

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
JANUARY 2010 AT A GLANCE
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VOCATIONAL

- The WCJ did not commit an error of law upon modifying the claimant's benefits in the context of the granting the claimant's Claim Petition based upon the employer's offer of sedentary work in the absence of the employer's filing of The Notice Of Ability To Return To Work (LIBC-757) because the claimant voluntarily returned to work upon being offered the light duty job without the issuance of the form.
- Once the claimant returned to work the employer was not required to issue LIBC-757 every time there were minor changes in the claimant's restrictions since such requirement would be superfluous considering the claimant was working.
- The purpose of the note requirement communicated by LIBC-757 is to require the employer to share the medical information about a claimant's physical capacity to work and its possible impact on existing benefits. Formal notice is not required where claimant is actually performing work.

Ashman v. WCAB (Helpmates, Inc.), No. 1429 C.D. 2009 (Decision by Judge McGinley, January 11, 2010) 2/10

SUPERSEDEAS/ SUBROGATION

- Where the parties executed a Third-Party Settlement Agreement, which obliged the employer to pay its pro rata share of attorney fees and costs, and the employer was subsequently granted its Petition for Modification the employer was entitled to reimbursement from the Supersedeas Fund for the monies paid to the claimant following the execution of the Third-Party Settlement Agreement in the form of its pro rata share of attorney fees and costs over the resulting grace period in addition to the unreimbursed balance of benefits the paid to the claimant.

This is because although the employer was technically paying the claimant its pro rata share of attorney fees and costs following the execution of the Third-Party Settlement Agreement, the requirement that an employer or insurer pay its pro rata share of the attorney's fees and costs is meant to properly distribute the costs of the particular benefit being received from the third-party settlement to the appropriate party as the benefits are received. In other words, the costs follow the

benefits. Section 319 does not convert the compensation paid for wage loss and medical benefits into something else for purposes of Section 443.

- This holding is to be distinguished from the Court's holding in Universal Am-Can, Ltd. v. WCAB (Minteer), 870 A.2d 961 (Pa. Cmwlth. 2005) where the Court held that the employer is not entitled to reimbursement from the Supersedeas Fund for payment of attorney fees and costs. This case was distinguishable because in Minteer, the Court held that under Section 440(a) the attorney fees and costs assessed due to an unreasonable contest, are not compensation but in addition to compensation.

In this matter, the insurer was seeking reimbursement for payments that, when made to Claimant, were payments of wage loss and medical benefits, which clearly constitute "compensation" under Section 443(a).

Moreover, although the amounts for which Insurer was seeking reimbursement correlated to what was designated as recovery costs when the subrogation calculations were made under Section 319, Section 319 does not convert the compensation paid for wage loss and medical benefits into something else for purposes of Section 443(a). Therefore, unlike Minteer, this case did not involve payments that were in addition to compensation; instead the payments in this case were payments of compensation.

Department of Labor and Industry, Bureau of Workers' Compensation v. WCAB (Exelsior Insurance) No. 2012 C.D. 2008 (September 16, 2009, Decision by Judge Cohn Jubelirer 2/10

FORFEITURE (REFUSAL OF MEDICAL TREATMENT)/COLLATERAL ESTOPPEL

- The employer was entitled to a granting of its Petition for a Suspension based upon the claimant's refusal to enroll in a supervised Detox Program notwithstanding the fact that there was no guarantee that the claimant would be able to return to her pre-injury job because refusal of such treatment would increase the claimant's incapacity.

The treatment that is the subject of a Petition for Forfeiture need only improve the claimant's condition; it does not have to return the claimant to pre-injury health.

- Under Section 306(f.1) (8), if an employee refuses reasonable treatment, the employer shall forfeit all rights to compensation for any increase in incapacity resulting from such refusal. Treatment is reasonable if it is highly probable that the treatment will cure the health problem and enhance the claimant's prospects for gainful and fulfilling employment.

In this matter, the court found that the a detox program would have weaned the Claimant from toxic doses of medication, curing that health problem, allowing Claimant to return to normal functioning and enhancing her prospects for gainful and fulfilling employment. Although such a program would not have returned Claimant to her pre-injury job, her refusal of such treatment increased her incapacity, thus entitling the employer to granting of its petition.

- A Judge's finding that employer's medical expert did not testify credibly that the claimant was recovered from her work injury, thus resulting in a denial of the employers Petition for Termination, that same decision did not collaterally stop the Judge from finding that same doctors opinion credible that the offer of enrollment in the Detox Program was a reasonable and necessary medical treatment. This is because collateral estoppel only forecloses a re-litigation of identical issues. The issue raised by this matter was not whether the claimant had fully recovered from her work injury but whether the offer of enrollment in a Detox Program was reasonable and necessary medical treatment.

Bereznicki v. WCAB (Eat'n Park Hospitality Group), No. 1047 C.D. 2009
(Decision by Judge Quigley, October 19, 2009). 2/10

RETIREMENT

- A claimant's receipt of a pension from his union, although it is from a source other than his employer, triggers the presumption that the claimant left the workforce unless the claimant establishes that he was actively seeking employment or that the work-related injury forced him to retire.

For the claimant to show that he is actively seeking employment, he must engage in a good faith job search.

In order to show that a work-related injury forced him to retire, a claimant must establish that the work-related injury made him incapable of working at any job in the entire labor market.

- This holding is consistent with the Supreme Court decision of SEPTA v. WCAB (Henderson), 543 Pa. 74, 669 A.2d 911 (1995) where the Court held that an employer should not be required to show that a claimant who has taken Social Security Retirement benefits and a pension from his employer has no intention of continuing to work; such a burden of proof would be prohibitive. Likewise, it would be overly burdensome for an employer to prove that a claimant has no intention of continuing to work where the claimant has mentioned to the employer that he would like to retire, has taken Social Security Retirement benefits and has taken a union pension.

Conversely, it would not be overly burdensome for the claimant to show that he intends to continue to work under the circumstances; the claimant need only show that he is applying for jobs within his physical restrictions.

Duferco Farrel Corporation and American Zurich Insurance Company v. WCAB (Zuhosky), No. 1304 C.D. 2009 (Decision by Judge Quigley, January 14, 2010). 2/10