THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
JANAURY 2018 AT A GLANCE

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DEATH BENEFITS

- Section 307(7) of the Act provides that no compensation shall be payable to a widow unless she was living with her deceased spouse at the time of his death. This language applies equally to both widows and widowers despite separate language in the statute pertaining solely to widowers.

  The term "living with" in Section 307(7) of the Act must be liberally construed and that the issue of dependency is peculiarly one of fact to be adjudicated by the WCJ.

  In this matter substantial evidence supported the WCJ find that after Decedent filed for divorce and that Claimant and Decedent resided in separate residences for reasons related to the dissolution of their marriage until Decedent's death. Although the couple continued to file joint tax returns after their separation, the WCJ noted the joint returns benefitted both of them financially and did not constitute evidence that the parties remained in a marital relationship other than in name.

  Since decedent and the claimant were not living together at the time of decedents death the claimant was not entitled to the presumption of actual dependency under Section 307(7) of the Act that applies to spouses living together at the time of the decedent's death.

- Where the spouses were separated at the time of the decedent's death, in order to be eligible for benefits, the claimant/widower must establish (1) that he was actually dependent upon the decedent, and (2) that he received a substantial portion of support from the decedent.

  A determination of dependency is a question of fact within the province of the compensation authorities.

  Where claimant had two children who entered into a compensation agreement with the employer Claimant needed to establish that he relied on Decedent for a substantial portion of his support in order to be "actually dependent" under Section 307(7) of the Act,.

In this matter the WCJ did not abuse her discretion where she found that Decedent's payment for health care coverage for her family did not establish that Decedent provided a substantial portion of Claimant's support. Moreover, the claimant failed to establish what portion of the family's health benefits he received. Although the Claimant testified he would not have been able to obtain COBRA coverage for himself and the children at $187 per month for the year 2012 without Decedent's, he failed to establish he would have been actually dependent on Decedent for his own health insurance coverage.

On the contrary, in this matter Claimant, notwithstanding his coverage from decedent's employment health care failed to establish he would have been actually dependent on Decedent for his own health insurance coverage.

Gerard Grimm, on behalf of Katherine A. Grimm, Deceased v. WCAB (Federal Express Corporation) No. 1982 C.D. 2016 (Decision by Judge Simpson, January 4, 2018) 1/18

MEDICAL ONLY NOTICE OF COMPENSATION PAYABLE/ REINSTATEMENT/STATUTE OF LIMITATIONS

- Where the WCAB had reversed the WCJ's granting of indemnity benefits following litigation of a Claim Petition, the claimant's compensation status was analogous to one where a Medical Only Notice of Compensation Payable was in effect.
Medical Only Notice of Compensation Payable is distinct from in effect from a WCJ ruling that a claimant has suffered a loss of earning power and granting a Claim Petition but immediately suspending benefits. Therefore, where it was determined the claimant did not suffer wage loss ongoing benefits for wage loss would not be subject to reinstatement.

  In this matter, since the WCJ's granting of indemnity benefits was reversed meaning that the claimant's compensation status was the same as if a Medical Only Notice of Compensation Payable has been issued, the claimant's Petition for Reinstatement was time barred because it was filed in excess of three years from the date of injury. It was no consequence that the petition was filed within 3 years of the last payment of indemnity since it was determined on appeal that indemnity never should have been payable in the first place.

  This holding is consistent with the Commonwealth decision Sloane v. WCAB (Children's Hospital of Philadelphia), 124 A.3d 778 (Pa.Cmwlth. 2015) that held the issuance of a Medical Only Notice of Compensation Payable was distinct from the an ongoing Suspension of benefits, which would occur if the claimant returned to work at no loss of earnings following the receipt of indemnity and issuance of a Notice of Compensation Payable.

Dorvilus v. WCAB (Cardone Industries) No. 397 C.D. 2017 (Decision by Judge Leavitt , January 5, 2018) 1/05

VOCATIONAL

- A Petition for Modification based on proof of earning power associated with specific positions identified by a labor market survey cannot be granted without evidence in the record that the specific positions remained open inasmuch as the claimant was afforded a reasonable opportunity to apply for them. In the absence of such evidence, earning power associated with specific positions cannot be used in the calculation of earning power under Section 306(b).

  This is because the jobs identified by the employer's expert witness, which are used as proof of earning power under Section 306(b), must remain open until such time as the claimant is afforded a reasonable opportunity to apply for them in order to actually constitute "substantial gainful employment which exists" .

  The employer, and not the claimant bears the burden of proving all facts entitling it to a modification of benefits, including the continued availability of jobs identified as proof of earning power.

  In this matter where evidence reflected that the claimant only received an interview for two of five identified positions, the two positions resulting in the interview were the only positions evidence reflected remained open and available. The employer was only entitled to a modification based upon those two positions notwithstanding the fact that the claimant was not hired.

  Under the circumstances of this case the employer was entitled to a modification of benefits based on the average weekly rate of the two positions.

  Smith v. WCAB (Supervalu Holdings PA, LLC), No. 796 C.D. 2016 (Decision by Simpson, January 5, 2018) 1/18

UTILIZATION REVIEW

- A WCJ lacks jurisdiction to review a UR Determination authored by the Bureau assigned UR Examiner where the provider under review did not provide the UR Examiner with his reports even though a UR report was produced based upon the UR Examiners conversation with the provider under review, a review of the reports of other providers and the UR Examiners independent research.

This is because an oral account of treatment is not a "record" for purposes of Utilization Review.

It is irrelevant that the UR Examiner received records from Claimant's previous treating doctors because they were not the providers subject to the utilization review.

This holding is consistent with the Commonwealth Court decisions Court's decisions in Stafford v. WCAB (Advanced Placement Services), 933 A.2d 139 (Pa. Cmwlth. 2007), and Leventakos v. WCAB (Spyros Painting), 82 A.3d 481 (Pa. Cmwlth. 2013), where the Commonwealth Court held that the WCJ lacks jurisdiction to review the reasonableness and necessity of the medical treatment where the provider under review did not provide medical records to the URO.

- The WCAB's reversal of the WCJ's granting of the claimant's Petition to Review a UR Determination did not violate claimant's procedural due process rights by depriving him of a hearing because he has a property interest in the medical treatment he received. This is because a claimant does not have a protected property interest in medical benefits not yet determined to be reasonable and necessary.
- The employer who stipulated it would remain responsible for the payment of occipital nerve blocks received by Claimant at Parkway Neuroscience and Spine Institute *that are reasonable and necessary* was not it violation of the Act where is successfully UR's that treatment and it was determined not to be *reasonable and necessary.* This is because by using the term *reasonable and necessary* Employer's obligation of payment was subject to modification by a Utilization Review Determination.
  This holding was supported by Section 306(f.1)(6)(i) of the Act, which provides that the reasonableness or necessity of all treatment provided by a health care provider may be subject to prospective, concurrent, or retrospective utilization review.

  Indeed, the passage of time may affect the reasonableness and necessity of a particular medical treatment, even if the claimant's medical condition has not changed.

Allison v. WCAB (Fisher Auto Parts, Inc.), No. 704 C.D. 2017 (Decision by Judge Leavitt, January 12, 2018) 1/18

IRE

- The Pennsylvania Supreme Court, in a Per Curiam order, vacates and remands an Unpublished Memorandum Opinion and Order to the Commonwealth Court to determine whether the Supreme Court's decision in Protz v. W.C.A.B. (Derry Area School District), 161 A.3d 827 (Pa. 2017) applies retroactively, thereby rendering Petitioner's IRE void ab initio.

  The underlying Commonwealth Court decision was issued prior to the Supreme Court Protz decision, that found the entire IRE provision unconstitutional but subsequent to the

initial Commonwealth Court Protz decision, that had held IRE's invalid if they were not based upon the 4rth Edition of the AMA Guides.

The underlying Commonwealth Court decision had found, citing Riley v. WCAB (Commonwealth of Pennsylvania), 154 A.3d 396 (Pa. Cmwlth. 2016), claimant's Petition that challenged the IRE was not timely because it was not filed within 60 days of the employer's issuance of the Notice of Change.

Gillespie v. WCAB (Aker Philadelphia Shipyard) No. 279 EAL 2017 **(**PER CURIAM, January 18, 2018)

ATTORNEY FEES/SUPERSEDEAS FUND

- The Pennsylvania Supreme Court reverses the Commonwealth Court and holds that the General Assembly, in enacting the Act, did not provide any mechanism by which employers can recoup erroneously awarded counsel fees, once paid either directly from counsel or from the Supersedeas Fund. Rather, the General Assembly contemplated that when a merits appeal is undertaken, a court may grant supersedeas of an order awarding attorney's fees.

  Where a supersedeas was requested and denied in this case, thus requiring the employer to pay the awarded attorney's fees, the employer was not permitted to recoup the already paid attorney's fees from the employee's counsel because there is no statutory provision authorizing reimbursement if the award is reversed.

  In reaching its holding the Supreme Court reasons that the availability of unreasonable contest attorney's fees under Section 440 is designed to discourage employers from contesting liability where doing so is questionable. Thus, requiring a claimant's attorney to disgorge unreasonable contest fees previously paid in the litigation would chill claimants' attorneys from bringing such claims and would, therefore, make employers more apt to bring unreasonable challenges to their liability.

- The employer was not entitled to reimbursement from the Supersedeas Fund for the unreasonable contest attorney fees it paid because unlike the reimbursement of compensation benefits, for which there is clear statutory support, there is no express concomitant right to reimbursement of attorney's fees under the Section 443.

County of Allegheny v. WCAB (Parker) No. 28 WAP 2017 (Decision by Justice Bear, January 18, 2018) 1/18