THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
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PARTIAL DISABILITY/SUSPENSION

- A claimant whose post-injury earnings are less than the pre-injury earnings is not automatically entitled to partial disability benefits. If the reduction in earnings is not tied to a loss of earning power attributable to the work injury, no disability benefits are due.

  This is because under workers' compensation law, the term "disability" is synonymous with loss of earning power. Consistent with this definition, Section 306(b) (1) limits partial disability to that caused by the compensable injury.

  A claimant who returns to their time-of-injury jobs with restrictions that do not require a modification of their duties or hours are considered to be without restriction. This is because medical restrictions are not relevant if they do not require a modification of the claimant's pre-injury job duties. Even if an accommodation could be construed as a restriction, it is irrelevant to the determination that the claimant can perform the pre-injury position.

  Therefore the Judge, did not commit an error upon granting the employer's Petition for Suspension where the claimant returned to work at her pre-injury position with a loss of earnings because overtime was eliminated for economic reasons and the claimant self-imposed the restriction of working fewer hours per week where the claimant's medical restrictions did not affect her ability to perform her regular work duties and the claimant acknowledged that she had been doing her regular job and had not been asked to do anything that exceeded her physicians restrictions and evidence reflected that the claimant could schedule around anything that exceeded her treating physicians restrictions.

  Furthermore, the employer was entitled to a Suspension where the situation that caused claimant's injury- a client hanging on her arm and refusing to walk- no longer existed because the group home where claimant worked had residents who were independent and required little direct care and if a client were to fall and have difficulty getting up, Employer's protocol is to call an ambulance and have the client examined at the hospital.

  The fact that claimant's job description included pushing and pulling 180 pounds, which was greater than the claimant's 50 pound restriction, did not entitle her to

partial disability because there were no wheelchair-bound clients at claimant's group home, meaning the restrictions were not relevant to her ability to perform the job without restrictions.

Donahay v. WCAB (Skills of Central PA, Inc.), No. 869 C.D. 2014 (Decision by Judge Leavitt, February 4, 2015) 2/15

IRE/ SUBSTANTIAL EVIDENCE/WCJ

- The qualifications that a physician must have to perform an IRE are clearly set forth by Section 306(a.2)(1) of the Act, which provides that an IRE physician must be licensed in this Commonwealth, certified by an American Board of Medical Specialties approved board or its osteopathic equivalent and be active in clinical practice for at least twenty hours per week, chosen by agreement of the parties, or as designated by the department. In addition, the IRE must be performed pursuant to the most recent edition of the American Medical Association 'Guides to the Evaluation of Permanent Impairment.

  Since whether a physician is qualified to perform an IRE is governed by the Act, a WCJ may not impose greater qualifications than those set forth in the Act. Therefore, the WCJ could not reject the testimony of the Bureau designated IRE physician, who was Board-Certified in Physical Medicine, Rehabilitation, And Pain Medicine, on the basis that brain injuries were not within his specialty.

  Although Regulation 34 Pa. Code § 123.105(b) provides that the designated IRE physician ***may*** refer the employee to one or more physicians specializing in the specific pathologies which constitute the compensable injury, there is no requirement that he do so.

- Although a WCJ is the sole arbiter of the credibility and the weight of testimony and other evidence and is free to reject or accept the testimony of any witness in whole or in part, the findings of the WCJ must be supported by substantial evidence.

  Thus, if a WCJ is to reject an IRE and the deposition testimony of the doctor who conducted the IRE as unpersuasive, there must be evidence of record to support the bases for that rejection.

  The WCJ's rejection of the testimony of the employer's IRE physician as unpersuasive was not supported by substantial evidence where the WCJ did not cite any provisions of the AMA Guides or other evidence in support of her reasoning that the IRE physician miscategorized or improperly grouped Claimant's injuries or that he improperly calculated Claimant's impairment rating. Moreover, Claimant did not elicit any evidence that could support the WCJ's reasoning.

- If the IRE is requested within the 60-day period and the claimant's impairment rating is less than 50 percent, then the change in disability status is automatic.")

  When outside the 60-day window, the employer must seek a change in disability status via the traditional administrative process. The burden in an IRE proceeding rests with the employer.

  When the employer requests the IRE outside of the 60-day window and claims that the claimant's impairment rating is less than 50 percent, the IRE merely serves as evidence that the employer may use at a hearing before a WCJ on the employer's modification petition to establish that the claimant's disability status should be changed from total to partial.

  In that event, the IRE becomes an item of evidence just as would the results of any medical examination the claimant submitted to at the request of his employer. It is entitled to no more or less weight than the results of any other examination.

  The physician who performed the IRE is subject to cross-examination, and the WCJ must make appropriate credibility findings related to the IRE and the performing physician. The claimant, obviously, may introduce his own evidence regarding his degree of impairment to rebut the IRE findings.

  Moreover, although a claimant may introduce his own evidence regarding his degree of impairment to rebut the IRE findings, he may limit his defense to cross-examination of the IRE physician.

IA Construction Corporation v. WCAB (Rhodes) No. 2151 C.D. 2013 (Decision by Judge Brobson, February 19, 2015) 2/15

PSYCHIATRIC INJURY

- Where a claimant asserts a claim under the "Physical/Mental Standard" the claimant must establish that the mental injury resulted from a triggering physical stimulus and arose during the course of employment.

  The claimant must show that the physical injury required medical treatment, even if that physical injury was not disabling under the Law. Additionally, the mental injury must be related to the physical stimulus.

  This is true although the claimant need not prove that he or she suffered a physical disability that caused a mental disability for which he or she may receive benefits or that the physical injury continues during the life of the mental disability.

Therefore, the WCJ did not commit an error of law where she used the "Mental-Mental" standard, which requires the showing of an abnormal working condition, rather than the "Physical-Mental", which does not require the showing of abnormal working conditions, where the WCJ concluded that at the time the claimant was a victim of an armed robbery and tied with rope she only suffered slight bruising to her ankles and wrists that required no medical treatment and the WCJ rejected claimant's medical expert as not credible that the clamant suffered orthopedic injuries as the result of the robbery.

- For actual working conditions to be considered abnormal, pursuant to application of the "Mental-Mental" standard they must be considered in the context of specific employment. However, this does not mean that the abnormal working conditions analysis ends when it is established that the claimant generically belongs to a profession that involves certain levels or types of stress. The court must look at the quantity or quality of stress an employee should be able "to take," or what episode of stress is, in the WCJ's subjective determination, comparable to a different episode of stress, which may be expected to be tolerated by an employee.

  The Court remanded this matter back to the WCJ with instructions to determine whether the armed robbery they represented a singular, extraordinary event occurring during Claimant work shift that caused Claimant's psychiatric injury. If it did, the claimant would prove she was subjected to an abnormal working condition, thus satisfying the "Mental-Mental" standard.

Murphy v. WCAB (Ace Check Cashing Inc.), No. 1604 C.D. 2013 (Decision by Judge Cohn Jubelirer, February 20, 2015) 2/15