THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
MARCH 2010 AT A GLANCE
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TERMINATION PETITION

- The employer was entitled to a granting of its Petition for Termination where the Notice of Compensation Payable recognized the injury of "low back, right hand, right low arm contusion" and the employer's medical expert, found credible by the Judge, testified that the claimant was fully recovered from her work injury notwithstanding the fact that the same medical expert did not examine the claimant's injured arm.

  This is because upon testifying to the WCJ, the claimant never mentioned that she suffered from lower arm pain, the claimant's treating chiropractor upon testifying made no mention of the claimant's lower arm pain and the employer's medial expert testified that he asked the claimant about her right arm and she stated it did not give her any pain at the present time.

  Accordingly, the doctor's testimony that she has fully recovered was supported substantial competent evidence and he did not need to specifically examine her right arm to make such a determination that she was fully recovered from her work injury.

Stancell v. WCAB (LKI Group, LLC), No. 1901 C.D. 2009 (decision by Judge Pellegrini, March 10, 2010). 4/10

CREDIT

- Pursuant to Section 204(a) of the Act an employer is entitled to an offset from a pension plan paid to the claimant to an extent it was funded directly by the employer liable for the compensation and ***against the pension payments*** received by the claimant. (Emphasis added)

  Therefore, the employer was only entitled to an offset of $0.28 per week where the claimant was only receiving $2.27 in monthly pension benefits where the employer established that they contributed 53.983 % of claimant's monthly pension benefits because under Section 22-401(4)(a) of Philadelphia Code a

claimant ***disability pension benefits are reduced*** by the amount received in workers compensation. (Emphasis added)

A claimant is not allowed to retain both disability pension and workers' compensation benefits for the same period of disability. To allow such a double recovery would be in contravention of Section 22-401(4) (a) of Philadelphia Code.

- Section 426 of the Act permits the Board to grant a rehearing as long as the request for the rehearing is made within 18 months of the issuance of its opinion. The Board has broad powers to grant a rehearing and may do so when justice requires. The Board has authority to grant to rehearing is to prevent manifest injustice. A rehearing has been found to be appropriate to allow the Board to correct the mistake of law or misapprehension of an issue. The authority to grant to rehearing is to be liberally interpreted in the interest of the claimant.

City of Philadelphia v. WCAB (Harvey), No. 1379 C.D. 2009 (decision by Judge Flaherty, March 17, 2010). 4/10

CREDIT/APPEAL/ATTORNEY FEE/ HEART AND LUNG ACT

- Although the Heart and Lung Act permits the employer to retain monies collected pursuant a Notice of Compensation Payable or an award while Heart and Lung Act benefits are being paid, Claimant's counsel was entitled to a 20 % attorney fee chargeable against the claimant's workers' compensation notwithstanding the fact that the claimant was receiving compensation under the Heart and Lung Act at the time the employer filed it Petition for Termination.

  This is because neither the Heart and Lung Act nor the Workers' Compensation Act prevents employers from initiating proceedings under the Workers' Compensation Act before, after, or simultaneous with proceedings under the Heart and Lung Act. Moreover, the language of the Heart and Lung Act does not estop an injured employee from seeking workers' compensation. It only prohibits the employee from retaining monies collected pursuant to a Notice of Compensation Payable or an award while Heart and Lung Act benefits are being paid.

- The language of the Heart and Lung Act does not estop an injured employee from seeking workers' compensation benefits; it only prohibits the employee from retaining monies collected pursuant to a Notice of Compensation Payable or an award while Heart and Lung Act benefits are being paid.

- The portion of a 20 percent contingent fee paid directly to a claimant's counsel is not "received" or "constructively received" by the claimant.

Accordingly, once the employer's Petition for Termination was denied by the WCJ and counsel's fee agreement was approved, 20 percent of claimant's indemnity benefits were no longer payable to the claimant. Rather, 20 percent of claimant's workers' compensation benefits were payable to counsel. Counsel was entitled to the 20 percent fee notwithstanding the fact the employer was able to retain the workers' compensation that was payable Notice of Compensation Payable while the claimant was receiving Heart and Lung Act benefits.

This holding applies whether the employer is insured or self-insured because such distinction would create disparate treatment between claimants who are injured working for employers who are insured and those who are injured working for employers that are self-insured. The result would be untenable.

- The unambiguous language of the Heart and Lung Act clearly contemplates the ability of an injured employee to seek workers' compensation and benefits under the Heart and Lung Act simultaneously. Although the Heart and Lung Act and the Workers' Compensation Act are similar in purpose, the two Acts operate separately from one another.

- The Heart and Lung Act was intended to cover only those disabilities where the injured employee is expected to recover and return to his or her position in the foreseeable future. Neither the Heart and Lung Act nor the Workers' Compensation Act prevents employers from initiating proceedings under the Workers' Compensation Act before, after, or simultaneous with proceeding under the Heart and Lung Act.

- Issues must be raised in a party's Petition for Review as well as the Statement of Questions Involved and Argument Sections of one's brief. Otherwise, they may be deemed waived. Moreover, it is well settled that an Appellate Court cannot properly consider averments of facts appearing only in a party's brief that are not part of the record.

  However, objections that are referenced in a Petition for Review are deemed to include every subsidiary question fairly comprise therein.

City of Philadelphia v. WCAB (Ford-Tilghman) No. 1049 C.D. 2009 (Decision by Senior Judge Flaherty, March 17, 2010) 4/10

CREDIT/TWO SEPARATE COMPENSABLE INJURIES/SUSPENSION

- When there are two injuries that are separately totally disabling, compensation should be based on the later-in-time injury until the entitlement to benefits for that injury changes.
  Benefits for the first injury are suspended while the claimant is receiving total disability for the most recent injury. It follows, then, that the injury that

determines the benefit rate should determine all matters related to the benefit, such as offsets.

Therefore, where the claimant suffered his first knee injury in 1991, which was pre Act 57, and his second disabling injury in 1996, which was post Act 57, the employer's right to a credit was controlled by Act 57 Section 204(a) of the Act.

- Prior to 1996, an employer was permitted to take an offset against disability compensation owed to an injured worker for other disability-type payments the employer paid that worker. However, the employer was required to raise the offset right at the "earliest possible stage," so that the WCJ could order the offset along with an award, if any, of benefits.

  In 1996, Act 57 was enacted to amend Section 204(a) of the Act to provide that employer may take offsets against disability compensation on its own initiative without prior authorization from the WCJ. Thus, the law on offsets is different depending upon whether a work injury occurred before or after the effective date of Act 57.

Christy v. WCAB (Philadelphia Gear Corporation), No. 1276 C.D. 2009 (decision by Judge Leavitt, March 12, 2010). 4/10

VOCATIONAL/SUSPENSION

- The Supreme Court decision of Schneider, Inc. v. WCAB. (Bey), 560 Pa. 608, 747 A.2d 845 (2000), which held that an employer was entitled to a suspension of benefits absent the showing of job availability when the claimant sustained a non-work related head injury that resulted in brain damage and paralysis precluding him from ever returning to the workforce, is fact specific and applies to the distinct factual circumstances where a claimant can never return to work.

  The Supreme Court's holding resulted from its recognition that it would be futile to require a showing of job availability if the employee can never return to the workforce.

  The holding of Schneider, Inc. v. WCAB. (Bey) did not apply to the factual scenario presented in this case where the claimant, though disabled due to his non-work related condition, was still capable of appearing live and testifying before the WCJ and was able to perform limited driving and cooking on occasion. These facts demonstrated that perhaps, at some point, he might be able to return to some sedentary position considering the totality of his physical condition.

The Court felt that it would be "unduly cynical to analogize the claimant to the brain damage paralyzed claimant in the Schneider."

Accordingly, the employer was still required to issue LIBC-757 and establish job availability. If an employer can establish that there is a job available that complies with the claimant's work related restrictions, and the claimant failed to return to or accept this position because of non-work related factors, the employer has proven that the loss of earnings is attributable to something other than the work related injury.

- Whether the showing of job availability was required or not, the employer was required to issue the Notice of Ability to Return to Work (LIBC-757) because the employer sought a modification of benefits based upon the opinion that the claimant was now capable of returning to sedentary work based upon his work related conditions only .

Wells v. WCAB (Skinner), No. 1136 C.D. 2009 (decision by Judge Flaherty, March 12, 2010). 4/10