

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:  
OCTOBER 2009 AT A GLANCE  
BY MITCHELL I GOLDING, ESQ.  
KENNEDY, CAMPBELL, LIPSKI & DOCHNEY  
(W) 215-430-6362**

**LITIGATION COSTS**

- Commonwealth, court grants claimant's Application for Reconsideration as to the issue of litigation costs and withdraws its decision of July 29, 2009 that denied claimant reimbursement of litigation costs holding that the claimant was not entitled to reimbursement of litigation cost where the WCJ, upon granting the employer's Petition for Modification, found all jobs located were available to him though the Board made a Technical correction of the date of modification from January 22, 2003 to May 5, 2003. The court had reasoned that this change resulted from a technical correction by the Board and not the result of a successful defense of the Modification Petition by the claimant.

*Bentley v. WCAB (Pittsburgh Board of Education), No. C.D. 2008 (Decision by Judge Leavitt, October 7, 2009). 11/09*

- Pennsylvania Supreme Court grants claimant's Petition for Allowance of Appeal and frames issue before the court as follows:

*Whether the Commonwealth Court erred in its interpretation of 77 P.S. § 551.2 by holding that respondents did not need to present evidence of job availability or earning power in order to change petitioner's disability status from total to partial, and whether the court's holding conflicts with Gardner v. WCAB (Genesis Health Ventures), 888 A.2d 758 (Pa. 2005).*

- The Commonwealth Court had held that an employer who seeks to modify a claimant's compensation from total to partial on the basis of an IRE requested outside the 60-day window is not required to prove earning power or job availability. The Commonwealth Court went on to state that the compensation may be modified by agreement or following an adjudication that the claimant's condition improved to an impairment of less than 50 percent.

*Diehl v. WCAB (IA Construction), No. 231 WAL 2009 (October 20, 2009). 11/09*

**IMPAIRMENT RATING EVALUATION**

- A claimant has two avenues of appeal following the issuance of a Notice of Change of Workers' Compensation Disability Status, which was premised upon an impairment rating evaluation under 50 percent.

First, pursuant to Section 306(a.2) (2) and Regulation 123.105(d) no reduction of an employee's disability status can be made until 60 days after Notice of Change is issued. The inclusion of the 60-day notice provision reflects that the General Assembly intend to give an employee the right to immediately appeal the reduction of his or her disability status before the reduction became effective.

This is because pursuant to Section 306(a.2)(2) if the determination results in an impairment rating of less than 50 percent, no reduction shall be made until the employee is given 60 days Notice of the Change.

Therefore, the claimant is provided with the right to immediately appeal the change in his or her disability status and seek a hearing before the WCJ.

Second, under Section 306(a.2) (4) an employee may appeal the IRE determination at any time during the 500 week period of partial disability, but after the 60 days that runs from the issuance of the Notice of the Modification, the appeal may only be based upon the allegation that the employee meets the threshold impairment rating that it is equal or greater than 50 percent.

What this means is that the claimant who files the appeal of the IRE determination under Section 306(a.2)(4) must show that he or she had an impairment rating that was equal to greater than 50 percent.

Accordingly, a claimant's appeal of an IRE determination was prohibited by the plain language of the Act where the employer issued its Notice of Change of Workers' Compensation Disability Status on June 13, 2006 and the claimant did not file her Petition to Review the Impairment Rating Evaluation until May 31, 2007 because the claimant's petition was premised upon her argument that the IRE Physician was not qualified to perform the IRE rather than premised upon the allegation that the claimant's impairment rating was 50 percent or greater.

- The language of Regulation 123.105(f) is contrary to the express language of the Act in that Section 123.105(f) permits an employee to appeal the adjustment of benefit status to a Workers' Compensation Judge at any time during the 500 weeks of partial disability without restriction. On the other hand, Section 306(a.2)(4) of the Act imposes the requirement that there be a determination that the employee meets the threshold impairment rating that is equal to or greater than 50

percent under the most recent guidelines when an employee appeals the adjustment of benefit status at any time during the 500 weeks period of partial disability.

It is well established that regulations promulgated by an administrative agency pursuant to a statutory directive are invalid if they are contrary to the legislative intent of statutory provisions to which they relate. Accordingly, Regulation 123.105(f) would be invalid inasmuch as it is inconsistent with Section 306(a.2) (4) that requires the claimant to meet the threshold impairment rating that is equal or greater than 50 percent under the most recent guidelines.

*Johnson v. WCAB (Sealy Components Group), 763 C.D. 2003 (decision by Judge Kelley, October 15, 2009). 11/09*

### **TERMINATION FOR CAUSE/ APPEAL**

- The employer fulfilled its burden in support of its Petition for Suspension where they produced credible testimony that the employer would have had three jobs available to the claimant within the claimant's restrictions but for the fact the claimant was not eligible to accept those positions because she had lost her nursing license because she abused the employer's narcotic policy, which resulted in the claimant's discharge for a cause.

Although the employer was required to show that there were actual jobs available to the claimant it was not required to actually offer the claimant a job that the claimant would not have been able to accept.

- Where an employer waits until after a work injury to terminate an employee for misconduct that the employer was aware of prior to the work injury, the employer is not excused from showing job availability before benefits can be modified.

However, where the employer immediately terminated the claimant for pre-accident misconduct after the employer learned of the misconduct the claimant's wage loss was unrelated to her work injury, the employer was relieved of the requirement to show availability of a light duty job even though the misconduct occurred prior to the work injury.

In this case, the employer only learned of the claimant's misconduct, which involved violation of its narcotic's policy, after the work injury and the employer then acted strictly and openly to address it. Therefore, the WCJ did not commit an error upon considering the claimant's pre-injury misconduct upon finding that the claimant was discharged from employment for reasons unrelated to her work injury.

- Although the employer was required to identify actual available positions within claimant's medical restrictions, employer was not required to offer those available nursing positions to the claimant based because the claimant was terminated for violating employer's narcotic medication policy, which resulted in the suspension of her nursing license.

The only issue upon deciding whether the claimant's benefits should be suspended is whether loss of earnings was no longer the result of the work injury and not whether the claimant was discharged for misconduct that took place prior to her work-related injury.

Here, the claimant's loss of earnings were the direct result of her termination and her loss of her nursing license for professional misconduct and not her work injury. As such, the employer was not required to refer the claimant to one of the identified nursing positions with an employer. Such a futile act would promote form over substance. Because these identified available positions would have been referred to Claimant had she not lost her job and nursing license for professional misconduct, Employer is not required to establish earning power outside of employment with Employer via expert opinion evidence under Section 306(b)(2) of the Act.

- Issues that are not raised before the WCJ are considered waived and the WCAB is precluded from reviewing the issue.

*Harvey v. WCAB (Monongahela Valley Hospital) No. 333 C.D. 2009 (decision by Judge Cohn Jubelirer, October 21, 2009). 11/09*

### **VOCATIONAL/STATUTORY CONSTRUCTION**

- The Pennsylvania Supreme Court reverses a Commonwealth Court and holds that, pursuant to the mandatory language of Section 306(b)(2), upon performing an earning power assessment for an out of state resident the earning power assessment is to be performed based upon jobs available in the area where the injury occurred. An earning power assessment performed based upon jobs available where the out of state resident resides will be insufficient to support a petition based upon an earning power assessment.
- The General Assembly defines the method for evaluating earning power in unequivocal mandatory language that identifies the area where the injury occurred as a relevant location for non-residents. For this reason, when developing an earning capacity assessment for non-resident claimants, an employer must focus its job availability analysis on the area where the injury occurred. The employer

has no discretion to enlarge its search and focus on multiple or other areas that it decides could yield a “true” assessment of an injured employee’s earning power, even if these additional areas overlap with the area where the injury occurred.

Therefore, the employer’s earning power assessment was not sufficient to support its Petition for Modification where the claimant suffered his injury in Pittsburgh but the earning power assessment was based upon jobs available in Wheeling, West Virginia, which is where the claimant resided at the time the earning power assessment was performed.

- Upon amending Section 306(b) (2) through the passage of Act 57 in 1996, the legislature replaced the Supreme Court’s approach in Kachinski by eliminating the requirement that an injured employee be offered an actual job. The legislature amended the Workers’ Compensation Act and added the definition of “earning power” at issue here as well as a new standard for proving earning power. The current Section 306(b) does not require that the employer provide the injured employee with a job or specify attributes, such as geographical location, for that job as this Court had previously done in Kachinski.

Rather, the sole purpose of current Section 306(b) is to describe the payment schedule for partial disability and provide a formula for calculating an injured employee’s benefits. The statute defines how earning power is calculated for different categories of claimants, including out-of-state residents.

- When words of a statute are clear and free from all ambiguity, the letter of it shall not be disregarded under the pretext of pursuing its spirit. In this context, the legislature upon amending Section 306 (b)(2) used the term “shall” when stating that if the employee does not live in this Commonwealth, the usual employment area where the injury occurred “shall” apply. In its common usage as well as legal parlance, the phrase “shall” is mandatory. The statute clearly and patently states that, for an out of state resident, the “usual employment area” for purposes of establishing an earning power assessment is defined as the area “where the injury occurred”.

*Riddle vs. WCAB (Allegheny City Electric, Inc), No. 54 WAP 2008 (decision by Justice Greenspan, October 22, 2009). 11/09*

### **EVIDENCE/COURSE AND SCOPE**

- The rules of evidence are relaxed in workers’ compensation proceedings, and hearsay evidence may be admissible and support findings of fact under certain circumstances. However, it is axiomatic that:

1. Hearsay evidence properly objected to is not competent evidence to support a finding;
2. Hearsay evidence admitted without objection may support a finding of fact if corroborated by competent evidence in the record, but a finding of fact based solely on hearsay cannot stand.

The WCJ did not commit an error of law by relying upon the testimony of the employer's witness, the Assistant Police Chief, who testified based upon his 43 years of experience and the claimant's own in court testimony rather than based upon an investigative report, that the claimant was not in the course and scope of his employment when he was shot after exiting a bar because the claimant was acting in his capacity as a civilian and not as a police officer at the time of the shooting.

*Graves v. WCAB (Philadelphia Housing Authority), No. 142 CD2009 (decision by Judge Leavitt, October 23, 2009). 11/09*