THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
NOVEMBER 2013 AT A GLANCE
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CREDIT/ATTORNEY FEES

- Although as general rule, employers seek reimbursement of benefit overpayments from the supersedeas fund, there are circumstances where an employer can recoup an overpayment directly from the claimant, i.e., to prevent unjust enrichment or a double recovery.

  The Employer was entitled to a credit against claimant's future compensation to prevent unjust enrichment where it proved that it paid the $509 per week undiminished by counsel fees under the mistaken belief that it was obliged to pay a 20% attorney fee over and above the claimant's compensation rate to discharge its duty under the WCJ's prior order.

  A remand was in order to make a finding as to how much Claimant can afford to repay each week.

- An employer's right to recoupment is permitted to prevent unjust enrichment. The right to recoupment is not solely limited to where there had been a mistaken belief or payments were made under a Section 413 (a) Agreement. Claimant's fault of lack thereof is not relevant where he was unjustly enriched by employer's excess payments of benefits.

  A person who has paid another an excessive amount of money because of an erroneous belief induced by a mistake of fact that the sum paid was necessary for the discharge of a duty, for the performance of a condition, or for the acceptance of an offer, is entitled to restitution of the excess.

- Under the Act, the claimant's counsel fees can be chargeable to the claimant or to the employer. Section 442 of the Act requires the WCJ to approve a contingent fee agreement whereby counsel fees are paid directly out of the amount of compensation awarded to the claimant. These counsel fees may not exceed 20% of the claimant's compensation.

  However, Section 440(a) of the Act provides that if the employer does not have a reasonable basis to contest liability, the employer shall pay "a reasonable sum for costs incurred for attorney's fee" in addition to the award of compensation.

Where fees are awarded because the employer's contest is unreasonable, the WCJ must determine the amount of a reasonable fee before awarding a quantum meruit standard, which requires the claimant to show, by evidence, the value of the work done by the claimant's attorney.

An attorney's fee that simply adds 20% to the claimant's weekly compensation indefinitely does not relate to the work actually done. Accordingly, it is not authorized by the Act. Put in other words, an indefinite award of 20% of all future benefits cannot be shown to be a "reasonable sum," as required by Section 440(b). It is an improper punitive award.

DD Commonwealth of PA/ Dept. of Transportation V. WCAB (Noll), No. 819 C.D. 2013 (Decision by Judge Leavitt, November 6, 2013) 11/13

VOCATIONAL

- It is true that Section 306(b) (2) of the Act provides that prior to performing a Labor Market Survey that "if the employer has a specific job vacancy the employee is capable of performing, the employer shall offer such job to the employee."

  However, an employer does not have the burden to prove the non-existence of available work at its own facility as a necessary element of the modification petition. Rather, a claimant may present evidence that during the period in which the employer had a duty to offer a specific job the employer had a specific job vacancy that it intended to fill that the claimant was capable of performing.

  To do this, the claimant may present facts that during the period in which the employer has or had a duty to offer a specific job, the employer is or was actively recruiting for a specific job vacancy that the employee is capable of performing or the employer posted or announced the existence of a specific job vacancy, that the employee is capable of performing, which the employer intends to fill.

  The burden then shifts to the employer to rebut the claimant's evidence.

  In this matter the Claimant failed to proffer any evidence demonstrating that he was capable of performing any of the jobs available at Employer's retail stores that did not comport with the restrictions outlined in employer's doctor's IME report.

- A vocational expert is not prohibited from conducting a labor market survey, unless he/she first contacts the liable employer to determine whether it has any open and available positions for a claimant.

Reichert v. WCAB (Dollar Tree Stores/Dollar :Express and Specialty Risk:Services, Inc.), No. 42 C.D. 2013 (Decision by Judge Brobson, November 8, 2013)11/13

NOTICE OF SUSPENSION (LIBC-760)

- The Employer did not violate the Act by suspending the claimant's compensation because the claimant, upon returning by facsimile "Employee Verification of Employment, Self-Employment or Change in Physical Condition" (LIBC-760) failed to date the form, which essential to the unsworn statement to the Department of Labor and Industry portion of the form.

  This is because the purpose of Form LIBC-760 is to inform an employer of the claimant's work status and medical condition. Section 311.1(d) of the Act states that the "form shall request verification by the employe that the employe's status regarding the entitlement to receive compensation has not changed and a notation of any changes of which the employe is aware at the time the employe completes the verification, including employment, self-employment, wages and change in physical condition."

  Further, an employer may request a claimant to complete Form LIBC-760 "at intervals of no less than six months."

  It is not improper to return "Employee Verification of Employment, Self-Employment or Change in Physical Condition" (LIBC-760) by facsimile; however, the date of the facsimile is not sufficient to date the form for the purposes of the Act.

McCafferty v. WCAB (Trial Technologies, Inc.) No. 208 C.D. 2013 (Decision by Judge Leavitt, November 21, 2013) 11/13

2. VOCATIONAL

- The Pa. Supreme Court reverses the Commonwealth Court and holds that in order to obtain a Modification or Suspension pursuant to Section 306(b)(2), where the employer does not have a specific job available to offer the claimant, the employer must prove through expert testimony that there are specific open jobs that exist within the claimant's limitations and that there is a mechanism for providing the claimant with notice of the existence of these jobs, which thus provides a serious opportunity to secure employment.

  This is because the statutory concept of "substantial gainful employment which exists" used in 306(b)(2) requires that the jobs identified by the employer's expert witness, which are used as the employer's proof of earning power under Section

306(b), remain open until such time as the claimant is afforded a reasonable opportunity to apply for them.

Although the employer need not show that the claimant had obtained employment, the claimant must have latitude to present evidence regarding her or his experience with applying for the jobs identified by the employer's expert witness.

A claimant may show that the employer's labor market surveys were simply based on unsubstantiated, erroneous, conflicting, false, or misleading information, and evidence regarding the claimant's actual experience with the employers identified in the employer's labor market surveys may lend support for establishing contentions along these lines.

- Whether a claimant had a "reasonable opportunity" to apply and did, in fact, apply for an identified position (and whether the job was already filled by the relevant time) are factual matters that the WCJ is fully qualified to determine.

- The Supreme Court specifically states that this decision does not mean a return to the standard under Kachinski v. Workmen's Compensation Appeal Board (Vepco Const. Co.), 532 A.2d 374 that the employer refer a specific job to the claimant. Rather, Section 306(b) (2) requires the employer to identify specific jobs through expert testimony rather than by providing evidence that the claimant had obtained employment. However, the Kachinski focus upon the requirement that both the employer and the claimant act in good faith in order for the intended system to function applies with equal force with respect to the parties' duties and burdens under Section 306(b).

Phoenixville Hospital v. WCAB (Shoap), No. 32 EAP 2011 (Decision by Justice McCaffery, November 21, 2013). 11/13

DISABILITY/CLAIM PETITION

- Workers' compensation benefits are not intended as a remedy where the claimant's loss in earnings is attributable to factors other than the work injury. In order to be entitled to workers' compensation benefits, the claimant must prove both that the injury resulted in disability, and the duration of that disability. In the context of workers' compensation benefits, the term disability is synonymous with a loss of earning power.

  Therefore, a former NFL Football Player was not disabled within the meaning of the Act because he failed to prove that his loss of earnings were not the result of his injury where the Judge found credible: a) Medical testimony that Claimant's injury would not prevent him from playing professional football, and b) There was no testimony found credible that Claimant's injury caused a loss in earning

power after he completed his rehabilitation; and c) Employer credibly testified that its decision did not resign the claimant was not premised upon the claimant's speed but because it signed a better player.

In essence, notwithstanding the fact the claimant was not recovered, the employer was not liable for indemnity where the claimant was not disabled from performing his pre-injury position yet the employer declined to re hire the claimant following his rehab because it had a better candidate for the job.

FEE REVIEW/EVIDENCE

- Section 306(f.1) (5) does not allow a provider to open another 30 day window simply by resubmitting a properly documented bill that has already been denied; Regulation § 127.252(a), promulgated under the Act allowing a provider the greater of the 30 day or 90 day window, offers providers a fair opportunity to seek review of an insurer's action, but neither the statutory text nor the regulations relieve providers of the duty to seek redress from the fee review process in a timely fashion.

  This factual scenario of this case, where a properly documented bill was denied, is distinguished from the scenario where a provider has submitted a bill to an insurer that is denied for failure to include the documentation required under the Act. If the provider resubmits the bill with the proper documentation and the insurer again denies the bill, the provider has 30 days following the notification of the denial of the properly documented bill to seek review of the fee dispute.

- When a dispute arises regarding the timeliness of an Application for Fee Review, the burden of proof is on the provider to show that the Application was timely filed.

- A question by counsel is not testimony.

Sanjay Gupta, M.D., v. Bureau of Workers' Compensation: Fee Review Hearing Office (Erie Insurance Co.), No. 753 C.D. 2013 (Decision by Judge Colins, November 21, 2013) 11/13