THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
MAY 2019 AT A GLANCE
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IMPAIRMENT RATING EVALUATION

- The Pennsylvania Supreme Court grants employer's Petition for Allowance of Appeal Petition for Allowance of Appeal limited to the issues:

  1. Whether the Commonwealth Court erred in applying the Protz II standard to the case on appeal at the time of this Court's decision retroactive to the date of the IRE instead of as of the date of the Supreme Court changed in the law?

  2. Whether the Commonwealth Court's failure to grant the employer credit for the three year period between the date of the IRE evaluation and the date of this Court's decision in Protz II unlawfully violates Employer's constitutional right pursuant to the "Due Course of Law" provisions of the Pennsylvania Constitution Article I, Section 11?

- It will be recalled that the Commonwealth Court had held that Protz II applies retroactively to cases where claimant's change in disability status based upon an IRE was still being litigated at the time Protz II was decided.

  The Commonwealth Court further held that employer was not entitled to a credit towards 500 weeks of partial for the period the IRE was in effect prior to the Supreme Court's decision in Protz II.

  The Commonwealth Court reasoned that this was because in this matter the IRE determination was never final since the parties were actively litigating their appeal of the WCJ's granting of the employer's Petition for Modification based upon the IRE. Accordingly, the time period between the date of the IRE and the decision in Protz II was not be counted against Claimant's 500-week period of partial disability.

Dana Holding Corporation v. WCAB (Smuck), No. 729 MAL 2018 (PER CURIAM, May 14, 2019) 5/19

AVERAGE WEEKLY WAGE/ INCARCERATION

- The intent behind Section 309(d.2) was to cover those instances of work injuries to recently hired employees for whom there was, by definition, no accurate measure of AWW other than taking the existing hourly wage and projecting forward on the basis of the hours of work expected under the employment agreement.

  Upon performing a calculation based upon 309(d.2), the baseline figure from which benefits are calculated should reasonably reflect the economic reality of a claimant's recent pre-injury earning experience, with some benefit of the doubt to be afforded to the claimant in the assessment.

  The employer's calculation premised solely upon claimant's pre-injury hourly rate multiplied by 40 hours per week did not reflect his economic reality because it did not include any overtime hours contrary to the credited testimony and evidence.

- Where the claimant worked less than 13 calendar weeks, and had no fixed weekly wages, Section 309(d.2) of the WC Act applied. Section 309(d.2) provides the AWW is:
  the hourly wage rate multiplied by the number of hours the employe was expected to work per week under the terms of employment

  Where an employee is expected to work overtime, such overtime is required to be considered when performing the AWW under Section 309(d.2).

  The question of how many hours a claimant was expected to work per week is a question of fact for the WCJ.

  The claimant's decision finding the employer properly calculated claimant's pre-injury aww by taking his hourly rate and multiplying it by 40 was not supported by substantial evidence where employer fact witness, who was found credible, testified the claimant could and probably would be overtime because it was the busy time of the year when he was hired and that the busy season typically include the "hundred days of summer".

- The WCJ committed an error upon suspending claimant's compensation premised upon the incarceration provision of Section 306(a.1) by suspending the claimant for the 525 days he spent in ***pretrial incarceration***, although, upon his conviction, was credited as time served.
  This is because under the plain language of Section 306(a.1), incarceration that occurs before a conviction, due to the inability to meet bail, is not a "period during which the employe is incarcerated ***after a*** conviction," and such an interpretation would be inconsistent with the fundamental principles underlying the WC Act and its purpose.

  This holding reflects the intent of the General Assembly upon enacting Section 306(a.1), which was to preclude the payment of workers' compensation benefits to persons who are convicted of violations of the Pennsylvania Crimes Code and who, as a result of those convictions, are thereafter removed from the work force. Because a claimant has only been accused of a crime prior to the conviction, the Act does not consider that period of incarceration as the claimant's fault or a voluntary withdrawal from the workforce.

> Prior to his conviction, Claimant was incarcerated because of his inability to make bail, not because of a conviction for criminal conduct. To suspend Claimant's benefits during a period that he was not incarcerated after a conviction, and during which his loss of earning power was caused by his work injury, essentially punishes him because he was unable to meet bail.

Sadler v. WCAB (Philadelphia Coca-Cola), No. 328 C.D. 2018 (Decision by Judge Renée Cohn Jubelirer, May 22, 2019)5/19