# THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION: NOVEMBER 2011 AT A GLANCE

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## SURVEILLANCE/REINSTATEMENT

- When the burden is on a claimant to prove an injury in the course of employment, surveillance films are properly admitted for the purpose of impeaching the claimant's testimony and/or the claimant's evidence.

- The Claimant did not fulfill his burden of proving continuing disability in support of his Petition for Reinstatement, where following a suspension of compensation the claimant alleged a recurrence as of November 1, 2006, and the WCJ upon reviewing surveillance, concluded based upon surveillance taken on April 24, 2008 that the claimant did not testify credibly on April 24, 2008 that he continued to suffer disabling pain and therefore, suspended the claimant's compensation as of April 24, 2008.

- Where an injured worker petitions for reinstatement, he needs to establish that "his or her earning power is once again adversely affected by his or her disability, and that such disability is a continuation of that which arose from his or her original claim."

  Because every reinstatement is different, the claimant's burden of proof will be different.

  Where the claimant seeks reinstatement following the elimination of a light duty job the burden then shifts to the party opposing the reinstatement petition. In order to prevail, the opposing party must show that the claimant's loss in earnings is not caused by the disability arising from the work-related injury. This burden may be met by showing that the claimant's loss of earnings is, in fact, caused by the claimant's bad faith rejection of available work with in the relevant required medical restrictions or by some circumstances barring receipt of benefits that is specifically described under provisions of statutory law or the Courts decisional law.

  Where the claimant seeks a reinstatement premised upon the allegation of the recurrence of a work injury and not the layoff from a light duty job, the employer did not have the burden of proof. It was the claimant's burden to prove that the pain had persisted, not dissipated, through the pendency of the litigation of the Petition for Reinstatement proceeding.

- Where the employer files a petition to reduce a claimant's benefits, thus placing the burden upon the employer, surveillance is inadequate evidence standing alone.

Rather, the video must be examined by a physician or vocational specialist who can offer evidence of what kind of jobs the claimant can do, other than his pre-injury job.

Likewise, where the employer has filed a termination or suspension petition, a video will not be sufficient to satisfy the employer's burden of proof.

*Soja v. WCAB(Hillis-Carnes Engineering Associates) No. 455 C.D. 2011 (Decision by Judge Leavitt, November 7, 201) 12/11*

**SPECIFIC LOSS/ MEDICAL TESTIMONY/MODIFICATION**

- Claimant's second petition alleging a specific loss was also properly denied where, following the denial of the initial petition alleging specific loss, because the Claimant failed to establish that his physical condition changed since the Judges February 18, 2000 decision.

  This is because Section 403(a) provides that a claimant's benefits may be modified upon proof that the disability of an injured employee has increased, decreased, recurred, or has temporarily or finally ceased, or that the status of any dependent has changed.

  This means to maintain his Petition seeking specific loss benefits, the Claimant had the burden to prove, through the presentation of medical evidence, that his condition changed the February 18, 2000 decision. In other words, Claimant's case had to begin with the adjudicated facts found by the prior decision and work forward in time to show the required change.

  Claimant failed to meet his burden because the WCJ specifically found as fact that there has not been a material change in Claimant's physical condition since the February 18, 2000 decision.

- 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.

- In order for a claimant to establish that his loss of use is permanent and for all practical intents and purposes, the claimant must present medical evidence.

- Where the foundation for the medical evidence is contrary to the established facts in the record, or is based on assumptions not in the record, the medical opinion is valueless and not competent.

  The opinion of the claimant's medical experts were not competent to support a petition alleging specific loss they opined that Claimant's loss of use of his right wrist dated back to the January 12, 1995 wrist fusion and the WCJ had previously denied a prior petition filed on November 2, 1998 alleging a specific loss in a decision issued February 18, 2000.

- In order to modify benefits on the theory that a claimant's disability has reduced or ceased due to an improvement of physical ability, it is first necessary that the employer's petition be based upon medical proof of a change in the claimant's physical condition. Only then can the WCJ determine whether the change in physical condition has effectuated a change in the claimant's disability, i.e., the loss of his earning power. Further, by natural extension it is necessary that, where there have been prior petitions to modify or terminate benefits, the employer must demonstrate a change in physical condition since the last disability determination. Absent this requirement a disgruntled employer or claimant could repeatedly attack what he considers an erroneous decision of the WCJ by filing petitions based on the same evidence ad infinitum, in the hope that one referee would finally decide in his favor.

*Argyle v. WCAB (John J. Kane McKeesport Regional Center and UPMC Work Partners Claims Management) No. 43 C.D. 2011 (Decision by Judge Brobson, September 2, 2011) 12/11*

## SUPERSEDEAS FUND REIMBURSEMENT/ HEART AND LUNG BENEFITS

- Unless there is evidence to the contrary, as a matter of law, when an employer is self-insured for Worker's Compensation purposes, and it is required to pay Heart and Lung payments in addition to workers compensation benefits, two-thirds of the amount paid automatically represents Worker's Compensation benefits and that self insured is entitled to Supersedeas Fund Reimbursement for the two-thirds of the amount paid in Heart and Lung payments that is attributable to Workers' Compensation.

This is because Section 1 of the Heart and Lung Act provides for certain types of employees to receive their full rate of salary if they are *temporarily* disabled due to a work-related injury. The Heart and Lung Act also provides that any Worker's Compensation benefits the employee receives or collects while receiving Heart and Lung Act benefits are to be turned over to the employer. If this is not done then the employer is to deduct that amount from the employee's salary which the employer pays under the provisions of the Heart and Lung Act.

- Although a self-insured employer, paying a claimant's full salary as required by the Heart and Lung Act would hardly reimburse itself for that portion of the claimant's benefits that represented benefits under the Worker's Compensation Act, this does not mean that two-thirds of the amount paid does not automatically represents Worker's Compensation benefits, thus entitling the self- insured from reimbursement form the Supersedeas fund.

*Bureau of Workers Compensation v. WCAB (Excalibur Insurance Management Service), No. 376 C.D. 2011 (Decision by Judge Butler, November 17, 2011) 12/11*

## AVERAGE WEEKLY WAGE/ UNEMPLOYMENT COMPENSATION/ SICK PAY

- Supplemental Unemployment Compensation Payments (SUB) paid by the employer to the claimant are included in the calculation of a claimant's pre-injury average weekly wage where they are an accrued entitlement which has been built up as a result of claimant's services for Employer. They are also included where the SUB payments made under the Collective Bargaining Agreement were in the nature of wages earned and were not intended to be in lieu of compensation and held that an employer was not entitled to a credit for such payments.

  SUB benefits are also included in the calculation of a claimant's pre-injury average weekly wage because they are not included as the class of benefits excluded in the wage calculation of Section 309, which excludes fringe benefits, including, but not limited to, employer payments for or contributions to a retirement, pension, health and welfare, life insurance, social security or any other plan for the benefit of the employee or his dependents.

- Unemployment Compensation benefits are not included in the calculation of the claimant's pre-injury average weekly wage under section 309.

- Sickness and Accident Benefits received as compensation for days missed from work are to be included in the calculation of a claimant's AWW where the sick leave, like vacation pay, was a benefit provided under the work agreement and was an entitlement like wages for services performed

- Vacation and Holiday Pay are considered to be wages in calculating AWW under section 309(d) of the Act because they are entitlements earned through and exchanged for services performed for the employer. Vacation and Holiday Pay are also properly included the calculation of a claimant's post injury "earning power" for partial disability benefits purposes under section 306(b) of the Act

- The Commonwealth Court, mindful of the Pa. Supreme Court case, Colpetzer v. Workers' Compensation Appeal Board (Standard Steel), 582 Pa. 295, 870 A.2d 875 (2005) further noted that the exclusion of SUB payment would artificially deflate the calculation of claimant's pre-injury average weekly wage based upon an inaccurate measure of his earning history and earning capacity.

  The purpose of calculating claimant's pre-injury average weekly wage under Section 309 of the Act is to create a reasonable picture of a claimant's pre-injury earning history to use as a projection of potential future wages to determine the corresponding wage loss. Thus, the calculation is designed to focus on the economic reality of a claimant's recent pre-injury earning experience.

*Bucceri v. WCAB (Freightcar America Corporation) No. 2021 C.D. 2010(Decision by Judge McCullough, November 22, 2011) 12/11*