THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
MAY 2011 AT A GLANCE
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AVERAGE WEEKLY WAGE

- Pennsylvania Supreme Court reverses the Commonwealth Court, which was not published, and holds that the WCJ did not err in finding that Claimant did not maintain a continuous employment relationship with Employer thereby justifying performing his wage calculation pursuant to Section 309(d.2) because the claimant did not retain significant rights/accoutrements of employment with Employer during his layoff.

  In this matter there was not a continuous employment relationship with the employer following layoffs prior to the work injury where the Claimant, who suffered a compensable work injury on August 29, 2008, was laid off in September 2007 and was not offered any type of ongoing benefits such as health insurance or retirement contributions, had no type of regular communication with Claimant, and there was no requirement that Claimant check in periodically. In addition, Claimant here had no choice in deciding whether or not he would accept the layoff. Furthermore, unlike in Reifsnyder, Claimant here had not retained significant rights/accoutrements of employment such as plant seniority, healthcare, and sick leave benefits, and employer contributions to his retirement account.

Hostler v. WCAB (Miller Wagman, Inc.), No. 866 MAL 2011 (Per Curiam, Decided May, 2, 2012) 5/12

DISFIGUREMENT

- The claimant bears the burden of proving each and every element necessary for an award of disfigurement benefits under Section 306(c)(22) of the Act.

- The Pennsylvania courts have consistently held that in order to establish entitlement to a disfigurement award, "there must be affirmative findings that the disfigurement be (1) serious and permanent, (2) of such character as to produce an unsightly appearance, and (3) such as is not usually incident to employment.

  Not every change to a claimant's head, neck or face will be compensable. A discernable scar, blemish or alteration of the head, neck or face must also rise to the level of creating an unsightly appearance or it will not be considered a disfigurement for purposes of the Act. The "unsightly appearance" requirement has produced the commonsense rule that not every mark or residual of an injury to

the head, neck or face will constitute disfigurement. The claimant may well suffer some alteration of the head, neck or face yet not be entitled to any award at all.

Therefore, the WCAB did not err by reversing the WCJ's award of benefits where it upon viewing claimant's nose, determined that the WCJ's decision was unsupported because although there was a visible alteration to Claimant's nose, it amounted to a "slight crookedness" that was "not noticeably disfiguring." Stated otherwise, it did not create an unsightly appearance.

- The issue of a residual injury is *serious or unsightly* is a question of fact to be determined upon a personal view of the claimant.

  The Pennsylvania Supreme Court has described the issue of the *amount* of a disfigurement to award if the scar is serious or unsightly award as "at least a mixed question of fact and law" subject to the WCAB's review. If the WCAB concludes, upon a viewing of a claimant's disfigurement, that the WCJ capriciously disregarded competent evidence by entering an award significantly outside the range most WCJ's would select, the WCAB may modify the award as justice may require.

  The Pennsylvania Supreme Court hoped to achieve "a reasonable degree of uniformity in disfigurement awards."

- The WCJ has the first opportunity to do this personal view of the injury to determine its seriousness and unsightliness. If the Board views the claimant and determines that the WCJ's finding of fact on unsightliness is not supported by the evidence, the Board will reverse the WCJ's disfigurement award or denial whichever the case may be.

Walker v. WCAB (Health Consultants) No. 492 C.D. 2011(Decision by Judge Leavitt, May 3, 2012)5/12

TERMINATION FOR CAUSE/WCJ/MEDICAL TESTIMONY

- Violation of an employer's substance abuse policy constitutes conduct that amounts to lack of good faith on the part of the claimant and a claimant terminated for such conduct is not entitled to disability benefits for that loss.

  Therefore, the WCJ decision granting the claimant's Claim Petition for disability benefits was not supported by substantial evidence where, notwithstanding the fact that a blood alcohol test performed following the claimant's return to work in a light duty position showed a blood alcohol level of .108, the WCJ granted the claimant's Claim Petition finding that the Claimant did not exhibit intoxicated behaviors do not negate the fact that she was under the influence of alcohol.

- A claimant seeking disability benefits must prove that she has suffered a disability and that the disability was caused by a work-related injury. To prove a disability, the claimant must show not merely physical impairment, but loss of earning power. For the purposes of receiving Workers' Compensation, disability means loss of earning power, and thus although a claimant may suffer a work-related physical disability, it is only if that physical disability occasions a loss of earnings that a worker will be disabled under the meaning of the Act and will be entitled to receive compensation.

  Where the claimant's loss of earnings is a result of a termination for misconduct unrelated to the injury, the requirement of causal connection to the work-related injury cannot be satisfied and claimant is not entitled to disability benefits for that loss. For a termination to bar disability benefits, the employer must show that the termination was for conduct that amounts to bad faith or a lack of good faith on the part of the claimant.

  If the employer has provided work within the claimant's physical limitations at no loss of pay and has shown that the claimant was terminated for conduct evidencing bad faith or a lack of good faith, disability benefits must be denied, regardless of whether the claimant has a physical disability caused by the work-related injury. Under such circumstances, the claimant is not entitled to workers' compensation disability benefits because "his loss of earnings subsequent to the discharge was caused by his own action, not by the work injury.

- While it is for the WCJ as fact finder to determine credibility, whether expert testimony is equivocal is an issue of competence, not credibility, and is a question of law subject to this Court's plenary, de novo review. WCJ's credibility determination cannot serve to preclude this Court from determining whether an expert's testimony was equivocal. The law is equally well settled that questions relating to the equivocality of an expert's testimony are questions of law fully subject to this Court's review.

BJ's Wholesale Club v. WCAB (Pearson) No. 2010 C.D. 2011 (Decision by Judge Colins, May 10, 2012) 5/12

REINSTATEMENT/ VOCATIONAL/ FUNDED EMPLOYMENT/ STATUTE OF LIMIATIONS

- A claimant who files a Petition for Reinstatement after the receipt of 500 weeks of partial disability following lay off from a funded employment job has the heightened burden of proof that applies to all claimants who seek reinstatement following receipt of 500 weeks of partial disability, irrespective of the fact the claimant was laid off from a funded employment position. The claimant must still show that he could no longer do the job because of an increased impairment.

There is nothing untoward about funded employment. It is a legitimate way to bring an injured claimant back to work and reduce his disability from total to partial.

- There are different burdens of proof for reinstating total disability benefits, depending on whether the claimant has exhausted his 500 weeks of partial disability benefits.

  Prior to 500 weeks elapsing- a partially disabled claimant can reinstate to total disability benefits by showing that his earning power is once again adversely affected by his work injury, and he need not show his physical condition has worsened. Such a claimant is entitled to total disability benefits if he is laid off when the employer eliminates his light-duty job

  After 500 weeks of partial disability benefits have exhausted- Where a claimant has exhausted his 500-week partial disability and seeks reinstatement to total disability, he must prove that his increased, work-related impairment has precluded continuation of such light-duty employment. The burden to prove the availability of employment consistent with the claimant's physical limitations will then shift to the employer.

  Simply, after exhaustion of partial disability, it is not enough to show that the light-duty job is no longer available. The claimant must show that he could no longer do the job because of an increased impairment.

- A Notification of Modification has the same effect as a Supplemental Agreement for a modification of benefits.

Sladisky V. WCAB (Allegheny Ludlum Corporation), No. 67 C.D. 2011 (Decision by Judge Leavitt, May 15, 2012) 5/12

SPECIFIC LOSS

- A specific loss is either (1) the loss of a body part by amputation or (2) the permanent loss of use of an injured body part for all practical intents and purposes.

  When a claimant alleges that his injury has resolved into a specific loss, he has the burden of proving that he has permanently lost the use of his injured body part for all practical intents and purposes.

  A specific loss requires more than just limitations upon an injured worker's occupational activities; a loss of use for all practical intents and purposes requires a more crippling injury than one that results in a loss of use for occupational purposes. However, it is not necessary that the injured body part be one hundred

percent useless in order for the loss of use to qualify as being for all practical intents and purposes.

- Whether a claimant has lost the use of a body part, and the extent of that loss of use, is a question of fact for the WCJ. Whether the loss is for all practical intents and purposes is a question of law.

- A claimant cannot rely solely on her own testimony and must present medical evidence to support a specific loss claim. A claimant's testimony and the WCJ's observations are relevant and can be considered "as further support" of a finding of specific loss, but competent medical evidence must be presented before "further support" in the form of a claimant's testimony can be considered.

- The WCJ erred by stating that in order to prove a specific loss of an arm, a claimant must also suffer the loss of the hand and the forearm. This was error. The court has repeatedly ruled that it is not necessary that the injured body part be 100 percent useless in order for the loss of use to qualify as being for all practical intents and purposes. In other words, a claimant may prove a specific loss even where she retains some use of the injured body part.

  The legal determination of whether the claimant suffered a specific loss will hinge on the specific fact findings of each case, including findings regarding credibility, the degree of the injury, and the degree of the claimant's ability to continue to use the injured body part. The degrees to which a claimant may continue to use the hand, wrist, and forearm are relevant to a determination of whether there is a specific loss of use of the arm, but they are not dispositive.

  The WCJ therefore committed an error of law by stating that a claimant must prove the loss of a hand and the loss of a forearm to prove the specific loss of an arm under Section 306 of the Act

  Nevertheless, the WCJ's denial of the claimant's petition seeking specific loss was supported by substantial evidence where the WCJ found that Claimant retained approximately 50 percent movement in her shoulder, as found by employer's medical experts credible testimony. The WCJ also found that Claimant had normal movement of her elbow, wrist, and hand. The WCJ further found that Claimant, although limited, was able to conduct many normal daily activities of life. The WCJ also found that claimant's descriptions and demonstrations of the use of her arm were contradicted by the surveillance video.

Susan Miller v. WCAB (Wal-Mart), No. 1741 C.D. 2011(Decision by Judge Colins, May 25, 2012) 5/12

SPECIFIC LOSS/AVERAGE WEEKLY WAGE

- The Pennsylvania Supreme Court affirms that Commonwealth Court and holds that the interpretation of "employer" in Section 309 means the employer at the time of the work-related injury.

  Interpreting "employer" to mean the employer at the time of the initial incident would result in a claimant receiving specific loss benefits calculated using out-of-date wages merely because the claimant's injury happened to lie dormant for a period of time.

  Therefore, the claimant's pre-injury was to be calculated based upon her earnings with her subsequent employer as of the date the injury became a specific loss, which was May 16, 2007, notwithstanding the fact she had suffered her initial injury in 1979 or 1980 and it was her initial employer in 1979/1980 that was responsible for paying her the monies for the specific loss.

- The various subsections of Section 309 have applications that are dependent upon disparate employment circumstances.

  Subsections (a), (b), and (c) provide straightforward methods for calculating the average weekly wage of employees whose wages are fixed by the week, month, or year, respectively.

  Subsections (d) and (d.1) address those employees who earned their wages by the hour.

  Subsection (d.2) applies to recently hired employees, as it permits wage projection based on the number of hours the employee was expected to work had he or she not been injured.

  Subsection (e) allows for some flexibility in calculating those wages earned by seasonal employees in order to arrive at a "fair ascertainment" of the claimant's weekly wage.

  Every subsection of Section 309 references an "injury" and an "employer," either implicitly or explicitly. Section 309 addresses the same "injury" and "employer" throughout its subsections. The differing calculations serve the common goal of accurately measuring an injured employee's wages, regardless of how that employee earned those wages.

Lancaster General Hospital v. WCAB (Weber-Brown), No. 69 MAP 2010 *(Decision by Justice Todd, May 29, 2012)5/12*

STATUTORY EMPLOYER

- The Pennsylvania Supreme Court affirms the Commonwealth Court and holds that the defendants were the claimant's statutory employer pursuant to Section 302(a), although they were owners of the fields where the tomatoes were picked. This is because the McDonald test, which states the statutory employer must be working under a contract with the premises owner only applies to Section 302(b) of the Act but does not apply to Section 302(a).

  Section 302(a), by its terms, is not limited to injuries occurring on premises occupied or controlled by the putative statutory employer. Rather, the statute extends to any scenario in which a "contractor subcontracts all or any part of a contract," within the scope of the work delineated in Section 302(a)'s specialized definition of "contractor" including work of a kind which is a "regular or recurrent part of the business" of the putative statutory employer.

  The Legislature meant to require persons (including entities) contracting with others to perform work which is a regular or recurrent part of their businesses to assure that the employees of those others are covered by workers' compensation insurance, on pain of assuming secondary liability for benefits payment upon a default. For similar reasons the broad owner exclusion which has arisen in the context of Section 302(b) has no applicability in the Section 302(a) setting, given the materially different terms of the statute. Therefore, neither the McDonald test, nor a per se owner exclusion, applies under Section 302(a) Act.

  Therefore, the defendants who owned fields upon which tomatoes were grown, owned a warehouse where they were packed and processing centers to which the tomatoes were delivered was deemed to be the statutory employer of the claimant because the claimant's direct employer, who did not have workers' compensation insurance, contracted with the defendant to provide certain services including the harvesting and hauling of tomatoes.

- Section 302(a) and (b) of the Act sets forth the criteria for determining whether an entity is a statutory employer under the Act.

  Pursuant to the second paragraph of Section 302(a) of the Act, an entity may be deemed a statutory employer, regardless of whether the entity was in control of the premises, where that entity contracted to have work performed by another of a kind which is a ***regular or recurrent*** part of the business, occupation, profession or trade of such person. The person with who the entity contracted with shall be deemed the sub contractor.

  The elements of the McDonald test are applicable to Section 302(b) of the Act but not to Section 302(a) of the Act.

Six L's Packing Company v. WCAB (Williamson) No. 46 EAP 2011 *(Decision by Justice Saylor, May 29, 2012). 5/12*