WCJ requires the submission of briefs and findings of fact and a party fails to timely comply with the WCJ's order, the WCJ may refuse to consider the party's filings.

- The purpose of the penalty provisions is to provide the Department of Labor and Industry with the powers and mechanisms needed to enforce the Act.

  While the penalty provisions mainly address employer misconduct, the Act does allow the imposition of a penalty against a claimant. In particular, Section 435(d)(iii) of the Act provides in relevant part:

  > *The Department, the board, or any court which may hear any proceedings brought under this [A]ct shall have the power to impose penalties as provided herein for violations of the provisions of this [A]ct or such rules and regulations or rules of procedure:*
  > …
  > *(iii) Claimant shall forfeit any interest that would normally be payable to them with respect to any period of unexcused delay which they have caused.*

The issue of whether a claimant forfeits interest on unpaid disability benefits normally arises in the context of claim proceedings.

The Act does not provide the procedures whereby a claimant's right to interest may be challenged. Notwithstanding this fact, forfeiture of interest may be raised by the WCJ when fashioning an award.

Nevertheless, the Court did not believe that this is the only manner in which the issue of interest forfeiture may arise.

The Board's regulations set forth procedures governing penalty proceedings. Section 131.121(a) of the Board's regulations provides that

"penalty proceedings may be initiated by a party filing a petition for penalties as provided in §131.32 (relating to petitions except petitions for joinder and challenge proceedings)."

Relevant to this language, Section 131.5 of the regulations defines a "party" as

"[a] claimant, defendant, employer, insurance carrier, additional defendant, health care provider and, if relevant, the Commonwealth and the Uninsured Employers Guaranty Fund."

The regulation further defines "penalty proceeding" as "[a] proceeding governed by section 435(d) of the Act

Thus, the Board's regulations clearly authorize any party, including an employer, to utilize the penalty procedures.

Yespelkis v. WCAB Board (Pulmonology Associates Incorporated and AmeriHealth Casualty) 1150 C.D. 2009 (Decision by Judge Simpson, December 4, 2009) 1/10

Medical Testimony/Claim Petition/Evidence

- A doctor's opinion that was based upon an incomplete and inaccurate medical history is not competent as a matter of law. Put another way, a doctor's testimony that the claimant suffered a work-related injury is incompetent where it is not supported by the claimant's medical records or the factual history of the case.

  A doctor's opinion is further not competent where the claimant's own medical expert testifies that if claimant's medical history was not as reported, his evaluation would be incorrect.

Therefore, the WCJ's decision that granted the claimant's Claim Petition was reversed by the Commonwealth Court where the claimant's medical expert was without any personal knowledge of the claimant's physical condition prior to the examination, did not review any of claimant's extensive relevant medical records which would have revealed two head injuries and complaints of headaches, blurred vision, dizziness and neck pain beginning in 1992. Moreover, the doctor's opinion was not competent as a matter of law where the claimant obfuscated her medical history by stating in a medical questionnaire she completed for the doctor that she had suffered no prior injuries or medical problems.

- An opinion on causation that is premised upon claimant's personal opinion of causation is not competent as a matter of law to establish a causative link between the work injury and claimant's disability.

- Statements to a doctor are admissible insofar as they are necessary and proper for diagnosis and treatment of the injury and refer to symptoms, feelings and conditions. Statements, however, that relate to the cause of the injury are not admissible, except when offered as part of the *res gestae* or in an unwitnessed occurrence case when the party involved has died.. Without personally observing the accident, the doctors' testimony regarding the workplace accident was hearsay and the WCJ's attempts to use the testimony as substantive evidence was error.

- The capricious disregard of evidence standard of review is a component of appellate review where the question is properly raised before the Court. Capricious disregard is a deliberate disregard of competent evidence which one of ordinary intelligence could not possibly have avoided in reaching the result.

- The WCJ's imputation of bias to employer's fact witnesses simply because they remained employed by employer and thus may be influenced by their ongoing employment status is unfounded in the absence of competent evidence of records to support the WCJ's presumption of bias. Accepting the WCJ's reasoning would also mean that employers could never present current employees as witnesses in workers' compensation matters. By this logic, claimant's testimony would also be tainted by bias, inasmuch as she was a former employee of employer and has a direct financial interest in the claim, which, her co-workers did not share.

Southwest Airlines/Cambridge Integrated Service v. WCAB (King), No. 136 C.D. 2009 (Decision by Judge Leavitt, July 30, 2009). 1/10

SPECIFIC LOSS/STATUTE OF LIMITATION/NOTICE

- In specific loss cases, under Section 306(c) of the Act, the date of the injury is a date that the claimant was notified by a doctor that they had a loss of the use of

the member or faculty for "all practical intents and purposes" and that the injury was job related in nature.

Therefore, the claimant's Claim Petition was timely because claimant's date of injury was May 16, 2007 where the claimant suffered initial exposure to HSV to her left eye in 1979 or 1980 but was not told by a physician until May 16, 2007 that the scarring of her cornea had progressed to the point that she needed a cornea transplant.

This is because under Section 315 the three-year statute of limitations runs from three years after the date of injury and claimant's petition was timely because the claimant's specific loss injury did not occur until May 16, 2007 rendering her Claim Petition notice.

- The Act defines wages in terms of a claimant's weekly pay "at the time of the injury. Therefore, the claimant's pr-injury was to be calculated based upon her earnings as of the date he injury became a specific loss, which was May 16, 2007, notwithstanding the fact she had suffered her initial injury in 1979 of 1980 and had not been employed by the employer since 1985.

Lancaster General Hospital v. WCAB (Weber-Brown), No. 1482 C.D. 2009 (Decision by Judge Pellegrini, December 15, 2009)1/10

- Pennsylvania Supreme Court, in per curium decision, grants the Bureaus Petition fro Allowance of Appeal was granted limited to the following issue:

> *Whether the Supersedeas Fund may deny reimbursement of medical treatment rendered before an insurer requested supersedeas, where the Workers' Compensation Act only permits reimbursement of amounts paid as a result of a denial of supersedeas?*

It will be recalled that the Commonwealth Court had held that the employer was entitled to reimbursement from the Supersedeas Fund where it filed a Petition for Termination with a request for supersedeas on July 19, 2004, had supersedeas denied by the WCJ on August 30, 2004 and on January 25, 2005 paid a medical bill for treatment received on October 11, 2004 for treatment rendered to the claimant on June 1, 2004.

This was because the supersedeas Section 443 of the Act does not speak of disability or the accrual of liability; rather, the statute speaks to payments of compensation paid as a result of a denied supersedeas request. The provision contains no plain language prohibiting reimbursement of retroactive benefits. The Court reasoned that unlike cases involving retroactive benefits accruing from employer's unilateral cessation of benefits under Section 413, there was no

reasonable argument that insurer wrongfully stopped benefits. Additionally, no argument was made that the insurer could have requested supersedeas sooner or had wrongfully done anything to avoid the payments in question. Reimbursement may be had for all payments actually made after supersedeas denial, including payment of benefits awarded retroactively for earlier periods of disability.

Department of Labor & Industry Bureau of Workers' Compensation v. WCAB (Crawford & Co.), No. 145 MAL 2009 (December 17, 2009)