THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
OCTOBER 2014 AT A GLANCE
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REINSTATEMENT

- Although the testimony established that Claimant's inability to perform his assignments in his post injury position of writer-producer was not caused by any physical restrictions, the analysis for reinstatement must focus on his restrictions when he returned to work at his pre-injury position of writer producer, not his post-injury position.

  Therefore the relevant inquiry upon determining whether there is a presumption of disability upon determining causation is whether the claimant was able to perform his pre-injury job.

  The WCJ therefore committed an error of law by determining the claimant was required to demonstrate a causal connection between his layoff (loss of earnings) and his continued disability.

  As causation is presumed, the burden shifted to Employer to prove that Claimant's loss in earnings was not caused by his work injury.

  The employer may meet this burden by showing that the claimant's loss of earnings was, in fact, caused by the claimant's bad faith rejection of available work within the relevant required medical restrictions or by some circumstance barring receipt of benefits that is specifically described under provisions of the Act or in the Court's decisional law.

  In the context of a layoff, an employer may meet this burden by showing bad faith or misconduct on behalf of Claimant that was responsible for the discharge. Generally, absent bad faith, the consequences of discharge are not allocated to a claimant.

  In this matter the claimant was laid off due to poor job performance of his post injury modified job. Unsatisfactory work performance alone does not suffice to deprive Claimant of reinstatement of benefits. The standard an employer must meet to show "lack of good faith" or "bad faith" underlying a discharge is not that of willful misconduct. Rather, the court has emphasized "if claimant shows he would if he could, the bad faith threshold is not met."

  In the context of a layoff for unsatisfactory work performance, loss of earnings is presumed to relate to the work injury when a claimant is terminated from a modified or light-duty position. The fact that Claimant was subsequently reassigned to a less physically demanding position does not alter the result.

- A claimant seeking reinstatement of suspended benefits must prove that:

  (1) His earning power is once again adversely affected by the work-related injury; and,
  (2) The disability that gave rise to the original claim continues.

  Once the claimant meets this burden, the burden shifts to the party opposing reinstatement to show that the claimant's loss in earnings is not caused by the disability arising from the work injury.

- Under a suspension of benefits, in contrast to a termination, an employer remains responsible for the consequences of a work injury. This is because the injury is presumed to continue, yet a claimant suffers no related loss of income. Accordingly, a claimant may be entitled to a presumption of causation between the work injury and later loss of income.

  A claimant is only entitled to the presumption of causation when he returns to work under suspension with restrictions, that is, returns to a modified or light-duty position. If a claimant can still perform the pre-injury job despite his restrictions, he has the burden of proving causation.

  Further, it is relevant whether the restrictions required modification of the duties Claimant performed in his pre-injury job. Restrictions that "do not require any job modification" do not trigger the presumption of causation.

- As to the second element, that the disability that gave rise to the original claim continued, a claimant may satisfy his burden as to continuation of his work injury through his own testimony.

  When a claimant does not return to his pre-injury job, and is then laid off from the modified duty job, the law presumes the layoff and attendant loss of earnings is attributable to the continued injury, shifting the burden to an employer to rebut the presumption.

  Conversely, where a claimant returns to his pre-injury position, and works under a suspension without restrictions, and is then laid off, a claimant must affirmatively establish the work injury caused the loss of earnings

Dougherty v. WCAB (QVC, Inc.) No. 386 C.D. 2014(Decision by Judge Simpson, October 14, 2014) 10/14

COURSE AND SCOPE

- The Commonwealth Court grants Employer's Petition for Reconsideration for the limited purposes of clarifying that this matter was remanded to the Board with

instruction that the matter be remanded to a WCJ for further proceedings on Claimant's claim petition

Otherwise, the Commonwealths new decision of October 17, 2014 was identical to its decision of August 22, 2014, which is vacated.

The Commonwealth Court's decision of October 17, 2014 renders the same holding as it did in its vacated August 22, 2014, which is the following:

- Under Section 301(c)(1) of the Workers' Compensation Act (Act), injuries occur during the course and scope of employment when they are "sustained while the employee is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or elsewhere."

  Not compensable under the Act are those "injuries sustained while the employee is operating a motor vehicle provided by the employer if the employee is not otherwise in the course of employment at the time of injury."

- Generally, under the "going and coming rule," injuries sustained while an employee is traveling to and from his place of employment are considered outside the course and scope of employment and are, therefore, not compensable under the Act.

  Such injuries will, however, be considered to have occurred during the course and scope of employment if one of the following four exceptions applies:

  (1) The claimant's employment contract includes transportation to and from work;
  (2) The claimant has no fixed place of work;
  (3) The claimant is on a special mission for employer; or
  (4) The special circumstances are such that the claimant was furthering the business of the employer.

  One with no fixed place of employment is a traveling employee. Whether a claimant is a traveling employee is determined on a case by case basis, and the court will consider whether the claimant's job duties involve travel, whether the claimant works on the employer's premises, or whether the claimant has no fixed place of work.

  The course of employment is broader for traveling employees.

  The fact that an employer has a central office at which an employee sometimes works is not controlling.

  A cable installer, closely fits the category of 'traveling employee'.

The claimant, who was employed as a cable installer, suffered a motor vehicle accident within the course and scope of employment, although it occurred while the Claimant was driving his company vehicle to Employer's facility prior to the beginning of his work, because the claimant had no fixed place of work and was a traveling employee. This is because although claimant reported to his employer's office in the morning, he was there for no more than fifteen minutes and then spent his whole workday to install services or make repairs for his employer's customers. The fact that he initially stopped at his employer's office is not dispositive.

As a traveling employee, Claimant was entitled to a presumption that he was working for Employer during the drive from his house to Employer's facility.

To rebut this presumption, Employer had to establish that Claimant's actions at the time of the injury were so foreign to and removed from his usual employment that they constituted an abandonment of that employment

Holler v. WCAB (Tri Wire Engineering Solutions, Inc.) No. 2209 C.D. 2013(Decision by Judge Brobson, October 17, 2014) 10/14

COURSE AND SCOPE

- As a general rule, an injury received by an employee while traveling to and from work is not compensable. However, such an injury is compensable if one of the following exceptions to the "coming and going rule" exist:
  (1) The employment contract included transportation to and from work;
  (2) The employee has no fixed place of work;
  (3) The employee is on a special mission; or
  (4) Special circumstances are such that the employee was furthering the business of the employer.

- Where attending meetings is part of an employee's regular work duties, traveling to or from such a meeting is not a special mission, thus bringing it within he course and scope of employment. .

  Claimant was not on a special mission where he was injured on his way to a Stand-Down Meeting, which was held infrequently, when the Stand-Down Meeting was held the same day as a Monthly Safety Meeting that was held at the same time each month for each department and was mandatory. The fact that the meeting was held 1 ½ hours before the start of his shift at the employer's premises did not render the claimant's commute a special mission.

- In order to prove one had a compensable injury while actually engaged in the furtherance of the business or affairs of the employer the claimant must still show

that he was acting for the employer's benefit and convenience and not simply commuting to or from his place of employment.

Put another way, it is always in the employer's interest that employees come to work. This interest, far from being a special circumstance, is a universal one.

Claimant's was not actually engaged in the furtherance of the business or affairs his employer when he was involved in a motor vehicle accident on his way to work because Claimant still would have been required to attend the monthly safety meeting he was driving to because attendance at the meeting was part of his regular duties. The fact that the meeting was held 1 ½ hours before the start of his shift at the employer's premises did not mean the claimant was actually engaged in the furtherance of the business or affairs of the employer such that he was in the course and scope of employment at the time of his accident.

Simko v. WCAB (United States Steel Corporation-Edgar Thomson Works), No. 829 C.D. 2014 (Decision by Judge Friedman, October 17, 2014) 10/14

IRE/MEDICAL TESTIMONY

- Where a claimant seeks to rebut competent IRE evidence he or she must present evidence of similar character—i.e., evidence of rating evaluations performed only by those persons the General Assembly has deemed qualified to engage in rating evaluations—osteopathic or medical doctors.

- The qualifications to perform IRE's as set forth the Regulations are as follows:

    1. Be licensed in this Commonwealth and certified by an American Board of Medical Specialties-approved board or its osteopathic equivalent.
    2. Be active in clinical practice at least 20 hours per week. Active in clinical practice" means the act of providing preventive care and the evaluation, treatment and management of medical conditions of patients on an ongoing basis.
    3. Meet training and certification requirements which may include, but are not limited to, one or more of the following:
       (1) Required attendance at a Departmentally approved training course on the performance of evaluations under the AMA "Guides to the Evaluation of Permanent Impairment."
       (2) Certification upon passage of a Departmentally approved examination on the AMA "Guides to the Evaluation of Permanent Impairment."
       (3) Other requirements as approved by the Department.

Therefore, the claimant's expert who testified on claimant's behalf in defense against the employers Petition for Modification based upon an IRE of 8% was not

competent to testify and his testimony could not be considered where he was a non-medical expert (in this case a psychologist).

- It was not relevant that there was a lack of state-certified IRE professionals in Claimant's geographical area and that this possible factual element resulted in a compromise of Claimant's due process interests. The regulations require a medical doctor to be certified by the Department only when an employer is requesting a claimant to submit to an initial IRE. The regulations do not require a claimant to obtain an IRE from a state-certified physician, but they do require IREs to be performed by medical or osteopathic practitioners. Thus, a claimant need not obtain state-certified doctors to testify regarding an IRE.

- The WCJ made an error of law upon finding the employer's medical expert who testified in support of the employer's Petition for Modification based upon an IRE of under 8% where the Jude concluded employer expert's testimony did not establish that he adequately considered all of the guidelines and tables set forth in the Guides, in finding that the Claimant suffered from an 8% whole person impairment.

  Any such failure is a matter for an opposing party to establish during cross-examination of a witness, and any failure of a medical expert to apply pertinent guidelines would affect the credibility of such a witness rather than his competency.

  The doctor's testimony would be incompetent if he did not consider all of the facts pertinent to claimant's condition.

Commonwealth of Pennsylvania/DPW Loysville Youth Center and Inservco Insurance Services, Inc. v. WCAB (Slessler) No. 99 C.D. 2014(Decision by Judge Brobson, October 30, 2014) 10/14