

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
MAY 2011 AT A GLANCE
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SUPERSEDEAS

- The Pennsylvania Supreme Court grants The Supersedeas Funds Petition for Allowance of Appeal, which was filed following Commonwealth Courts holding that 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 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 paid to the claimant.

The court frames the two issues pending before it as follows:

(1) Whether the payments made by Excelsior Insurance to Claimant, for which Excelsior Insurance sought reimbursement from the Supersedeas Fund, constituted payments of compensation within the meaning of Section 443 of the Workers' Compensation Act, and were, therefore, subject to reimbursement by the Supersedeas Fund, or whether such payments constituted the payment of costs associated with obtaining the settlement of Claimant's third-party tort action under Section 319 of the Act.

(2) Whether equity requires that the Supersedeas Fund reimburse the insurer's pro rata share of attorney fees and costs incurred by a claimant in recovering from a third-party tortfeasor?

Department of Labor and Industry, Bureau of Workers' Compensation v. WCAB (Excelsior Insurance) No. 100 MAL 2010 (May 10, 2011, Per Curiam) 6/11

PSYCHIATRIC CLAIM

- The Pennsylvania Supreme Court grants the Claimant's Petition for Allowance of Appeal which was filed following the Commonwealth Court's holding that the claimant, who was a state trooper, did not suffer a compensable psychiatric injury, diagnosed as posttraumatic stress disorder, where he struck and killed a woman who, dressed entirely in black, stepped in front of his car while he was traveling on Interstate 81 resulting in the death to the woman and where, following the

accident the police officer attempted to resuscitate the woman through mouth-to-mouth resuscitation notwithstanding the fact that woman was bleeding profusely from the mouth.

The Commonwealth Court had reasoned that the claimant had failed to show that his psychiatric injury resulted from an extraordinary event or an abnormal working condition.

The court frames the issue pending before it as follows:

Whether the Commonwealth Court erred as a matter of law in concluding that the Claimant was not exposed to abnormal working conditions when the WCJ found that he was exposed to an unusual event which made his job more stressful than it had been.

Payes v. WCAB, (Cmwlth. of PA/State Police) No. 804 MAL 2010 (May 17, 2011, Per Curiam) 6/11

RETIREMENT/SOCIAL SECURITY

- Upon analyzing an allegation of voluntary retirement case, the claimant's failure to seek employment is relevant only after the employer initially proves that the claimant has voluntarily retired from the workforce. An employer cannot rely upon claimant's failure to seek work to prove a voluntary retirement from the workforce because the claimant has no duty to seek work until the employer meets its burden to show a voluntary retirement. Until the employer proves a voluntary retirement, the employer had a duty to make job referrals to the claimant.

An employer may meet its initial burden of proving a voluntary retirement by showing: (1) there is no dispute that the claimant is retired; (2) the claimant has accepted a retirement pension; or (3) the claimant has accepted a pension and refused suitable employment.

In this matter the WCJ committed an error by suspending the claimant's compensation based upon finding the claimant had retired where the claimant disputed that she was retired, the claimant had not accepted a retirement pension and the claimant had not refused suitable work.

- The receipt of Social Security Disability Benefits, by itself, does not prove the claimant voluntarily removed herself from the workforce. Social security Disability Benefits are given to those who are unable to engage in any substantial gainful activity because of a medically determinable impairment which lasts for twelve months and is so severe that the individual is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national

economy. Thus, the receipt of social security disability benefits is actually not evidence that a person voluntarily withdrew from the workforce, but, rather, is evidence that the person's work injury took them out of the labor market.

Keene v. WCAB (Ogden Corp.), No. 1421 C.D. 2010 (Decision by Judge Friedman, May 19, 2011). 6/11

MEDICAL TESTIMONY/CLAIM PETITION/NOTICE OF COMPENSATION DENIAL

- Although a WCJ, as fact finder, has exclusive power over questions of credibility and evidentiary weight, the Judge's credibility determinations cannot serve to preclude the Court from determining whether an expert's testimony was equivocal. Questions relating to equivocality of an expert's testimony are questions of law fully subject to the Court's review.

Whether or not medical evidence is equivocal involves a determination of its competency, not its credibility. Even if the entire testimony of the claimant's medical expert has been accepted as credible by the WCJ, it would not be sufficient to support an award reinstating benefits if it was equivocal. Medical testimony is equivocal if it is less than positive or merely based on possibilities. Upon determining whether medical testimony is equivocal, the Court must review the medical testimony as a whole. Medical testimony will be deemed incompetent if it was equivocal.

The WCJ committed an error of law by granting the claimant's Claim Petition for a closed period and suspending the claimant's compensation as of the date the employer offered the claimant his pre-injury job, where the employer's medical expert's testimony, though found credible, was equivocal.

Employer's medical expert's testimony was equivocal on the issue of recovery where he opined: 1) the claimant should undergo an exercise-oriented physical therapy program; 2) the claimant should be able to return full duty upon completion of four weeks of physical therapy, which he viewed as a prophylactic and preventive measure and; 3) claimant was able to work in a light to moderate setting that should be changed in approximately four weeks to full-time duty without restrictions.

- The employer did not commit a violation of the act where it issued a Notice of Compensation Denial following its issuance of the temporary Notice of Compensation Payable premised upon the employer's belief that it had offered the claimant a job within his restrictions within the 90-day period following the issuance of the Notice of Temporary Compensation Payable.
- Generally, an employer must issue an NCP or NCD within twenty-one days of notice of a work injury. Where an employer is uncertain whether a claim is

compensable or is uncertain of the extent of its liability under the Act, the employer may comply with the Act by initiating compensation payments without prejudice and without admitting liability by issuing a NTCP, as Employer did in this case. Although an employer may controvert the claim at any time after issuing the NTCP, the employee is entitled to a maximum of ninety days of temporary compensation at the rate fixed in the notice until such time as the employer issues timely notices stopping and denying compensation as set forth in section 406.1(d)(5) and (6) of the Act.

An employer may properly file an NCD when it disputes a claimant's disability, even though it does not dispute that a work-related injury has occurred. In fact, the NCD form provides an employer with the option of acknowledging the occurrence of a work-related injury but declining to pay compensation benefits on the basis that the claimant is not disabled as a result of the work injury. Even when an employer issues the Notice of Compensation Denial, which acknowledges an injury but disputes disability, the claimant who has filed the Claim Petition maintains the burden to prove he is entitled to benefits.

- In an original Claim Petition the claimant bears the burden of proving all of the elements necessary to support an award of benefits. The claimant must establish that he sustained an injury during the course of his employment in that he is disabled as a result of that injury.

For purposes of workers' compensation benefits, the term disability is synonymous with loss of earning power. The claimant's burden to prove disability never shifts to the employer, this burden remains with the claimant throughout pendency of the Claim Petition. Even when an employer issues a Notice of Compensation Denial which acknowledges an injury but disputes disability, the claimant maintains the burden to prove he is entitled to benefits. Moreover, if the WCJ determines that the evidence supports a finding of disability only for a closed period, the WCJ is free to make such a finding.

Potere v. WCAB (KEMCORP) No. 1349 C.D. 2010 (decision by Judge McCullough, May 20, 2011). 6/11

AVERAGE WEEKLY WAGE

- The WCJ did not commit an error of law by calculating the claimant's pre-injury average weekly wage premised upon Section 309(d) by averaging the highest three 13 calendar weeks in the 52 weeks immediately preceding the claimant's injury notwithstanding the fact that during the last 13 week period the claimant changed his job from Warehouse Laborer to Commissioned Certified Driver, which resulted in an increase in the claimant's income.

The Judge did not err by not applying the concepts of Hannaberry HVAC v. WCAB (Snyder Jr.), 575 Pa. 66, 834 A.2d. 524 (2003) because the WCJ did not find sufficient evidence of record from which to conclude, within a degree of certainty, that the claimant's forth period earnings as the Commissioned Certified Driver were indicative of what he would have earned had he not been injured.

The Court has held that subsections (d) and (d.1) of Section 309 applies to claimants with long-term employment relationships because it looks back to the previous 52 weeks of employment. By contrast, Section 309(d.2), which would require the claimant's average weekly wage be calculated by multiplying his hourly rate weekly by the number of hours he is expected to work per week, applies to recently hired employees because it looks forward. This means the Section 309(d.2) applies only to prospective of calculations.

The plain language of Section 309(d) also compelled the Court to apply this section to the facts of this case. The averaging required by the Section 309(d) was enacted when Act 57 became law. These amendments in Act 57 rewrote subsections (d) and (e) and inserted subsection (d.1) and (d.2) and, thereby, eliminated a former statutory option that permitted employees to elect the highest income 13 week period on the basis of average weekly wage calculations. The fact that a former provision of the Act that permitted an employee to select the highest income period as a basis for the average weekly wage calculation was specifically removed by Act 57 amendments supports the Court's determination that Section 309(d) was applicable.

- The WCJ, upon calculating the claimant's pre-injury average weekly wage, did not commit an error of law by subtracting the claimant's tax return deductions and business related depreciation and \$596.00 for home office use, as reflected by his tax returns, from his gross reported income.
- Subtraction of depreciation from commission earnings to arrive at net earnings is proper.
- Before calculating the AWW under the Act, the WCJ must first determine "total wages" for any relevant quarter. However, the Act does not contain a definition for the term "wages," but that term is "generally recognized as compensation given to a hired person for his or her services, based on time worked or output of production."

In this matter, for the quarter at issue, Claimant was paid commissions on a percentage basis for each job, as opposed to set wages, and consequently was required to pay his expenses from those commissions. Therefore, Claimant must first establish his net business income from his commissions in order for the WCJ to arrive at "total wages" for purposes of the AWW calculation.

A claimant's business income is limited to his net profits as shown on his tax return. Since depreciation may be a proper business expense with subtraction to arrive at net business income for purposes of total wages, the WCJ did not commit an error.

Pike v. WCAB (Veseley Brothers Moving), No. C.D. 2010 (Decision by Judge Cohn Jubelirer, May 23, 2011). 6/11