THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
JUNE 2017 AT A GLANCE
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PARTIAL DISABILITY

- A claimant who suffers a loss of earning power attributable to her work-related injury when she returns to work in a modified-duty position with her pre-injury employer and thereafter accepts a permanent position specifically created and offered to her by her pre-injury employer at a loss of wages is entitled to Partial Disability

  Therefore, the claimant was entitled to partial disability where the claimant, who had suffered an injury recognized by a Medical Only Notice of Compensation Payable was entitled to Partial Disability where the Claimant had returned to work following her work-related injury in a modified-duty position with Employer as a telemetry R.N. at no loss of earnings and thereafter was offered and voluntarily accepted a permanent position created by Employer in the Care Management Department and that resulted in wage loss though she remained capable of performing the modified-duty telemetry R.N. position at the time that she accepted the permanent care management position.

  This is because Employer, on its own, created and offered Claimant a permanent light-duty position within her restrictions at a loss of earnings for which it now claims no liability.

  The court reasoned "We simply cannot permit employers to evade the payment of pre-injury wages or partial disability benefits by creating and offering permanent, lower-paying positions to claimants that are within the restrictions imposed by the claimants' work-related injuries."

- A claimant is entitled to partial disability benefits if her earning power is decreased as a result of her work-related injury. Thus, a claimant whose earning power is not affected by her work-related injury is not entitled to partial disability benefits, even though her earnings may be less than her pre-injury earnings.

Holy Redeemer Health System v. WCAB (Lux) No. 768 C.D. 2016 (Decision by Judge Brobson FILED, June 6, 2017) 6/17

ATTORNEY FEES

- The Pa. Supreme Court grants Petition for Allowance of Appeal and asserts it will address the following issues:

  (a.) Whether the Commonwealth Court erred when it held, without legal precedent, that a workers' compensation claimant's attorney must disgorge and return unreasonable contest attorney's fees if the employer ultimately prevails?

  (b.) Whether the disgorgement and return of unreasonable contest attorney's fees when the employer ultimately prevails is better left to the legislature rather than the courts?

- It will be recalled that the Commonwealth Court had held that an employer was entitled to recover from claimant's Counsel the invalid unreasonable contest attorney fees award that it was required to pay to counsel. This is because the employer would not be entitled to reimbursement for such costs from the Supersedeas Fund.

  The Commonwealth Court had reasoned that an order to refund unreasonable contest attorney fees involves no repayment of compensation benefits and denying a refund order would result in unjust enrichment by allowing an unsuccessful claimant's counsel to keep funds that may only be awarded where the claimant is the prevailing party.

  The Commonwealth Court therefore ordered Counsel to refund to Employer the $14,750 in unreasonable contest attorney fees that Employer paid to Counsel following reversal of the WCJ's decision that has assessed unreasonable contest attorney fees against the employer.

County of Allegheny v. WCAB (Parker) No. 31 WAL 2017 (PER CURIAM, June 6, 2017) 6/17

NOTICE OF STOPPING TEMPORARY COMPENSATION

- The employer did not issue an untimely Notice of Stopping Temporary Compensation pursuant to the 5 day rule set forth by Section 406.1(d)(5)(i), of the Act where:

  1) The employer issued the Notice of Temporary Compensation Payable (NTCP) on June 6, 2012;

  2) The employer made payment for the closed period of May 15, 2012- June 6, 2012 on June 14, 2012; and

  3) The employer did not issue the Notice of Stopping Temporary Compensation until June 15, 2012.

This is because the five days from which the employer has to issue the Notice of Stopping Temporary Compensation, pursuant to Section 406.1(d)(5)(i), is calculated from when compensation must be paid, which was by June 27, 2012, and not from the last period for which compensation was payable ended.

This is consistent with the language of Section 406.1(a) that provides that "compensation shall be paid not later than the twenty-first day" after an agreement, NCP or NTCP, which means the five days is calculated from when compensation must be paid, not the last period for which compensation is payable ended.

This means the employer had 21 days from June 6, 2012 or until June 27, 2012 to make payment on the NTCP. The Notice of Stopping Temporary Compensation was timely because it was issued within 5 days of 21 day time period it was required to make payment.

Jones v. WCAB (Villanova University) No. 1531 C.D. 2016 (Decision by Judge Pellegrini, March 30, 2017) 6/17

IRE

- Pennsylvania Supreme Court finds unconstitutional in its entirety the IRE provision of Section 306(a.2) of the Workers' Compensation Act that allows employers to demand that a claimant following the receipt of 104 weeks of total disability to undergo an IRE during which a physician must determine the" degree of impairment" that is due to the claimant's compensable injury and results in modification of the claimant's compensation status form total to partial resulting in a limitation of 500 more weeks of benefits if the impairment is found to be less than 50%.

  This is because Section 306 (a.2) violates the non-delegation doctrine embodied by the Pa. constitution by giving the AMA unfetered discretion over Pennsylvania's' impairment-rating methodology.

Protz v. WCAB(Derry Area School District), No.7 WAP 2016 (Decision by Justice Wecht, June 20, 2017)

PENALTY/ ATTORNEY FEE/UNINSURED EMPLOYERS GUARANTY FUND

- The fact that the employer based in Texas was not insured in Pennsylvania and did not have the financial ability to pay the WCJ's order granting the claimant's Claim Petition did not relieve it of its obligations under the Act to make payment within 30 days of the receipt of the WCJ's order despite the fact that the claimant also filed a Penalty Petition against the Uninsured Employers Guaranty Fund (Fund) who subsequently commenced payment.

Although the Employer argued that the Fund was aware of the fact that it had not paid the Claimant compensation benefits prior to the initiation of the Penalty Petition and, thus, its delay in providing benefits to the Claimant was unreasonable the Commonwealth Court agreed with the WCJ who noted that the obligation to pay the WCJ's award granting the Claim Petition was on Employer and the fact that the Fund ultimately commenced such payments did not relieve Employer of its obligation.

There is no precedent or specific statutory language that relieves an employer from the obligation to pay an award due to purported financial inability to satisfy its obligation.

Therefore, penalties were appropriate against the employer where the WCJ issued an order granting the claimant's Claim Petition on April 3, 2014, the Employer and the Fund filed supersedeas requests with the Board that were denied on May 20, 2014 and the Fund did not begin to make biweekly payments to Claimant until September 1, 2014.

This is because the Fund was not created to protect the uninsured employer or otherwise shield such an employer from its obligations under the Act, as evidenced by section 1605(b) of the Act, which authorizes the Department of Labor and Industry, on behalf of the Fund, to seek reimbursement of any award paid by the Fund, as well as penalties, interest and attorney fees, from the responsible employer. The Fund was created so a third-party that would be responsible for the payment of claims to protect an injured worker and his right to be compensated for work-related injuries.

- The Fund is not considered an insurer and is not subject to penalties or unreasonable contest attorney fees

- Pa.R.A.P. 2744 provides that an appellate court may award reasonable counsel fees and damages for delay at the rate of six percent if the court determines that the appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate, or vexatious.

  A frivolous appeal implies that no justiciable question has been presented and that the appeal is readily recognizable as devoid of merit in that there is little prospect of success.

  In this matter the court declined to assess attorney fees for frivolous appeal against the employer because although Employer's arguments were ultimately unsuccessful, the court could not that the same were frivolous or meant solely for delay.

CMR Construction of Texas v. WCAB (Begly), No. 693 C.D. 2016 (Decision by JUDGE McCullough, June 26, 2017) 6/17

COURSE AND SCOPE

- The claimant, who was a roofer and a traveling employee, suffered an injury in the course and scope of his employment where he injured himself after he jumped off a roof because a ladder had been removed and where he first waited one-half hour for help and he tried calling two employees for help before he jumped but got their voicemail.

  Whether a claimant is a traveling or stationary employee is relevant for determining whether an injury sustained while on a departure from work duties is compensable. Injuries sustained by traveling employees are given more latitude when considered if compensable. In this matter claimant was a traveling employee and, as such, he was entitled to a presumption that he was furthering Employer's business when he was injured.

  To rebut this presumption, the employer bears the burden of proving that the claimant's actions were so foreign to and removed from his or her usual employment as to constitute job abandonment thereof.

  While Claimant's decision to jump was not advisable, may not have been a smart move, and may have been misguided, the court could not say that it was so unreasonable as to make the action so foreign to and removed from Claimant's job as to constitute an abandonment of that job. Rather, here, Claimant was a traveling employee who had reasonably used the ladder of other trades people at that job site to enter and exit the working area, and who unexpectedly found his means of egress removed when his job was over.

- Although jumping off a roof was not one of Claimant's job duties, exiting a work site was a necessary component of any job and so advanced Employer's business and affairs.

Wilgro Services, Inc. v. WCAB (Mentusky), No. 1932 C.D. 2016 (Decision by Judge McCullough: June 28, 2017) 6/17

CREDIT

- The pension benefit offset provision of Section 204(a) of the Act focuses on the extent to which benefits are funded by the employer.

  Therefore, the employer was entitled to an offset to the extent it funded the claimant's ***maximum single life annuity*** in a monthly amount equivalent to a life annuity payable to the claimant from the effective date of retirement with the provision that, if, at his death the unpaid balance would be payable to his beneficiary.

  This was despite the fact that the clamant instead ***voluntarily chose a joint and survivor annuity,*** which required Employer to fund both his and his wife's annuity benefits in an equivalent amount to claimant's maximum single life annuity but resulted in a monthly

lower payout to the claimant since it was actuarially presupposed a continuing pension would be paid to claimant's spouse following his death.

Although Claimant was receiving a reduced payment under this option, Employer did not receive a corresponding reduction in the amount it must fund Claimant's pension benefits. Rather, the reduction in Claimant's payment was necessary to enable Employer to provide funding for a survivor benefit for Claimant's wife. Thus, because Employer was partially funding both the annuity to Claimant and the survivor annuity for Claimant's wife, Employer was entitled to an offset for Claimant's maximum single life annuity regardless of the monthly amount paid solely to Claimant

- The employer is not required to calculate the workers' compensation offset based on the net maximum single life annuity after taxes

  An employer may calculate the pension offset based on the gross amount of the other benefit received by the employee, subject to a correction once the employee notifies the insurer he has paid the required tax consistent with Specifically, 34 Pa. Code §123.4(f) that provides, in pertinent part:

  > *The insurer shall repay the employee for amounts previously offset, and paid in taxes, from workers' compensation benefits, when the offset was calculated on the pretax amount of the benefit received.*

  In this matter when Claimant initially retired, he chose to have taxes taken out. He was therefore entitled to reimbursement from Employer for taxes paid.

- Even though Claimant filed the offset review petition, Employer, as the party seeking the pension offset and a change in the status quo, bears the burden of proof regarding its entitlement.

Harrison v. WCAB (Commonwealth of Pennsylvania), No. 658 C.D. 2016 (Decision by Judge Simpson, June 28, 2017) 6/17