

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
SEPTEMBER 2011 AT A GLANCE
BY MITCHELL I GOLDING, ESQ.
KENNEDY, CAMPBELL, LIPSKI & DOCHNEY
(W) 215-430-6362**

COURSE AND SCOPE/FATAL CLAIM

- In a fatal claim petition, the surviving family member bears the burden of proving all of the elements necessary to support an award under the Act.
- To be entitled to benefits, Section 301(c)(1) of the Act, requires that the surviving family member demonstrate that the decedent's injury arose in the course of employment and was causally related thereto.
- There are two situations in which an injury may be sustained in the course of employment:

The first is where the employee is injured, on or off the employer's premises, while furthering the employer's business.

The second is where the employee, although not actually working, is on the premises under the employer's control; is required by the nature of his employment to be there; and sustains injuries as a result of the condition of the premises or operation of the business.

- The WCJ did not commit an error of law, upon finding that the decedent who was at home at the time of his fatal head injury did not die in the course and scope of employment under the first criteria, where the record was unclear as to how Decedent was injured, where Decedent was injured, and at what specific time Decedent was injured. Perhaps more importantly, even if the cause, location, and time of Decedent's injury were established, there was nothing in the record demonstrating what Decedent was doing when he was injured.

This is despite the fact evidence established that that the Employer approved Decedent's home-office as a secondary work premises, and that Decedent was working from his home-office on the date of his death. Claimant's testimony that Decedent slipped and hit his head while outside smoking a cigarette—*i.e.*, attending to his personal comfort—or retrieving business mail was speculative at best.

*Werner Deceased v. WCAB (Greenleaf Service Corporation), No. 25 C.D. 2011
(Decision by Judge Brobson, September 1, 2011) 10/11*

SUCCESSOR-IN-INTEREST/ HEARING LOSS/MEDICAL BILLS

- Whether an employer is a successor-in-interest to the entity that employer the claimant whose assets were acquired depends on the totality of the circumstances on how the plant or corporation is acquired; if the circumstances establish that the new owner is a successor-in-interest, it is not a new employer.
- With respect to successor liability in this Pennsylvania, it is well-established that when one company sells or transfers all of its assets to another company, the purchasing or receiving company is not responsible for the debts and liabilities of the selling company simply because it acquired the seller's property.

This general rule of non-liability can be overcome, however, if it is established that (1) the purchaser expressly or implicitly agreed to assume liability, (2) the transaction amounted to a consolidation or merger, (3) the purchasing corporation was merely a continuation of the selling corporation, (4) the transaction was fraudulently entered into to escape liability, or (5) the transaction was without adequate consideration and no provisions were made for creditors of the selling corporation

Therefore, the claimant's present employer was not the successor-in-interest to claimant's prior employer where the Asset Purchase Agreement provided that it was strictly a sale of assets between the two entities and was not intended to be a sale of any liabilities.

Because there was no merger or consolidation, the transaction expressly excluded workers compensation claims and there was no allegation that the transaction was fraud to escape liability to pay compensation or defraud creditors, and there was no indication that the sale was not for fair value, the WCAB properly determined that claimant's present employer was not a successor-in-interest and not responsible for 100% of Claimant's binaural hearing loss but only was responsible for the hearing loss attributable to the claimant's employment with the new employer.

- Since the claimant's employer was not a successor-in-interest responsible for 100% of claimant's binaural hearing loss it was not responsible for payment of 100% of claimant's medical expenses because the concept of joint and several liability for medical expenses involving hearing loss cases are not embodied in the Act. Once it is determined that an employer is liable for an injury under the Act, the employer is required to pay a claimant's reasonable and necessary medical expenses that are causally related to the injury.

Section 306(c) (8) (IV) of the Act states:

An employer shall be liable only for the hearing impairment caused by such employer. If previous occupational hearing impairment or hearing impairment from non occupational causes is established at or prior to the time of employment, the employer shall not be liable for the hearing

impairment so established whether or not compensation has previously been paid or awarded.

This means that in a hearing loss case, when there is more than one employer responsible for a claimant's hearing loss, each employer shall be liable only for the hearing impairment caused by each employer.

Therefore, since claimant's employer was only responsible for the hearing loss incurred while Claimant was in its employ, the WCAB did not err in modifying the WCJ's order and determining that it was only responsible for 26.61% of Claimant's related medical expenses representing that portion of Claimant's hearing loss for which it was responsible.

McClure v. WCAB (Cerro Fabricated Products and PMA Group) No. 388 C.D. 2011 (Decision by Judge Pellegrini, 2011) 10/11

TERMINATION/LITIGATION COSTS

- An employer seeking to terminate a claimant's benefits must prove that a claimant's disability has ceased, or that any existing injury is not the result of the work-related injury. An employer may satisfy this burden by presenting unequivocal and competent medical evidence of the claimant's full recovery from the work-related injury.
- Within the context of an employer's termination petition, the employer may not relitigate the nature of any accepted work-related injury that has previously been established. As such, a medical opinion that does not recognize the work-relatedness of an injury previously determined to be work-related is insufficient to support a termination of benefits.

A medical expert need not necessarily believe that a particular work injury actually occurred to be considered competent. The expert's opinion will be competent if he assumes the presence of a previously accepted work-related injury and finds it to be resolved by the time of his examination.

Therefore, employer's medical expert's testimony was competent to support a Petition for Termination where he voiced skepticism that the claimant suffered work-related bilateral thoracic outlet, which was recognized as compensable by prior WCJ who denied a prior Petition for Termination, but for the purposes of his opinion of recovery, accepted this diagnosis.

- Section 440(a) of the Act authorizes an award to a claimant for a reasonable sum for certain litigation costs. In order for litigation costs to be considered

reasonable, and thus reimbursable under Section 440(a), they must “relate to the matter at issue” on which Claimant prevailed.”

The WCJ did not commit an error where he denied counsels request for reimbursement of litigation costs for a successfully litigated Petition seeking reimbursement of travel expenses where the claimant’s testimony the sole basis for the WCJ’s award of travel reimbursement costs whereas the claimant’s medical experts testimony, which generated the litigation cost, was rejected as not credible by the WCJ and was not related to the matter at issue on which Claimant prevailed.

O’Neill v. WCAB (News Corp. Ltd.) No. 2203 C.D. 2010 (Decision by Judge Kelley, June 15, 2011) 10/11

PSYCHIATRIC CLAIM

- When the claimant alleges a psychic injury, “he must prove that he was exposed to abnormal working conditions and that his psychological problems are not a subjective reaction to normal working conditions.” Psychic injury cases are highly fact-sensitive and the working conditions must be considered in the context of the specific employment.

While there is no bright-line test or a generalized standard, we consider whether the working conditions were foreseeable or could have been anticipated.

If the employer provided training to its employees on how to handle a specific working condition, that working condition could have been anticipated.

Therefore, where the clamant worked in a state liquor store in a high crime neighborhood the claimant was not subject to abnormal working conditions where employer provided Claimant with training on workplace violence – some of which was specifically geared toward robberies and thefts – as well as “pamphlets and educational tools on the handling of a robbery.” Given these facts, the Claimant could have anticipated being robbed at gunpoint.

- When determining whether a working condition is abnormal, the court considers the frequency of its occurrence in the specific industry.

In this matter Employer presented uncontested evidence that there had been 99 robberies of its southeastern Pennsylvania retail stores since 2002, which equates to 15 robberies per year or more than one per month. Given the frequency Employer’s stores had been robbed and the proximity of the recent incidents, robberies of liquor stores is a normal condition of retail liquor store employment in today’s society.

COURSE AND SCOPE/ WCJ/CLAIM PETITION

- In a Claim Petition proceeding, the claimant bears the burden of proving all elements necessary to support an award. An injury is compensable under Section 301(c) (1) of the Act only if the injury arises in the course of employment and is causally related to thereto.

An injury may be sustained “in the course of employment” under Section 301(c) (1) of the Act where the employee is injured on or off the employer’s premises while actually engaged in furtherance of the employer’s business or affairs.

The operative phrase “actually engaged in the furtherance of the business or affairs of the employer,” which is usually expressed as “in the course of employment,” must be given a liberal construction. An activity that does not further the affairs of the employer will take the employee out of the course and scope of employment and serve as a basis for denial of the claim by the WCJ. Determining whether an employee is acting in the course of employment at the time of an injury is a question of law, which must be based on the findings of fact made by the WCJ.

To determine whether Claimant was actually engaged in the furtherance of Employer’s business or affairs the court must consider the nature of the employment and Claimant’s conduct.

Based upon the WCJ’s credibility determination that claimant was not hired as a Security Guard but was solely hired to be an “Event Ambassador”, whose job was to sit and remain in the Lexus tent and watch the car, the clamant was not in “furtherance of the business or affairs of the employer” at the time of his injury where the claimant left his work station and wandered around the premises and was found by the WCJ to have “abandoned his position.”

- The WCJ is the ultimate fact finder in workers’ compensation cases, and we are bound by the WCJ’s findings of fact if they are supported by substantial evidence. It does not matter that there is evidence of record which could support a finding contrary to that made by the WCJ, the only inquiry is whether there is evidence of record which supports the WCJ’s finding. The WCJ, however, cannot capriciously disregard competent, relevant evidence, and “capricious disregard is found when the fact-finder ignores relevant, competent evidence.”

Credibility determinations are within the exclusive province of the WCJ and the courts only inquiry is whether there is evidence of record which supports the WCJ’s finding. It does not matter that there is evidence of record which could support a finding contrary to that made by the WCJ.

IMPAIRMENT RATING EVALUATION (IRE)

- The sole purpose of an IRE is to assess the claimant's degree of impairment. Whether the claimant is recovered or disabled is not relevant.

An IRE that assigns a zero impairment rating to a work injury does not render the IRE invalid. This is because the AMA Guides require objective evidence before a condition can be rated.

Therefore, WCJ committed an error of law upon denying employer's Petition for Modification based upon an IRE of under 50% where the Bureau appointed IRE examiner acknowledged the claimant's compensable RSD and Brachial Plexus injury but rated them as having zero impairment because he did not find objective evidence of those conditions, or that they impaired Claimant, on the day of the IRE.

Most significantly, the IRE physician did not opine that Claimant had not sustained RSD and Brachial Plexus injury and he did not opine that Claimant was completely recovered from these conditions. He simply explained that he did not find objective evidence of those conditions, or that they impaired Claimant, on the day of the IRE.

- Given that an IRE one takes place on one specific day does not render the IRE findings invalid because the claimant's manifests increased symptomatology following the performance of the IRE. This is because both the Act and the AMA Guides anticipate and, indeed, require an impairment rating to be based on the claimant's condition on a particular day, *i.e.*, the "date of the IRE physician's evaluation." The IRE produces a snapshot of the claimant's condition at the time of the IRE, not a survey of the claimant's work-related injuries over a period of time.

Fact that claimant's medical expert testified to findings of RSD five months after the IRE did not render the IRE invalid because this evidence would be relevant if Claimant's full recovery had been at issue. However, it does not undermine the validity of the IRE where the issue is degree of impairment, not ability to work.

Moreover, the Bureau designated IRE physician could not rely on another physician's notes to do his IRE, and he certainly could not rely on notes made five months after he did the IRE and issued his impairment rating.

- The employer who requests an IRE beyond 60 days following 104 weeks of total disability must file a petition to have the claimant's status changed from total to partial. Both the employer and claimant may introduce evidence relevant to a claimant's impairment, without elaborating on the type of evidence needed to rebut an IRE done by a Department-appointed physician.

The impairment rating system was developed by the AMA to quantify the monetary loss caused by a personal injury in an objective way. The AMA Guides have been used by states and the federal government for many years to determine eligibility to a variety of workers' compensation and related benefits. In Pennsylvania, initial eligibility for total disability benefits under the Act is based upon the opinion of a medical expert, not upon the AMA Guides.

However, the Act uses the impairment rating system to limit the duration of benefits. A claimant who has reached maximum medical improvement and has an impairment rating below 50 percent will have his status changed from total to partial disability. Section 306(a.2) of the Act. At the end of 10 years, or 500 weeks, the claimant's benefits terminate unless the claimant persuades a fact finder that his impairment rating has risen to at least 50 percent.

Under Section 306(a.2) of the Act, an impairment rating determination is issued after an examination by a physician assigned by the Department, who has been approved by the Department as a professional trained to conduct IREs and to establish impairment ratings using the most recent edition of the AMA Guides. The official IRE is not done by a claimant's physician or by the employer's preferred IME physician. The IRE physician must do a physical examination of the claimant using the AMA Guides to assess the level of the claimant's impairment. If an employer's modification petition is granted, the claimant's benefit status is changed "as of *the date of the IRE physician's evaluation*."

- Commonwealth Court comments in footnote "some commentators counsel against using a treating physician to do the IRE. This is because the impairment rating system seeks objective and consistent results. It is difficult for the treating physician to approach the impairment rating with the desired objectivity".

Westmoreland Regional Hospital v. WCAB (Pickford) No. 1188 C.D. 2009
(Decision by Judge Leavitt, September 23, 2011) 10/11