

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
FEBRUARY 2008 AT A GLANCE
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CLAIM PETITION

- Where, in the absence of economic reasons, following the claimant's work injury the employer chose not to renew her one-year employment contract the situation was more akin to a termination from employment than to a layoff

Therefore, in defense against the claimant's Claim Petition the employer was permitted to demonstrate that the claimant's loss of earnings resulted from the claimant's lack of good faith, which resulted in her discharge. A showing of a lack of good faith, or bad faith, on the part of the claimant is not the same as the more restrictive willful misconduct standard sufficient to deny unemployment compensation. While willful misconduct may be evidence of bad faith, it not necessarily followed that bad faith must rise to the level of willful misconduct. Although evidence of willful misconduct will satisfy a showing of bad faith necessary in the workers' compensation context, it is not the sole means to show bad faith sufficient to warrant a suspension.

The WCJ, as fact finder, determines whether a claimant was discharged for conduct evidencing lack of good faith. The only relevant issue in deciding whether the claimant's benefits should be suspended is where the loss of earnings was only because of the work injury.

- The burden upon a Claimant who files a Claim Petition is the establishment of the right to compensation and then the proving all necessary elements to support an award. The claimant must establish that her injury was sustained during the course and scope of employment and is causally related thereto. The claimant is also required to establish the length of her disability. The burden never shifts to the employer. An employer may, however, rebut a claimant's proof of loss of earning, by demonstrating that suitable work was available or would have been available but for circumstances, which merit allocation of the consequences of the discharge to the claimant, such as claimant's lack of good faith.
- A WCJ can terminate benefits within the context of the Claim Petition even when the employer has never filed a Termination Petition. In the context of the Claim Petition, the claimant has the burden to establish the duration of her disability throughout the pendency of her petition. The claimant failed to meet her burden of showing that she continued to be disabled by her work injury where the WCJ found the claimant was recovered as of the date of her independent medical examination.

Coyne v. WCAB (Villanova University and PMA Group), No. 710 C.D. 2007 (Decision by Judge Flaherty, February 11, 2008).

FORFEITURE (REFUSAL OF MEDICAL TREATMENT)

- The employee was not entitled to reimbursement from the Supersedeas Fund after successfully litigating a Petition for Suspension that was premised upon seeking a forfeiture of compensation based upon the claimant's refusal to accept reasonable and necessary medical treatment pursuant to Section 306(f.1)(8). This is because reimbursement from the Supersedeas Fund is only permitted where an employer has litigated a Petition pursuant to Section 413 and Section 430 of the Act.
- A petition alleging the forfeiture of the right to compensation is not the same as the Petition for Suspension because forfeiture is based on the claimant's own unwillingness to accept medical treatment rather than a change in status while a suspension requires a change that alters the claimant's right to benefits.

Land O'Lakes, Inc. v. WCAB (Todd), No. 1085 C.D. 2007 (Decision by Judge Smith-Ribner, February 11, 2008).

LONGSHORE AND HARBOR WORKERS ACT/JURISDICTION

- The Pennsylvania Supreme Court holds that a graven dry dock is land-based regardless of how much water has been flooded into it when a vessel enters or exits, and an injury occurs. A graven dry dock is land based regardless of how much water has been flooded into it when a vessel enters or exits and an injury occurs. Therefore, the Longshore and Harbor Workers' Act and the Pennsylvania Workers' Compensation Act had jurisdiction over an injury that occurred while a claimant was performing a maritime activity while working in a graven dry dock.
- A graven dry dock, by definition, is cut and dug out of the land. This is sufficient to make it land based. The periodic and artificial flooding of the graven dry dock with water is insufficient to divorce the site from land and render it exclusively within the limits of the "navigable waters of the U.S, which would bring it within the exclusive limits of the Longshore and Harbor Workers' Act. On the contrary, the Longshore and Harbor Workers' Act and the Pennsylvania Workers' Compensation Act have concurrent jurisdiction over an injury that occurs when an employee is performing a maritime activity in a graven dry dock.
- The Pennsylvania Supreme Court distinguishes its analysis from the Commonwealth Courts analysis by emphasizing the fact that the vessel in this case was resting on land at the time of the injury was not dispositive. A graven dry dock is land based regardless of how much water has been flooded into it when a vessel enters or exits and the injury occurs. Where the injury occurs within the dry dock is also insignificant. There is concurrent jurisdiction whether the injury occurred on the dry docked vessel or in the dry dock apparatus itself.

McElheney v. WCAB (Kvaerner Philadelphia Shipyard), No. 15 EAP 2007 (Decision by Chief Justice Castille, February 19, 2008). 3/08

LOSS OF USE

- Although a claimant's testimony and/or WCJ's personal observation of the injured extremity is important with respect to determining whether or not a claimant has suffered a specific loss of use, competent medical evidence of permanent loss of use for all practical intents and purposes must be presented before further support for the claim in the form of the claimant's testimony can be considered.
- The claimant did not fulfill his burden of proof pursuant to his Claim Petition that alleged he had suffered a specific loss of the middle finger where his doctor, though opining that the claimant would have residual permanent impairment, gave no opinion as to any degree of impairment and this opinion was given before the claimant underwent subsequent fusion surgery.
- When a claimant alleges that his injuries have resolved into a specific loss, he has a burden of proving that he has permanently lost the use of his injured body part for all practical intents and purposes. A specific loss requires more than just limitations upon an injured worker's occupational activities; a loss of use for all practical intents and purposes requires more crippling injury than one that results in a loss of use for occupational purposes. However, it is not necessary that the injured body part be 100 percent useless in order for the loss of use to qualify as being for all practical intents and purposes.
- Whether a claimant has lost the use of a body part and the extent of that loss of use is a question of fact for the WCJ. Whether the loss is for all practical intents and purposes is a question of law.

Jacobi v. WCAB (Wawa, Inc.), No. 1110 C.D. 2007 (Decision by Judge Leavitt, February 12, 2008).

MEDICAL TESTIMONY

- Medical testimony will be deemed incompetent if it is equivocal. Medical testimony will be found unequivocal if the medical expert, after providing a foundation, testified that in his professional opinion that he believes a certain fact or condition exist. Medical testimony is equivocal if, after review of a medical expert's entire testimony, it is found to be merely based on possibilities. In determining whether medical testimony is unequivocal, the medical witness' entire testimony must be reviewed and taken as a whole and a final decision should not rest upon a few words taken out of context.
- The fact that a medical expert does not have all of the claimant's medical records in formulating his opinion only goes to the weight of the expert's testimony and not his competency. Likewise, the medical expert's testimony is not rendered incompetent simply because he requested the opportunity to review an updated MRI that had not yet been performed upon the claimant.
- A medical expert's acknowledgment of the claimant's subjective complaints does not necessarily preclude a termination of benefits where there is no objective

evidence in support of complaints. Therefore, employee's medical expert's acknowledgment that, based upon the claimant's subjective complaint, he would send her back to physical therapy if she was his own patient, did not render his opinion that the claimant was recovered equivocal.

Coyne v. WCAB (Villanova University and PMA Group), No. 710 C.D. 2007 (Decision by Judge Flaherty, February 11, 2008).

PENALTY

- There are two components to an employer's obligation pursuant to Section 406.1 of the Act. The employer is required to promptly investigate each injury reported or known to the employer *and* the employer is required to promptly commence the payment of compensation pursuant to an Agreement upon the Compensation Payable or a Notice of Compensation Payable or pursuant to a Notice of Temporary Compensation Payable.

Therefore, the WCJ did not commit an error of law by denying a claimant's Petition for Penalties where the claimant sought penalties based upon the employer's failure to timely investigate the claim where the WCJ found the employer's violation resulted from its failure to issue the appropriate document.

Coyne v. WCAB (Villanova University and PMA Group), No. 710 C.D. 2007 (Decision by Judge Flaherty, February 11, 2008).

SUPERSEDEAS FUND

- The employee was not entitled to reimbursement from the Supersedeas Fund after successfully litigating a Petition for Suspension that was premised upon seeking a forfeiture of compensation based upon the claimant's refusal to accept reasonable and necessary medical treatment pursuant to Section 306(f.1)(8). This is because reimbursement from the Supersedeas Fund is only permitted where an employer has litigated a Petition pursuant to Section 413 and Section 430 of the Act.
- Section 443(a) of the Act allows Supersedeas Fund reimbursement if an employee meets the following requirements:(1) a supersedeas was requested pursuant to Section 413 or Section 430; (2) the request was denied; (3) the employer continued benefits because of the denial; (4) it received a final order; and (5) a determination ultimately was made that compensation was not payable.

Land O'Lakes, Inc. v. WCAB (Todd), No. 1085 C.D. 2007 (Decision by Judge Smith-Ribner, February 11, 2008).

TERMINATION FOR CAUSE

- Where, in the absence of economic reasons, following the claimant's work injury the employer chose not to renew her one-year employment contract the situation was more akin to a termination from employment than to a layoff

Therefore, in defense against the claimant's Claim Petition the employer was permitted to demonstrate that the claimant's loss of earnings resulted from the claimant's lack of good faith, which resulted in her discharge. A showing of a lack of good faith, or bad faith, on the part of the claimant is not the same as the more restrictive willful misconduct standard sufficient to deny unemployment compensation. While willful misconduct may be evidence of bad faith, it not necessarily followed that bad faith must rise to the level of willful misconduct. Although evidence of willful misconduct will satisfy a showing of bad faith necessary in the workers' compensation context, it is not the sole means to show bad faith sufficient to warrant a suspension.

The WCJ, as fact finder, determines whether a claimant was discharged for conduct evidencing lack of good faith. The only relevant issue in deciding whether the claimant's benefits should be suspended is where the loss of earnings was only because of the work injury.

- The Commonwealth Court states in dicta that it has rejected its holding in United Parcel Service v. WCAB (Portanova), 594 A.2d 829 (Pa. Cmwlth. 1991) where the Court held that denying compensation to a claimant where an employer discharged the employee because of misconduct committed prior to a work injury would create too much potential for abuse. The only relevant issue upon deciding whether the claimant's benefits should be suspended following a discharge is whether the loss of earnings is no longer the result of the work injury.

Coyne v. WCAB (Villanova University and PMA Group), No. 710 C.D. 2007 (Decision by Judge Flaherty, February 11, 2008).

VOCATIONAL

- An employer who files a Petition for Modification/Suspension based upon the performance of the labor market survey has a burden of proof to show that no job existed in its workplace within the claimant's restrictions once the issue is raised by evidence of a possible opening with the employer by the claimant.
- Consistent with the regulations, the time period that the employer must make a position available to the claimant runs from the date the employee issue the Notice of Ability to Return to Work (LIBC-757) and continues until the filing of the petition. The regulations further provide that a claimant may prove that during the period in which the employer had a duty to offer a specific job, the employer announced the existence of a specific job vacancy that the claimant was capable of performing, which the employer intended to fill.

Rosenberg v. WCAB (Pike County), No. 17 C.D. 2007 (Decision by Judge Simpson, February 5, 2008).

WCJ

- The admission of evidence generally committed to the sound discretion of the WCJ. Moreover, whether WCJ should waive any of the rules contained in Chapter 131 is a matter of discretion. The test to determine whether the WCJ erred in waiving the rules is whether there has been an abuse of discretion.

The WCJ also has control over when to close the record. Indeed, it is the WCJ's duty is to resolve the claims before her in a fair and efficient manner.

Coyne v. WCAB (Villanova University and PMA Group), No. 710 C.D. 2007 (Decision by Judge Flaherty, February 11, 2008).