THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION: MAY 2014 AT A GLANCE

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CREDIT/WAIVER

- Claimant waived the argument that that the employer was not entitled to any offset for the portion of disability pension funded by the employer against the claimant's worker's compensation proceeds because the employer did not first send the claimant Form LIBC-756, entitled "Employee's Report of Benefits for Offsets," before notifying him of its intention to take an offset because the claimant failed to raise the issue during the litigation of Claimant's Petition To Review Compensation Offset.

  Had Claimant properly raised the issue, Employer would have had the opportunity to prove that it did supply the form. Because Claimant did not raise the issue until after the record was closed, Employer did not have that chance.

  Therefore, the WCAB erred by finding, irrespective of the waiver issue, Employer's failure to provide Claimant with a Form LIBC-756 barred its recoupment of the overpayment. This is because if an issue is waived, it is waived for all purposes.

- The WCJ committed an error of law by finding Maxim Crane Works v. WCAB (Solano), 931 A.2d 816 (Pa. Cmwlth. 2007) holds there is a "presumption of prejudice" whenever an employer seeks to recoup an overpayment of offsetable benefits, no matter how implemented. Maxim Crane was decided on legal grounds, i.e., that the employer had failed to notify the claimant of his duty to report offsetable benefits to the employer. Maxim Crane went on to explain that where an employer waits two years to satisfy this notice obligation, there will be a presumption that recoupment will cause a hardship. This was *obiter dicta* because the case was decided on the employer's failure to inform the claimant of his duty to report offsetable benefits.

  Implicitly, Muir v. Workers' Compensation Appeal Board (Visteon Systems LLC), 5A.3d 847 (Pa. Cmwlth. 2010), established that a recoupment of an overpayment that occurred over six months or less eliminates the need of the WCJ to inquire into hardship.

  Muir did not address the equities of recoupment but, rather, established that the employer must notify the claimant of his reporting requirement by sending him a Form LIBC-756 every six months.

In this matter the employer was entitled to a recoupment of its overpayment where the overpayment covered a period of weeks, not a period in excess of six months.

- In the context of the allegation of hardship where the employer seeks recoupment of an overpayment, the court comments in a footnote:

  Hardship is a difficult inquiry because the circumstances of each claimant will be different. Further, it is difficult to square the notion of "hardship" to the situation where a person is required to return monies to which he is not entitled. The manner of repayment may create a hardship, and a WCJ has discretion to fashion an appropriate repayment schedule.

- Section 204(a) of the Act and the regulations expressly authorize an employer to do a retrospective offset as needed to recover overpaid workers' compensation benefits.

  The court has allowed an employer to recoup overpaid benefits to prevent the claimant's unjust enrichment even in situations where recoupment is not expressly authorized in the Act or regulations.

  Regulation Section 123.5, entitled "Offset for benefits already received," specifically authorizes a retrospective offset or recoupment.

  The Department's Form LIBC-761 contains a specific section dealing with recoupment, which states as follows:

  > An ending date of _____ has been established for this offset or a portion of it *to recoup prior offsetable benefits you received*. After that date you will continue to receive reduced workers' compensation benefits in the amount of $_____ per payment based on your continuing receipt of [offsetable] benefits.

City of Pittsburgh, and UPMC Benefit Management Services, Inc. v. WCAB (Wright), No. 329 C.D. 2013 (Decision by Judge Leavitt, May 1, 2014) 5/14

UNINSURED EMPLOYERS GUARANTY FUND

- Pursuant to Section 1603(b) of the Act an injured worker is required to notify the Pennsylvania Uninsured Employers Guaranty Fund (Fund) within 45 days after the worker knew that the employer was uninsured. This section further provides that no compensation shall be paid from the Fund until notice is given and the Department determines that the employer failed to voluntarily accept and pay the claim or subsequently defaulted on payments of compensation.

Consistent with Section 1603(b), Bureau Regulation 123.802 provides the injured worker who seeks benefits from the Fund shall notify the Fund of a claim within 45 days from the date upon which the injured worker knew that the employer was uninsured.

Neither Section 1603 of the Act or the Bureau's Regulations requires the Bureau to issue a notice letter to Claimant informing him that the employer did not have workers' compensation insurance to trigger the date from which the 45 days to provide notice to the Fund begins. Rather, the issue of whether a claimant "knew" of the lack of coverage, which triggers the 45 days to provide notice to the Fund, is a factual determination to be made by the WCJ.

- Neither the WCAB nor the Commonwealth Court may review the evidence or reweigh the WCJ's credibility determinations.

  The critical inquiry on appeal is whether there is evidence to support the findings actually made. We review the entire record to determine if it contains evidence a reasonable mind might find sufficient to support the WCJ's findings. If the record contains such evidence, the findings must be upheld even though the record contains conflicting evidence.

Pennsylvania Uninsured Employers Guaranty Fund, v. WCAB (Lyle and Walt & Al's Auto & Towing Service), No. 1421 C.D. 2013 (Decision by Judge Covey, May 12, 2014) 5/14

JURISDICTION

- Section 305.2 of the Act, which permits the invocation of jurisdiction for injuries occurring out-of-state provides, in pertinent part:

  > *(a) If an employe, while working outside the territorial limits of this State, suffers an injury on account of which he, or in the event of his death, his dependents, would have been entitled to the benefits provided by this act had such injury occurred within this State, such employe, or in the event of his death resulting from such injury, his dependents, shall be entitled to the benefits provided by this act, provided that at the time of such injury:*
  >
  > *(1) His employment is principally localized in this State, or*
  >
  > *(2) He is working under a contract of hire made in this State in employment not principally localized in any state, or*
  >
  > *(3) He is working under a contract of hire made in this State in employment principally localized in another state whose workmen's compensation law is not applicable to his employer*

- Although the claimant's contract of hire was in Pennsylvania, the WCJ did not commit an error of law by finding that the claimant's principle place of employment was in New York and New York conferred jurisdiction, notwithstanding the fact that the claimant worked as a union laborer out of Local 1451 in Latrobe, Pennsylvania, the employer's main connection to New York was that it was working on a New York project and the claimant had worked for employer intermittently on several prior occasions.

  This is because the claimant, prior to his injury, was specifically hired by employer to work on a job in New York and claimant suffered his injury in New York.

- Pursuant to Section 305.2(a) (1) and (d) (4) (i) of the Act, upon determining whether a claimant regularly works at a place of business within that state, one must consider whether the claimant worked at that location as a rule and not as an exception.

  In this matter the evidence supported the WCJ's findings that Claimant worked exclusively at the New York job site after undergoing a week of training needed to start that job.

  The fact that the claimant had worked for employer at approximately 30 to 50 jobs over a four or five-year period in Pennsylvania and West Virginia prior to his alleged work injury did not establish a continuous employment relationship for purposes of determining where Claimant's employment was principally localized. This is because Claimant had a break in his employment with employer of several months during which he performed work for two other employers.

- Section 305.2 (d) (4) provides, in pertinent part:

  > *A person's employment is principally localized in this or another state when (i)* ***his employer has a place of business in this or such other state and he regularly works at or from such place of business****, or (ii) having worked at or from such place of business, his duties have required him to go outside of the State not over one year, or (iii) if clauses (1) and (2) foregoing are not applicable, he is domiciled and spends a substantial part of his working time in the service of his employer in this or such other state.*

  An employer is not required to own or lease property to have a ***place of business*** under Section 305.2 of the Act. The fact that claimant reported to employer's job site in New York for several months and it was undisputed claimant was expected to work at least 40 hours per week at the New York Site was sufficient to show the employer had a place of business in New York out of which claimant regularly worked.

In order for Section 305.2(d)(4)(ii) of the Act to indicate that Claimant's employment was principally localized in Pennsylvania, Claimant must have regularly worked in Pennsylvania and have been required by employment to temporarily travel outside Pennsylvania for not more than one year.

- Upon analyzing Section 305.2(3) of the Act, since it is claimant's burden of proof to establish jurisdiction in Pennsylvania for his workers' compensation claim the claimant failed to show he was not entitled to Workers' Compensation under the New York Act where he presented no proof as to the inapplicability of New York workers' compensation law.

Greenawalt v. WCAB (Bristol Environmental, Inc.) No. 1894 C.D. 2013 (Decision by Judge Simpson, May 12, 2014) 5/14

IRE/REASONED DECISION/WCJ

- The WCJ's rejection of the employer's Petition for Modification based upon an IRE of 10% premised upon the WCJ's rejection of the IRE's doctors testimony that the claimant had reached MMI because of reliance upon the testimony of claimant's medical expert who testified in defense against Employer's Petition to Modify a NCP and Claimant's Petition to Review an NCP was not supported by competent evidence because:

  1) Claimant's medical expert, who testified in defense a Petition to Review the NCP and in support of claimant's Petition to Review the NCP, did not offer an opinion of whether the claimant had reached MMI as defined by AMA Guides;
  2) Claimant's medical expert last saw the claimant four months before the IRE took place;
  3) Claimant's medical expert treats the claimant will palliative care and the AMA Guides specifically state that maximum medical improvement "can be determined if recovery has reached the stage where symptoms … can be managed with palliative measures that do not alter the underlying impairment substantially…."
  4) Claimant's medical expert was treating Claimant for lumbar radiculopathy and spondylosis, which the WCJ specifically found not to be work-related and refused to add to the NCP.

  Per the fourth rational, only the impairment "resulting from the compensable injury" is to be considered, while "non-work-related impairment" is irrelevant and must not be included in the impairment rating. Necessarily, maximum medical improvement applies only to the compensable work injury for purposes of the IRE.

- Maximum medical improvement is not the same as full recovery.

Maximum Medical Improvement refers to a status where patients are as good as they are going to be from the medical and surgical treatment available to them. It can also be conceptualized as a date from which further recovery or deterioration is not anticipated, although over time (beyond 12 months) there may be some expected change.

Thus, MMI represents a point in time in the recovery process after an injury when further formal medical or surgical intervention cannot be expected to improve the underlying impairment. Therefore, MMI is not predicated on the elimination of symptoms and/or subjective complaints.

Also, MMI can be determined if recovery has reached the stage where symptoms can be expected to remain stable with the passage of time, or can be managed with palliative measures that do not alter the underlying impairment substantially, within medical probability.

- The WCJ is permitted to reject uncontroverted evidence. However, if the WCJ chooses to do so, she must comply with the following requirement in Section 422(a) of the Act:

> *Uncontroverted evidence may not be rejected for no reason or for an irrational reason; the WCJ must identify that evidence and explain adequately the reasons for its rejection.*

Arvilla Oilfield Services, Inc. v. WCAB (Carlson), No. 1578 C.D. 2013 (Decision by Judge Leavitt, May 20, 2014) 5/14

COURSE AND SCOPE

- Whether an employee is acting in the course of his or her employment at the time of an injury is a question of law, which must be based on the WCJ's findings of fact.

- The WCJ's findings supported the conclusion that the claimant/ decedent was injured in the course and scope of employment and did not abandon his employment where the claimant/decedent, who was employed as Night Manager of employer's store, helped to thwart a robbery by threatening the robber with a gun and then after, the robbery was thwarted, pursued the robber outside the employer's store at which time he is struck by the robber's car as the robber was fleeing the scene.

  This is because claimant did not actively disengage himself from his work responsibilities when he attempted to stop the thief from fleeing Employer's premises. Moreover the claimant's duties, as Employer's night manager, included securing the safety of his fellow employees and the customers who patronized

Employer's store. The facts also showed that Claimant/Decedent did not attempt to stop the thief from fleeing to further his own interests; rather, the facts showed that Claimant/Decedent was furthering the interests of Employer.

As such, claimant's pursuit of the thief was not so far removed from his job duties as Employer's Store Manager as to constitute abandonment of the course of his employment or engaging in something wholly foreign thereto.

- An activity that does not further the affairs of the employer will take the employee out of the course and scope of employment and serve as a basis for denial of the claim by the WCJ. However, the operative phrase 'actually engaged in the furtherance of the business or affairs of the employer,' which is usually expressed as 'in the course of employment,' must be given a liberal construction."

  An employee is entitled to compensation for every injury received on the premises of his employer during the hours of employment so long as there is nothing to show that he had abandoned the course of his employment or was engaged in something wholly foreign thereto.

- Violation of a positive work rule is an affirmative defense to a claim petition.

  The employer must prove that: (1) the injury was caused by the rule violation; (2) the employee actually knew of the rule; and (3) the rule implicated an activity not connected with the employee's duties.

Walter Wetzel, deceased, c/o Walter Wetzel III v. WCAB(Parkway Service Station), No. 1693 C.D. 2013 (Decision by Judge Cohn Jubelirer, May 27, 2014) 5/14