THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
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BY MITCHELL I GOLDING, ESQ.
KENNEDY, CAMPBELL, LIPSKI & DOCHNEY
(W) 215-861-6709

VOCATIONAL

- The mere presentation of evidence of unsuccessful application to jobs listed in a Labor Market Survey (LMS) /Earning Power Assessment does not mandate a finding that the positions identified were not open and available and that claimant lacked any earning capacity. Such evidence from a Claimant, though relevant is not dispositive with regard to the earning power inquiry.

  Therefore the WCJ's decision that granted employer's Petition for Modification was affirmed because the WCJ found that the claimant's testimony on the application process failed to show that the jobs identified by the LMS were not vocationally suitable or actually open and available.

  The fact the claimant had applied for several positions but was not hired did not automatically compel the WCJ to reject the earning capacity found in the LMS.

- This result is not inconsistent with the Supreme Court decision of Phoenixville Hospital v WCAB (Shoap), 81 A.3d 830 (Pa. 2013) where the court held that although section 306(b) of the Act does not require that the claimant be offered a job, an employer may prevail on a modification petition under section 306(b) only if it proves the existence of meaningful employment opportunities, and not the simple identification of jobs found in want ads or employment listings.

  Under the direction of Phoenixville Hospital, if the WCJ accepts the evidence of the vocational expert, the WCJ's inquiry is not over if the claimant submits evidence regarding her or his experience in pursuing the jobs identified by the employer's vocational expert witness.

  Evidence of unsuccessful employment applications is relevant but not dispositive to rebut the employer's argument that the positions identified were proof of the potentiality of a claimant's substantial gainful employment.

  This means that a claimant may a claimant may offer evidence that the position was filled by the time the claimant had had a reasonable opportunity to apply for it. If the job is already filled, it does not exist.

  The fact that the claimant was not hired, as opposed to being filled, does not mean each job did not exist. Phoenixville Hospital stated "substantial gainful employment which exists" requires that the jobs remain open until such time as the claimant is afforded a reasonable opportunity to apply for them.

Whether a claimant had a 'reasonable opportunity' to apply and did, in fact, apply for an identified position and whether the job was already filled by the relevant time are factual matters that the WCJ is fully qualified to determine.

In this matter using his discretionary powers the WCJ to assess credibility found that the positions identified were physically and vocationally appropriate for the claimant and open and available to her.

Valenta v. WCAB (Abington Manor Nursing Home) No. 1302 C.D. 2016 (Decision by Judge McCullough , December 7, 2017)12/17

MEDICAL TREATMENT

- Regardless of whether or not massage therapists are licensed, if they are supervised or have an employment or agency relationship with a licensed health care provider, an employer is liable for expenses related to the health care services rendered.

  Therefore the treatment of a Message Therapist was compensable since he was providing those services for Claimant as claimant's treating Chiropractor's employee or agent

  This is holding is consistent with Section 306(f.1)(1)(i) of the Act requires Employer to pay for reasonable services rendered by health care providers, which Section 109 of the Act defines to include chiropractors and their employees or agents acting in the course and scope of employment or agency related to health care services.

  Accordingly, the WCJ did not err when she found message therapy compensable where documents, which included Claimant's massage therapy receipts were printed on Chambersburg Chiropractic forms, reflected that claimant received treatment from a licensed massage therapist working under the direction and control of claimant's treating chiropractor.

- It is true that under Section 109 of the Act, a health care provider and/or his employee or agent must be rendering "health care services". However, the Act does not specifically define health care services.

  Section 109 and Section 306(f.1)(1)(i) of the Act do not expressly limit health care providers to medical treatment, to the exclusion of methodologies intended to enhance an injured worker's health and well-being such as treatment afforded by a message therapist.

- In order for medical to be compensable under Section 306(f)(1) of the Act, the health care service must be performed by a duly licensed practitioner or under the supervision of such a person.

  In 2008, the General Assembly enacted the Massage Therapy Law, which became effective on October 12, 2010.Thereunder, the State Board of Massage Therapy was created and authorized to establish qualifications for and approve massage therapists for Commonwealth licensing.

  Notwithstanding, the General Assembly specifically declared in Section 17 of the Massage Therapy Law, in relevant part, that "licensure under the Massage Therapy Law shall not be construed as requiring new or additional third-party reimbursement or otherwise mandating coverage under the Act.

  The fact that treatment of even a licensed Massage Therapist is not automatically compensable does not preclude reimbursement where the treatment is provided a Massage Therapist who is an employees or agent acting in the course and scope of employment on behalf of a duly licensed health care provider.

Schriver v. WCAB (Commonwealth of Pennsylvania, Department of Transportation),No. 289 C.D. 2017 (Decision by Judge Covey, December 28, 2017)
12/17