THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
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HEARINGS/ LACK OF PROSECUTION/ WCJ

- A claim petition will not be dismissed for lack of prosecution without evidence of prejudice to the employer unless the evidence shows that the claimant's counsel is "not trying" to advance the case.

  The WCJ improperly dismissed claimant's Claim Petition for failure to timely depose his medical expert where no prejudice was shown to employer and part of the delay was caused by claimant counsels discovery that claimant's treating physician would not testify in the litigation and upon obtaining a new expert and scheduling the deposition the deposition was postponed at the request of employer counsel who was waiting receipt of his IME report.

- It is within the WCJ's discretion to control his/her docket by ordering parties to comply with litigation in a timely manner." If they do not comply, the WCJ may close the record and preclude the submission of evidence, provided he first warns the parties that the record will close. Nevertheless, a WCJ's dismissal of a petition for lack of prosecution can be set aside for abuse of discretion.

Wagner, II. v. WCAB (Ty Construction Co., Inc.) No. 1202 C.D. 2013 (Decision by Judge Leavitt, January 3, 2014) 1/14

IRE/ APPEAL

- If a claimant appeals the change in total benefit status within 60 days of receipt of notice, he may challenge the IRE on its merits. After 60 days, the IRE is beyond challenge. However, the claimant may obtain a new impairment evaluation. If that evaluation shows an impairment rating of 50% or greater, then the claimant may file a petition to change his disability status back to total.

  Therefore a 2005 IRE Determination of 11% Impairment was not disturbed the fact the claimant in 2012 successfully amended the NCP to go from sole recognition of low back

strain to include "chronic radiculopathy and post-laminectomy syndrome; chronic low back pain; and depression". This is because the Petition to Review the IRE was filed four years following the date IRE was performed. Once 60 days passed, it became fixed and beyond challenge. Following expiration of 60 days the burden shifted to Claimant to prove that the addition of depression to the NCP rendered him at least 50% impaired.

- Section 306(a.2) requires an IRE to be conducted in accordance with the "most recent edition of the American Medical Association 'Guides to the Evaluation of Permanent Impairment.'" The "most recent edition" is the edition that was in effect when the IRE was conducted.

- A party who proceeded before a Commonwealth agency under the terms of a particular statute shall not be precluded from questioning the validity of the statute in the appeal, but such party may not raise upon appeal any other question not raised before the agency *Wingrove V. WCAB(Allegheny Energy), No. 1151 C.D. 2013 (Decision by Judge Leavitt, January 3, 2014) 1/14*

SUPERSEDEAS FUND REIMBURSEMENT/ COMPROMISE AND RELEASE AGREEMENT

- The test to determine whether a subsequent Compromise and Release Agreement (C&R) moots a pending appeal of a prior ruling by a WCJ or WCAB is whether the Agreement "settled the exact issue raised" in the appeal.

  A C&R entered into by the parties did not moot employers pending appeal of the wage issue resulting from the WCJ's prior granting of a Claim Petition where the language of the C&R clearly indicated the parties' intent that the C&R Agreement was executed to resolve amicably only Employer's termination petition as to future benefits.

  Therefore, the issue of whether Employer overpaid past indemnity benefits due to an erroneously-calculated AWW was not settled by the C&R Agreement, which, by its terms, related only to claims that Claimant may have pursued for additional and unpaid past, present, and future benefits.

  Accordingly, employer was entitled to the granting of its Application for Supersedeas Fund Reimbursement when its appeal was subsequently granted.

- In the absence of a reservation of rights language within a Compromise and Release Agreement, once a valid Compromise and Release Agreement is approved, it is final, conclusive, and binding on the parties. If some liability is not compromised and released,

then that liability still exists, and the agreement only extinguishes liability where the person with the claim specifically agrees to relieve the entity of that liability.

H.A. Harper Sons, Inc. v. WCAB (Sweigart),No. 861 C.D. 2013 (Decision by Judge Brobson, January 3, 2014) 1/14

CLAIM PETITION/ NOTICE OF ABILITY OF RETURN TO WORK/ MEDICAL TESTIMONY

- Section 306(b)(3), which guides the issuance of the Notice of Ability to Return to Work (LIBC-757), presumes that the injury has caused a disability, a claim has been acknowledged as compensable and that the employer seeks to reduce its existing liability by decreasing the amount of benefits it has to pay.

  Employer was not required to provide Claimant with a Notice of Ability to Return to Work in the context of the "claim petition setting." The notice is part of the earning power assessment process and is required when an employer seeks to change a claimant's status quo to partial disability by modification or suspension of payments on the basis of medical evidence.

  Therefore, the WCJ did not commit an error of law upon granting the claimants Claim Petition for a closed period and then suspending her compensation based upon a reassignment to a less stressful school within her restrictions where claimant was not receiving benefits at the time of the job offer and no litigation was taking place and a Notice of Compensation Denial had been issued.

  In this matter the burden on Claimant, who had filed a Claim Petition, was to show the duration of her disability, and she simply did not establish that it continued beyond the date her reassignment to a less stressful school would have taken place. .Accordingly, the requirement for issuance of the Notice of Ability to Return to Work (LIBC-757) was not triggered.

- The legislature created the notice requirement in Act 57 to be used as part of the earning power assessment process. Specifically, the notice is required when an employer seeks to change a claimant's status quo to partial disability by modification or suspension of payments on the basis of medical evidence. Further, the clear purpose of Section 306(b)(3) is to require the employer to share new medical information about a claimant's physical capacity to work and its possible impact on existing benefits.

- In general, a physician is competent to testify as to specialized areas of medicine even though he or she is not a specialist or certified in those areas. Objections to such testimony generally go to the weight of the evidence. In addition, it is well established that "greater credence may be given to the testimony of a treating physician than to a physician who examines simply to testify for litigation purposes.

  Therefore the WCJ did not commit an error of law by finding claimant's medical experts opinion credible that the claimant had sustained totally disabling work injuries to her vocal cord in the nature of muscle tension dysphonia from voice overuse and an exacerbation of her pre-existing lupus although the claimant's medical expert was is no longer board-certified in internal medicine and that she is not an expert in psychology, rheumatology, cardiology or otolaryngology.

School District of Philadelphia v. WCAB (Hilton), No. 598 C.D. 2013 (Decision by Judge Leadbetter, January 7, 2014) 1/14

COURSE AND SCOPE

- Injuries may be sustained in the course of employment in two distinct situations:
  (1) Where the employee, whether on or off the employer's premises, is injured while actually engaged in the furtherance of the employer's business or affairs, or

  (2) where the employee although not actually engaged in the furtherance of the employer's business or affairs (a) is on the ***premises*** occupied or under the control of the employer, or upon which the employer's business or affairs are being carried on; (b) is ***required by the nature of his employment*** to be present on the employer's premises; and (c) sustains injuries caused by the condition of the premises or by operation of the employer's business or affairs thereon.

- The "***required by the nature of employment***" language in section 301(c) of the Act and/or the common law Bunkhouse Rule includes those situations where the evidence establishes that an employee lives on the premises because he or she was "practically required" to do so.
  The Bunkhouse would apply where the employees were not contractually obligated to live in the employer's bunkhouse/premises but had no reasonable alternative than to live on employer premises, and their presence on employer's premises was to the employer's advantage.

  Under the Bunkhouse Rule, an employee is considered to be in the course of employment while sleeping on the premises, even though the employee was not actively furthering the interests of Employer at the time of the injury.

Per the Bunkhouse rule, the Act will cover every injury received on the premises of the employer so long as the nature of the employment demands the employee's presence there, regardless of whether his or her presence at the particular place where the injury occurred was actually required, if there is nothing to prove a virtual abandonment of the course of employment by the injured person, or that, at the time of the accident, he was engaged in something wholly foreign thereto.

Per the Bunkhouse rule, an employee's "hours of employment" are not confined to the period for which wages are paid and may be extended beyond that time. Whether the relationship between master and servant continues after the employee ceases actual labor is a question of fact, and the actual hours of physical work are not necessarily controlling. Rather, the fact-finder must determine "from all the facts and circumstances, whether the employee's presence on the premises was required by the nature of the service.

Per the Bunkhouse Rule, the employer's premises is extended to encompass the area where the employee sleeps and/or is "bunked."

Therefore, the claimant suffered an injury in the course and scope of her employment after she was stabbed by her son/Employer in the middle of the night while she was asleep pursuant to the Bunkhouse Rule where the claimant, whose employer was her invalid son, was hired to provide a variety of attendant care services to her son/employer for a period of up to 64 hours a week; Employer/Son could request Claimant to provide care anytime Claimant was awake; and Claimant worked evening hours on the weekend and evening hours on a sporadic basis during the weekdays, and; Employer did not have another residence in which to receive attendant care, and, the only feasible way for Claimant to provide Employer with attendant care was to do so in her home.

- In construing the term "***premises***" in section 301(c)(1) of the Act, the determinative question is not whether the employer had title to or control over the site of the accident. The 'premises of the employer' are neither defined as nor limited to the employer's actual property. Rather, by its very language, section 301(c) states, in pertinent part, that an injury must occur on "premises ***occupied*** by … the employer, or upon which the employer's business or affairs are being carried on." ***Occupancy*** is defined by the Webster's Third New International Dictionary as "to take up residence in: settle in" or "to reside in as an owner or tenant."

  Per the Bunkhouse Rule, the employer's premises is extended to encompass the area where the employee sleeps and/or is "bunked.

  The claimant suffered an injury on employer's premises, within the meaning of the Act, although the premises was claimant's home where the Employer, was claimant's

son cared for by claimant in claimant's home, and was assaulted by her son/employer while asleep in the middle of the night.

It was irrelevant that Employer's occupancy or business affairs did not encroach into Claimant's bedroom. This is because if the employee is required to live on the premises by reason of the nature of the employment, any injury resulting from normal activities on the premises is compensable.

- Under the "personal animus" exception in Section 301(c)(1), injuries caused by an act of a ***third person*** intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment" are excluded from coverage.

The term "***third person***" used in section 301(c) can include an employer acting in an individual capacity. Therefore, the rebuttable presumption may be applied where it was the employer who assaulted the claimant.

When an employee is injured on the work premises by the act of a ***third person***, there is a rebuttable presumption that the employee is covered by the Act.

Therefore, where it is alleged that compensation is not payable under Section 301(c), the burden of proving that an injury was caused by reasons personal to the assailant rests with the employer. If the employer is successful in carrying its burden, the personal animus exception will rebut the presumption that an injury that occurs on the employer's premises is work-related.

Laura O'Rourke v. WCAB (Gartland), No. 1794 C.D. 2012(Decision by Judge McCullough, January 8, 2014) 1/14

UTILIZATION REVIEW

- Section 306(f.1)(6)(ii) of the Act provides, in pertinent part:

(ii) The utilization review organization shall issue a written report of its findings and conclusions within thirty (30) days of a request.

For purposes of calculating the 30-day review period in the Act, a request for Utilization Review is considered complete upon the URO's receipt of pertinent medical records or 35 days from the assignment of the matter by the Bureau to the URO, whichever is earlier.

A URO shall complete its review, and render its determination, within 30 days of a completed request for UR. Thus, *at latest*, a URO has 65 days from the date of assignment to issue a written report. If, however, the URO receives medical records

before the 35th day following assignment, the due date for the written determination would be earlier.

In this matter where the Employer filed a UR Request of Provider's treatment on September 21, 2010, the URO received those records on October 5, 2010 and the URO issued its UR Determination on November 15, 2010, the URO did not issue his UR Determination within the time frame provided in the Act because it issued its decision more than 30 days from October 5, 2010.

- The failure of the URO to issue its determination within 30 days of receipt of medical records from the Bureau, and hence in a timely fashion, does not void the determination. Since the requirement is not mandatory and not a directive. Here, it was not the employer that failed to meet a statutory or regulatory deadline in this case. Instead, it was the URO to whom the Bureau assigned this matter that failed to issue a timely decision. And while a URO's failure to comply with the Department's regulation may put the URO at risk of losing its authorization to conduct UR review, there is no basis in the Act, the regulations, or case law to impose the additional consequence of vacating the URO's decision as void *ab initio* simply because the URO failed to issue it within the proscribed time period.
- The Bureau's regulations make clear that a URO may conclude that treatment is not reasonable and necessary when a provider fails to submit records regarding a claimant's treatment. Implicit in such a provision is the notion that a URO Reviewer requires sufficient information regarding the nature of the treatment in order to render a recommendation, and that, when a provider fails to submit information with sufficient detail regarding the purposes, objectives, and outcome of treatment, a URO Reviewer may reach a negative conclusion regarding the need for and reasonableness of treatment based on a lack of sufficient information from the provider. The WCJ, in turn, is permitted similarly to reach her own negative inferences.
- Medical treatment may be reasonable and necessary even when it is designed to manage a claimant's symptoms rather than to cure or permanently improve the underlying condition; however, the Courts have also recognized that a lack of progress in pain improvement is a factor that the WCJ may consider in making the factual determination of whether palliative care is reasonable and necessary.

  The absence of a reasoned approach to manage a claimant's pain is a relevant factor for a workers' compensation judge to consider in making a factual determination regarding the necessity of and reasonableness of a provider's treatment.

Womack v. WCAB (The School District of : Philadelphia) No. 1137 C.D. 2013 (Decision by Judge Brobson January 14, 2014) 1/14