

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:  
JULY 2008 AT A GLANCE  
BY MITCHELL I GOLDING, ESQ.  
KENNEDY, DANIELS & LIPSKI  
(W) 215-430-6362**

**UTILIZATION REVIEW**

- Although a Workers' Compensation Judge lacks jurisdiction to decide the merits of Utilization Review Petition i.e. whether the claimant's treatment was unreasonable and unnecessary based on the provider's failure to supply medical records with a verification form, the WCJ does have a jurisdiction to decide the issues of the adequacy of the URO's pursuit of the verification form, the URO's compliance was 34 Pa. Code Section 127.464(b) and whether the provider complied with that section.

Therefore, the WCJ had jurisdiction to order the medical records subject to the employer's initial UR request be re-reviewed by the URO where the issue before the WCJ was whether the Utilization Review Petition was properly denied where there was disagreement as to whether the Provider under review ever received a verification form from the URO.

*HCR ManorCare v. WCAB (Bollman) No. 2320 C.D. 2007 (decision by Judge Pellegrini, July 2, 2008).*

**SUBROGATION**

- The employer did not waive its right to subrogation where it checked off "no" in response to paragraph 11 of the Compromise and Release Agreement indicating that there was no lien or potential lien for subrogation under Section 319 because at the time the Compromise and Release Agreement was executed the third-party action had not been filed and the employer had no awareness of the potential or existence of a third-party action. That being the case, the employer could not have bargained away its subrogation rights as part of a settlement agreement.

The fact that employer stated in the Compromise and Release Agreement that there was no lien or potential lien for subrogation did not indicate a waiver of a right to subrogation. Rather, it merely indicated the employer's belief that a lien or potential lien did not exist, a belief that claimant agreed was correct at this time.

- The subrogation provision of that Section 319 of the Act is clear and unambiguous and is written in mandatory terms and without exceptions. Section 319 of the Act is both automatic and absolute.

*Gorman v. WCAB (Kirkwood Construction) No. 1926 C.D. 2007 (decision by Judge McCloskey)*

### **Termination/Res Judicata**

- Pursuant to the Pennsylvania Supreme Court's decision of Lewis v. WCAB (Giles & Ransome, Inc.), 591 Pa. 490, 919 A.2d 922 (2007) when employer seeks to terminate benefits on the basis that claimant's medical condition has improved, reducing his disability, the employer bears the burden of showing actual physical improvement.

In order to meet its burden an employer need only adduce medical evidence that the claimant's physical condition is different than it was at the time of the last disability adjudication. It is not sufficient, nor is it proper, for an employer merely to challenge the diagnosis of the claimant's injuries as determined by a prior proceeding. To do would fail to establish the change in condition required by the first prong of Kachinski.

Absent this requirement, a disgruntled employer or claimant could repeatedly attack what he considers an erroneous decision by a Judge by filing petitions based on the same evidence in the hope that one Judge would finally decide in his favor. Moreover, such a challenge is barred by the doctrines of res judicata and collateral estoppel.

Accordingly, the Commonwealth Court remanded the WCJ's granting of the employers second Petition for Termination where the first Judge, upon denying the claimant's Petition for Termination noted that the Notice of Compensation Payable did not define the nature of the claimant's knee injury and therefore it was inferred that the employer intended to accept a broad and expensive liability for the knee injury and the second Judge, who made this determination prior to the Lewis decision, made no finding as to whether the claimant's condition had changed since the first of WCJ's decision. The Lewis decision renders it clear that such a factual finding is necessary where there was a prior adjudication that resulted in a WCJ decision that addressed the nature of the claimant's injury.

*Prebish v. WCAB (DPW/Western Center), No. 319 C.D. 2007 (Decision by Judge Simpson, July 14, 2008).*

### **LOSS OF USE BENEFITS**

- Pursuant to Section 306(c)(23), a claimant who has suffered specified bilateral specific losses is presumed to be totally disabled and is entitled to total disability irrespective of the claimant's present earning capacity subject to the discretion of the Workers' Compensation Appeal Board.

- The benefit rate for compensation payable under all subsections of Section 306(c), which is the specific loss section, is computed in the same manner as for total disability under Section 306(a), which is the total disability section.
- The remedy provided by the specific loss section of Section 306(c) is exclusive. Thus, a claimant who sustains an injury adjudged compensable under Section 306(c) is not entitled to compensation beyond that provided by Section 306(c), even though he may be totally disabled by his injury. This is because the right to compensation under Section 306(c) is measured by the extent of the injury, regardless of the degree of disability.

*Allegheny Power Service Corporation and Acordia Employer Service, Inc. v. WCAB (Cockroft), No. 242 C.D. 2007 (Decision by Judge Friedman, July 22, 2008).*

**MEDICAL TESTIMONY / STATUTE OF LIMITATIONS / PETITION TO REVIEW / PSYCHIATRIC**

- When a claimant seeks to amend a Notice of Compensation Payable to include additional injuries, he must file his petition within three years of the last payment of compensation.

Therefore, the claimant's Petition for Review was timely where the claimant, who suffered a compensable work injury on January 11, 1994 and continued to receive total disability in 2003, filed a Claim and Review Petition in 2003 alleging that as a result of his injury he sustained in January 1994 he suffered from psychiatric injuries .

- A claimant who files a Petition to Review to allege that he suffered from mental injuries in addition to the recognized physical injuries, has the burden of establishing, by unequivocal medical evidence, that his mental injuries developed as a result of his initial physical injury.

Medical testimony will be found to be unequivocal if the medical expert, after providing a foundation, testified in his professional opinion that he believes a certain fact or condition exists. Medical testimony is equivocal if, after a review of the medical expert's entire testimony, it is found to be merely based on possibilities. Medical testimony will be deemed incompetent if it is equivocal. Whether medical testimony is equivocal is a question of law subject to plenary review.

While a Court's rejection of testimony based upon the finding of equivocality is subject to review, a Judge's credibility determination is not. A WCJ is free to accept or reject, in whole or in part, the testimony of any witness.

- There are no magic words that a doctor must recite to establish causation. There is no requirement that every utterance that escapes the lips of a medical witness on a medical subject must be certain, positive, without reservation, exception, or peradventure of a doubt noted to be considered unequivocal. Moreover, it is not necessary that a medical expert rule out with absolute certainty that other factors may have caused or contributed to a condition.

Even if the testimony of a medical expert is unequivocal, it must be accepted by the fact finder to support an award. The WCJ must make clear whether they are denying a claim based upon the fact that the burdened party's medical expert is equivocal or because his opinion simply is not credible.

- A claimant who seeks benefits for mental injuries that he alleges were caused by physical stimulus is required to show that the physical stimulus caused the mental injuries. Such causal relationship must be established by unequivocal medical evidence. The claimant alleging a psychological injury stemming from a physical injury is not required to show abnormal working conditions.

Campbell v. WCAB (Pittsburgh Post Gazette), No. 38 C.D. 2008 (Decision by Judge Flaherty, July 29, 2008).

### **OCCUPATIONAL DISEASE/FIREFIGHTER PRESUMPTION/REMAND**

- Section 301(e) provides a procedural or evidentiary advantage to a claimant who proves an occupational disease and employment in an occupation where such disease is a hazard. Once the claimant meets his or her burden under Section 301(e) the claimant becomes entitled to a non-conclusive presumption that the occupational disease arose out of claimant's employment. An employer may rebut the presumption through competent medical expert testimony.
- A firefighter who is suffering from an occupational disease set forth by Section 108(o) must produce medical expert testimony that the claimant is disabled from firefighting due to his condition. Once the expert testifies as such, there is a presumption set forth by Section 301(e) that the claimant's occupational disease arose out of and in the course of his employment. This is a difficult presumption to rebut though the employer may rebut it through competent medical expert testimony found credible by the WCJ
- The WCJ as the ultimate fact finder in workers' compensation cases, has exclusive province over questions of credibility and evidentiary weight, including a medical witness, in whole or in part. If WCJ fails to make findings integral to determining that matter on appeal to the board, the appropriate course of action is to remand the matter to the WCJ to make those findings. A WCJ should restrict remand proceedings to the purpose indicated by the board's remand order.

Repash v. WCAB (City of Philadelphia), No. 114 C.D. 2008 (decision by Judge Smith-Ribner, July 28, 2008).