THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION: JANUARY 2013 AT A GLANCE

BY MITCHELL I GOLDING, ESQ.
KENNEDY, CAMPBELL, LIPSKI & DOCHNEY
(W) 215-430-6362

SUSPENSION/ PENALTY

- Whether the procedural posture is that of a Suspension Petition, where the burden is on the employer, or a Petition for Reinstatement, where the burden is on the claimant, or the factual basis for the claimants' separation from their modified-duty position, the court examines the relationship between the reason for the separation and the claimants' work injuries. The Act was not intended as a remedy where a claimant's loss of earnings is due to factors other than such injury.

  In the case of an employee who has accepted and performed a light-duty job, and then loses that work, the focus of the inquiry is on the employee's reason for losing the job.

  However, if the reason for separation was not related to the claimants' work injuries, either because of the claimants' bad faith conduct or voluntarily quitting for reasons unrelated to their injuries, then benefits would be suspended or not reinstated.

  The reason for claimant's separation was not the result of his work injuries and employer was entitled to the granting of its Petition for Suspension where the claimant, after performing a light duty job within his restrictions stopped performing the position because he did not have transportation for the following reasons: Claimant's vehicle was repossessed, and Claimant did not have the funds available to retrieve his vehicle from the lienholder. Having no personal vehicle to travel to Employer's warehouse, Claimant borrowed his father's vehicle and returned to work. Claimant had no difficulty performing the light-duty position but, after two or three days, Claimant's father needed his vehicle back.

- The fact that the employer failed to pay the claimant during the three days he performed light duty work was no basis for denying the employer's Petition for Suspension where there was no question that Employer offered Claimant a light-duty position for a particular wage, Claimant accepted that position.

- The employer violated the Act and was subject to Penalties where it did not reinstate the claimant's compensation after the Commonwealth Court's, in its initial decision of June 25, 2007, vacated the WCAB's initial reversal of the WCJ's granting of the employer's Petition for Suspension yet the employer did not begin to pay benefits until February 25, 2009.

This is because the term "vacate" is defined as to nullify or cancel; make void; invalidate. Although the Commonwealth Court in its first decision, did not expressly state that Employer was obligated to resume making benefit payments to Claimant, when it vacated the WCAB's granting of the employer's Petition for Suspension, it nullified, invalidated, voided, the Board's 2006 Order suspending Claimant's benefits. This means that there was no longer any authority on which Employer could base a suspension of benefits

North Pittsburgh Drywall Co., Inc. v. WCAB (Owen), No. 1257 C.D. 2012 (Decision by Judge Cohn Jubelirer, January 9, 2013) 1/13

VOCATIONAL/REINSTATEMENT

- The claimant was not entitled to the granting of his Petition for Reinstatement where the claimant first refused to accept in good faith a funded employment position offered to him by his employer, resulting in claimant's unsuccessful defense against the employers Petition for Modification during which time claimant did not raise the issue of the duration of the job and then after having his benefits modified asked the employer to reoffer the funded employment job and after the employer failed to do so filed his Petition for Reinstatement.

  In order to have his benefits reinstated, he was required to prove that his physical condition had worsened so that he could not do the job provided to him at IDI. He did not do so.

- The availability of a job and its duration, including a job made available by funded employment, is an issue for a Petition for Modification, not a Petition for Reinstatement.

  Once the claimant refuses any kind of job in bad faith, whether funded or specially created for the claimant, job availability ceases to be an issue. It matters not that an employer might be able to provide another job for the claimant; it cannot be forced to do so more than once.

- A claimant is entitled to a reinstatement of benefits if he can show that the reason for the suspension or modification no longer exists.

  Typically, a partially disabled claimant can reinstate to total disability by showing that his earning power is once again adversely affected by his work injury. The claimant is entitled to a reinstatement to total disability where his light-duty job has been eliminated and the employer cannot show that there is other employment available to the claimant.

  A claimant's burden of proof is different where his benefits have been modified because of his bad faith conduct. Once a claimant has refused an available job in

bad faith, his employer's obligation to show job availability ends. The claimant must "live with the consequences of the decision," meaning that he cannot remedy the situation "by subsequent action" such as attempting to accept the job that was previously offered. Instead, the claimant must show a worsening of his medical condition to be granted a reinstatement to total disability.

Napierski v. WCAB (Scobell Company, Inc. and Cincinnati Insurance Company) No. 330 C.D. 2012 (Decision by Judge Leavitt, January 10, 2013) 1/13

SUBROGATION/EVIDENCE

- Pursuant to the plain language of Section 319, subrogation is automatic and, by its terms, admits no express exceptions, equitable or otherwise. The Pa. Supreme Court has held that, generally, the right to subrogation is "'statutorily absolute and can be abrogated only by choice.

  Ad hoc equitable exceptions to subrogation are inappropriate in light of the plain language of Section 319. However, there may be circumstances where an employer undertakes in deliberate bad faith to subvert a third party suit brought by its employee, or dereliction of duty that results in the same, which might require a different calculus. This is because it would be unreasonable to permit an employer both to act in deliberate bad faith to subvert an employee's third party action, and then to demand subrogation arising from that action.

  A series of miscommunications between employer's Legal Assistant, Sergeant, and Lieutenant regarding the motorcycle, that the claimant was riding at the time of his compensable injury, that led to the alteration of the motorcycle before inspection by claimant's expert, did not rise to bad faith or dereliction of duty that defeated employer's right to subrogation. .

- When a party who has the burden of proof relies upon circumstantial evidence and inferences reasonably deducible therefrom, such evidence, in order to prevail, must be adequate to establish the conclusion sought and must so preponderate in favor of that conclusion as to outweigh in the mind of the fact-finder any other evidence and reasonable inferences therefrom which are inconsistent therewith.

  Clamant was not able to defeat employer's right to subrogation where the inferences the WCJ drew from the circumstantial evidence were reasonable and that a reasonable mind would accept such evidence as substantial evidence to support the WCJ's finding that there was a miscommunication between Employer's employees that resulted in the alteration of the motorcycle that claimant was riding at the time of his compensable injury, prior to inspection by claimant's expert, rather than deliberate bad faith to hinder Claimant's third party action.

Glass V. WCAB (The City of Philadelphia), No. 1274 C.D. 2012 (Decision by Judge Cohn Jubelirer, January 10, 2013) 1/13

ILLEGAL ALIEN/SUSPENSION

- A claimant's status as an undocumented alien worker does not preclude him from receiving total disability benefits under the Workers' Compensation Act

- An employer seeking to suspend the disability benefits of a claimant who is an unauthorized alien is not required to show job availability. In that situation, the employer need only demonstrate that the claimant is an unauthorized alien and that the claimant is no longer totally disabled.

  To suspend weekly wage benefits of an unauthorized alien, an employer need only demonstrate that the claimant is performing some type of employment, even at wage loss, or the claimant's medical condition has improved enough to work at some job, even one with restrictions.

  Therefore, the employer was entitled to a suspension of the benefits of claimant, who was an unauthorized alien, once the claimant had been released to perform and performed part time work even though the claimant still had restrictions, a wage loss and the employer did not prove a change in physical condition.

Ortiz v. WCAB (Raul Rodriguez d/b/a Rodriguez General Contractors and : Uninsured Employer's Guaranty Fund) No. 446 C.D. 2012 (Decision by Judge Leavitt, January 15, 2013)1/13

COMPROMISE AND RELEASE AGREEMENT/ MEDICAL BILLS/ PROMISSORY ESTOPPEL

- Once a C & R agreement is approved, any issue which was not expressly reserved in the agreement may not be raised later. The C&R judgment settles everything involved in the right to recover, not only all matters that were raised, but those which might have been raised

  Therefore, where the claimant did not expressly reserve his right to add a new injury (left shoulder) to the description of his work injuries (recognized as closed' head injury, seizure disorder, left shoulder fracture, chronic pain, loss of short-term memory and Bi-polar Disorder) he was precluded from doing so more than two years after the approval of the Medical Only C & R agreement.

- A valid C & R agreement, once approved, is final, conclusive and binding on the parties. An approved C & R agreement can be set aside only upon a clear showing of fraud, deception, duress, mutual mistake, or unilateral mistake caused by an opposing party's fault.

- An employer's voluntary medical payment does not constitute an admission of liability for an injury. To hold otherwise would be contrary to the Act's policy of encouraging employers to voluntarily pay medical expenses to injured employees to assist them in regaining health without fear of being later penalized for the payment.

  Therefore, the employer's voluntary payment of medical expenses was not an admission of its liability for the left shoulder injury and cannot be construed as a promise to continue to make such payment.

- In order to maintain an action in promissory estoppel, the aggrieved party must show that (1) the promisor made a promise that he or she should have reasonably expected to induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise.

  The essential elements of equitable estoppel are the party's inducement of the other party to believe certain facts to exist and the other party's reliance on that belief to act

  The doctrine of Promissory Estoppel did not apply where the employer paid bills for the unrecognized left shoulder where nothing in the record suggested that Employer promised to continue to pay medical bills for the left shoulder injury and that Claimant relied on such promise to enter into the C & R agreement.

DePue v. WCAB (N. Paone Construction, Inc.), No. 1113 C.D. 2012 (Decision by Judge Leadbetter, January 30, 2013) 1/13