THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
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COURSE AND SCOPE

- The Claimant who injured herself while engaging in a Functional Capacity Evaluation (FCE) at the employer's request and at employer's expense, before the employer would permit the claimant to return to work following a non-occupational back injury did not suffer an injury in the course and scope of employment.

  This is because although an employment relationship existed prior to the commencement of Claimant's non-work-related disability, case law also makes clear that an employment relationship must be maintained by the parties.

  The employer-employee relationship between a claimant out on non-work related long term disability and his or her employer is held in abeyance due to his or her non-work related long-term disability. However, whether a claimant out on non-work disability maintains an employment relationship into the future depends, in certain cases such as this one, on whether the claimant can successfully satisfy Employer's requirements for return to employment.

  In this matter, the Claimant, who had been out on non-work related long-term disability for a prolonged period of time, may have indicated her desire to return to work, but it was not a foregone conclusion that Employer would be able to provide her with employment, either in her former position or in an alternative position if there were restrictions which may attach due to the medical condition for which she was absent from work.

  Whether the claimant is an injured employee on long term non occupational disability, as in this case, or a with new applicant , the employer may require the individual to fulfill certain requirements before becoming employed and returning to work, such as obtaining a fitness for duty certification, as did Employer herein, and while these requirements are managerial decisions over which the individual has no control, fulfilling those requirements as a pre-condition of renewed employment does not place the Claimant in the course and scope of employment.

  The fact that Claimant was an employee prior to commencing her non-work long term disability is not dispositive, because Claimant may not have returned to employment if she was unable to complete any of Employer's other pre-requisites for employment

Reichert v. WCAB (Foxdale Village), No. 2080 C.D. 2014 (Decision by Judge Leadbetter, September 10, 2015) 11/15

VOCATIONAL/ RETIREMENT

- The Claimant's permanent relocation from Pennsylvania to Nevada, standing alone, did not support a determination that she had permanently removed herself from the workforce even though the claimant retired from her job, received a disability pension and relocated to Nevada to take advantage of the warmer weather due to non-occupational health reasons.

  Such relocation is specifically contemplated by and provided for in Section 306(b) (2) of the Act, which states upon determining "earning power" under the Act:

  > *Disability partial in character shall apply if the employe is able to perform his previous work or can, considering the employe's residual productive skill, education, age and work experience, engage in any other kind of substantial gainful employment which exists in the usual employment area in which the employe lives within this Commonwealth.* ***If the employe does not live in this Commonwealth, then the usual employment area where the injury occurred shall apply. (emphasis added)***

  The language of Section 306(b) (2) specifically contemplates that Claimant would permanently relocate outside the Commonwealth following her work-related injury and the payment of benefits, and directs how to determine her earning power when the modification or suspension of these benefits is sought.

  Therefore, where an injured employee relocates to a different state for such an employee, an employer must focus its job availability analysis on the area where the injury occurred.

- A WCJ could not solely rely on Claimant's receipt of a disability pension to support the suspension of benefits on the basis that she has permanently separated from the workforce.

  This is because there is no presumption of retirement arising from the fact that a claimant seeks or accepts a pension, much less a disability pension; rather, the worker's acceptance of a pension entitles the employer only to a permissive inference that the claimant has retired. Such an inference, if drawn, is not on its own sufficient evidence to establish that the worker

has retired–the inference must be considered in the context of the totality of the circumstances.

Chesik v. WCAB (Department of Military and Veterans' Affairs), No. 758 C.D. 2015(Decision by Judge Pellegrini, November 9, 2015)11/15

REVIEW NOTICE OF COMPENSATION PAYABLE

- Section 413(a) of the Act specifically authorizes the WCJ to amend the NCP during litigation of any petition where the evidence presented shows that the NCP is materially incorrect provided the employer has adequate notice that the amendment is being sought. This is because the employer must have the opportunity to contest a corrective amendment.

  Whether an employer has had a fair opportunity to contest the corrective amendment is determined on a case-by-case basis by looking at the totality of circumstances.

  In this matter, Employer was aware this diagnoses the diagnoses of left suprascapular neuropathy was at issue since the employer had filed a Utilization Review questioning the need for the decompression surgery. This procedure was done to relieve Claimant's suprascapular neuropathy.

- An amendment is corrective if the WCJ adds a diagnosis that is part of the original work injury. On the other hand, where a claimant develops another new injury as a consequence of the original injury, the WCJ cannot add that injury to the NCP without a review petition.

  The WCJ made a corrective amendment where he added the diagnoses of left suprascapular neuropathy where compensable injury was recognized as being to the left shoulder

Walter v. WCAB (Evangelical Community Hospital), No. 139 C.D. 2015 (Decision by Judge Leavitt, November 23, 2015) 11/15

CUMULATIVE TRUAMA/NOTICE/NON-OCCUPATIONAL DISABILITY FORMS

- Section 311 of the Act requires the claimant to inform his employer of a work injury within 120 days of its occurrence.

  When cumulative trauma/aggravation injuries are at issue the last day of employment is the critical date of injury for purposes of determining timely notice.

In the case of a cumulative trauma, the connection to work duties may not be obvious. The claimant must notify an employer that he has an injury, but this can be done in collective communications.

A claimant need not state with certainty that the injury is work-related, as long as employer is informed of the possibility it was work-related.

In this matter the claimant, who alleged a cumulative trauma to his back, gave adequate notice where the claimant reported to his employer that he had increased back pain due to the increased hours that the employer was requiring him to work.

Claimant's statements were sufficient to inform Employer of the possibility his pain was work-related.

- The claimant must have knowledge that his injury is work-related. Accordingly, Section 311 states that the time for giving notice shall not begin to run until the employee knows that his injury is work-related

- A claimant's affirmative statement on her disability insurance application that her condition was not work-related is not fatal to her subsequent claim for workers' compensation.

  This is because claimants are not expected to be capable of medical diagnoses, particularly in the case of a medical condition that results from cumulative insults to the body. The adequacy of notice is determined from an examination of the totality of circumstances.

Gahring v. WCAB Petitioner (R and R Builders and Stoudt's Brewing Company), No. 534 C.D. 2015 (Decision by Judge Leavitt, November 23, 2015) 11/15