THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
OCTOBER 2013 AT A GLANCE
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IRE/REVIEW NCP/ TERMINATION

- Although Section 306(a.2)(1) of the Act provides that after a claimant has been on total disability for 104 weeks, the employer can request an IRE "to determine the degree of impairment due to the *compensable injury"*, the fact that the IRE physician assessed a 13% impairment solely based upon the claimant's pre-existing flat foot condition did not implicitly or explicitly amend the NCP to include the pre-existing flat foot condition and preclude the WCJ from granting of the employer's Petition for Termination based upon the finding that the claimant was recovered from the specific injury recognized on the NCP, which was a right ankle sprain.

  This is because although Section 306(a.2) states that the impairment rating is to be based on the "compensable injury," it does not state that an impairment rating based on all of a claimant's medical conditions changes the work injury.

  Therefore, by modifying Claimant's disability status based upon the IRE, the WCJ did not "implicitly amend" the NCP and it was not improper for the WCJ to grant the employer's Petition for Termination based upon its credibility determination that the claimant was recovered from his recognized right ankle sprain .

- An IRE is undertaken to determine the claimant's level of disability, i.e., his ability to perform his pre-injury job. It is separate and distinct from an IRE, which is undertaken to determine whether the claimant has recovered from his work injury. Accordingly, the finding in an IRE of a permanent impairment does not bar an employer from pursuing a termination of benefits.

- The burden of proof was not upon the employer to prove additional injuries were not related to the claimant's compensation injury solely because the alleged additional work injuries were to the same body part that was the subject of the NCP.

  Where the injuries are separate, the burden rests with claimant to establish the existence of additional compensable injuries giving rise to corrective amendments, regardless of the procedural context in which the amendments are asserted.

- A WCJ may amend the NCP at any time during litigation of any petition if the evidence shows that the injury sustained in the original work incident is different or more expansive than that listed in the NCP. This is known as a "corrective amendment."

  In addition, the NCP can be amended if the claimant files a review petition and proves that another injury subsequently arose as a consequence of the original injury. The party seeking to amend the NCP has the burden of proving that the NCP is materially incorrect.

  It may be that in an IRE proceeding where the work injury description becomes an issue in the case, the WCJ could amend the NCP. However, the WCJ is not required to do so.

Harrison v. WCAB (Auto Truck Transport Corp.) No. 769 C.D. 2013 (Decision by Judge Leavitt, October 2, 2013) 10/13

NOTICE/CUMULATIVE TRUAMA/MEDICAL TESTIMONY/WCJ

- Where the claimant in a cumulative trauma claim knows of work-relatedness of an injury before the last day of work the 120–day notice period begins to run on the last day a work-related aggravation injury is suffered, which will usually be the last day of work.

  By contrast, in a cumulative trauma claim where the Claimant did not know for sure whether there was a relationship between his work duties and his knee pain until his Physician informed him of the causal connection, the 120 day notice period begun to run as of the date he was so informed by his physician.

  This holding is consistent with the Discovery Rule of Section 311. Per the Discovery rule set forth within Section 311, the 120-day notice period does not begin to run in cases in which the nature of the injury or its causal connection to work is not known, until an employee knows or by the exercise of reasonable diligence, has reason to know of the injury and its possible relationship to his employment.

  The discovery rule, as incorporated in Section 311, calls for more than an employee's suspicion, intuition or belief; by its terms, the statute's notice period is triggered only by an employee's knowledge that he is injured and that his injury is possibly related to his job.

  The "'reasonable diligence' mentioned in Section 311 is an objective, rather than a subjective standard. The elements of knowledge a claimant must possess in order to trigger the running of the notice period are: (1) knowledge or constructive

knowledge (2) of disability (3) which exists, (4) which results from an occupational disease [or injury], and (5) which has a possible relationship to the employment.

- The claimant bears the burden of establishing he gave the employer timely notice of the injury. The question of the timeliness of that notice is generally one of fact.

- The WCJ did not commit an error of law or issue a decision that was not reasoned where, in a cumulative trauma claim, he found liable the employer the claimant worked for from August 2004 until September 25, 2007, rather that his last employer for whom he worked for three days until his final day of employment on October 6, 2008.

  This is because the WCJ was free to accept or reject, in whole or in part, the testimony of any witness, including medical witnesses. In this matter the WCJ choose to find the last employer's testimony credible that the claimant did not materially aggravate his knee during his three days of employment yet reject his opinion that the claimant's knee pathology was not at all related to any of his past employment.

A & J Builders, Inc. v. WCAB (Verdi), No. 479 C.D. 2013 (Decision by Judge Simpson, October 16, 2013) 10/13

HEALTH CARE PROVIDER/MEDICAL TREATMENT/MEDICAL BILLS

- Since a Licensed Practical Nurse is a Health Care Provider under the Act, the message therapy provided by the Licensed Practical Nurse is compensable if it is reasonable and necessary.

  This holding is distinguished from the scenario where the message therapy is provided by a Message Therapist. The court has held that the services of a Massage Therapist, who is not licensed or otherwise authorized by the Commonwealth to provide health care services, are not reimbursable under the Act, even if the services are prescribed by a health care provider.

  In this matter the Licensed Practical Nurse stated that massage therapy was something she utilized in providing therapeutic care to patients and referenced the regulation regarding LPNs, 49 Pa. Code §21.145 (b) which states, in pertinent part:

  > *(b) The LPN administers medication and carries out the therapeutic treatment ordered for the patient in accordance with the following:*

- Employers must pay for medical services and services rendered by physicians and health care providers, and pursuant to Section 109 of the Act. An individual must be licensed or authorized by the Commonwealth to provide health care services in

order to qualify as a health care provider. This does not demonstrate an intent to require employers to be liable for treatment rendered by unlicensed individuals. Until the Commonwealth begins authorizing state licensure of massage therapists employers are not required to pay for such treatment

- Where the employer questions the reasonableness or necessity of treatment, the employer bears the burden of proving that the challenged treatment is not reasonable or necessary. There is a rebuttable presumption that the treatment is reasonable and necessary. The court has determined that treatment may be reasonable and necessary even if it is designed to manage the claimant's symptoms rather than to cure or permanently improve the underlying condition.

Moran v. WCAB (McCarthy Flowers and Donegal Mutual Insurance), No. 830 C.D. 2013(Decision by Judge McGinley, October 16, 2013) 10/13

RETIREMENT

- The WCJ committed an error of law upon granting employer's Petition for Suspension based upon the fact that Claimant had applied for and accepted a disability pension from Employer, and applied a presumption to conclude that Employer met its burden of establishing that Claimant had voluntarily withdrawn from the workforce.

  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. The WCJ must also evaluate all of the other relevant and credible evidence before concluding that the employer has carried its burden of proof.

  This is because receipt of a pension is not the factual or legal equivalent of retirement, or withdrawal from the workforce, in every case. It is true that in most instances an employee must withdraw from his employer's work force in order to be eligible for a pension. However in many instances, such as in this matter, that was not the case.

  Where, as here, the employee has been laid off, the employer has effectively removed the employee from its workforce, and the application for a pension merely formalizes the circumstances that already exist -- the employer has severed the employment relationship in both the factual and the legal sense. Under such circumstances, the receipt of a pension is not a separation from the employer's workforce and thus, there is no rational basis for shifting the burden of proof from the employer, affording the employer any presumption, or imposing

any duty upon the claimant. Instead, in cases like this, the receipt of a pension is merely one fact for a WCJ to consider in deciding a suspension petition.

- The employer who challenges the entitlement to continuing compensation on grounds that the claimant has removed himself or herself from the general workforce by retiring, has the burden of proving that the claimant has voluntarily left the workforce. If the employer produces sufficient evidence to support a finding that the claimant has voluntarily left the workforce, then the burden shifts to the claimant to show that there in fact has been a compensable loss of earning power. Conversely, if the employer fails to present sufficient evidence to show that the claimant has retired, then the employer must proceed as in any other case involving a proposed modification or suspension of benefits.

  At most, a claimant's receipt of a pension could give rise to a permissive inference that a claimant is retired, which "was just one fact of many possible probative facts that must be considered in determining whether the claimant has voluntarily withdrawn from the workforce.

  A "permissive inference" as no more than a logical tool enabling the trier of fact to proceed from one fact to another, if the trier of fact believes that the weight of the evidence and the experiential accuracy of the inference warrants so doing. The WCJ can reject the inference in whole or in part.

  There is no burden shifting with a permissive inference and that the burden of persuasion remained with the employer to persuade the trier of fact that the suggested conclusion should be inferred based on the predicate facts proved. Such an inference, on its own, is not sufficient to meet the employer's burden.

Turner v. WCAB (City of Pittsburgh), No. 347 C.D. 2013 (Decision by Judge McCullough, October 16, 2013) 10/13

HEARING LOSS

- Although it is true that the Hearing Loss Provision of the Act does not permit a deduction from a claimant's total binaural hearing impairment for that portion of the impairment caused by presbycusis (aging process), a medical expert may still be found credible by the WCJ who, though acknowledging claimant's hearing loss is in excess of 10%, nevertheless credibly opines that Claimant's hearing loss was not caused by hazardous exposure to occupational noise.

McCool, Sr. v. WCAB (Sunoco, Inc.) (No. 783 C.D. 2013) (Decision by McGinley, August 23, 2013) 10/13

3. PSYCHIATRIC CLAIM

- Pennsylvania Supreme Court reverses the Commonwealth Court and affirms the WCJ's award of benefits and holds claimant, who was a state trooper, suffered a compensable psychiatric injury, diagnosed as posttraumatic stress disorder, where he struck and killed a woman who, dressed entirely in black, who intentionally stepped in front of his car while he was traveling on Interstate 81 resulting in the death to the woman and where, following the accident the Police Officer attempted to resuscitate the woman through mouth-to-mouth resuscitation notwithstanding the fact that woman was bleeding profusely from the mouth.

- The WCJ did not commit an error of law upon granting a Mental-Mental Claim, where the WCJ found that the State Trooper suffered an single extraordinarily unusual and distressing single work-related event, which constituted objective evidence, and the working condition was abnormal, based on the credible evidence before the type of incident in this case was not one to which state troopers are normally exposed.

- The issue of determination of whether working conditions are abnormal is a mixed question of fact and law. Furthermore, such case are cases are highly fact-sensitive. Such a fact-sensitive inquiry requires deference to the fact-finding functions of the WCJ and, accordingly, review of those factual findings is limited to determining whether they are supported by the evidence and such findings may be overturned only if they are arbitrary and capricious.

  In this matter the WCJ specifically found that the claimant was not in the normal course of his duties but was exposed to an extraordinarily unusual and distressing single work-related event.

  This single incident occurred that occurred while the claimant was performing his duties as a State Trooper, established with "objective evidence" that the claimant suffered an injury and resultant disability stemming directly from his working conditions.

  The "abnormal working conditions" requirement was satisfied by the WCJ's finding that the claimant was disabled by Post Traumatic Stress Disorder caused by a caused by a single documented incident.

- Since claimant this was a psychic injury the claimant was further required to prove that the causative working conditions were "abnormal," a highly fact-sensitive inquiry. In this matter the WCJ found, based on the credible evidence before him, that the type of incident in this case was not one to which state troopers are normally exposed resulting in his disabling mental condition, and such single and comprehensive work-related event constituted an abnormal working condition as a matter of law.

Psychic injury cases are highly fact sensitive and for actual working conditions to be considered abnormal, they must be considered in the context of specific employment. Such a fact sensitive inquiry requires deference to the fact-finding functions of the WCJ and, accordingly, the court will review of those factual findings to determining whether they are supported by the evidence and overturn them only if they are arbitrary and capricious.

Payes v. WCAB, (Cmwlth. of PA/State Police) No. 50 MAP 2011 (Decision by Justice McCaffery, October 30, 2013). 10/13