

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:  
DECEMBER 2010 AT A GLANCE  
BY MITCHELL I GOLDING, ESQ.  
KENNEDY, CAMPBELL, LIPSKI & DOCHNEY  
(W) 215-430-6362**

**IRE/STATUTORY CONSTRUCTION/REGULATION**

- The employer's IRE, which was timely requested within 60 days of 104<sup>th</sup> week of total disability, was nevertheless invalid because the IRE physician performed the IRE based upon the Fifth edition of the AMA guidelines, which was inconsistent with Section 306(a.2) and regulations 123.105(a) because the most recent AMA guideline at the time the IRE was actually performed was the Sixth edition. In this matter, the AMA published the Sixth Edition of the AMA guides in approximately January 2008 yet the IRE was performed pursuant to the Fifth edition of the AMA Guides on April 14, 2008. .
- The use of the term "Shall" as used in Section 306(a.2)(1) of the Act is mandatory. Consistent with that provision, impairment ratings must be determined in accordance with the most recent edition of the AMA Guides.
- The IRE was also invalid, notwithstanding the Bureau's interpretation of the regulations as expressed in its notification to IRE physicians that in light of the issuance of the Sixth edition of AMA guides in approximately January of 2008, the Bureau would accept impairment rating as calculated pursuant to either the Fifth or Sixth edition of AMA guides through August 31, 2008 to afford those physicians the opportunity to take a training course under new checks and reapply for certification.

Although the Bureau's notification was not a regulation, it was the Bureau's interpretation of its own regulation and it must be disregarded if it was clearly erroneous or inconsistent with the statute under which the regulation being interpreted was promulgated.

The Bureau's interpretation of its own regulation was inconsistent with the statute and was invalid and must be disregarded because although the Bureau's decision to phase in the use of the newest addition of the AMA guidelines may be reasonable, its interpretation of Act 57 regulations as expressed in the notification was inconsistent with the plain language of Section 306(a.2)(1) of the Act under which the regulations were promulgated.

- Notwithstanding the fact, the Commonwealth Court reversed WCJ's granting of the claimant's petition seeking modification of the IRE, this matter was remanded back to the WCJ so that the IRE could be calculated under the most recent edition of the AMA guides, the Sixth edition. The Court further ruled that since the employer made its initial request for the IRE within 60 days after claimant received 104 weeks of total disability, an IRE less than 50% that was calculated under the most recent guides would entitle the employer to self-executing relief.

This is because the employer complied with the strict time requirements for requesting IRE under the Act and it should not be penalized for circumstances beyond its control i.e. the issuance of the Sixth edition of the AMA guides and necessity that the IRE physician to be certified under the most recent volume. Moreover, employer was relying on the Bureau's notification that impairment rating is calculated under the Fifth Edition of the AMA guides would be accepted to August 31, 2008.

- Regulations promulgated by an administrative agency pursuant to a statutory directive are invalid if they are contrary to the legislative intent for statutory provisions to which they relate. An administrative agency's regulation cannot conflict with a statutory intention. The statute is always controlling. Although an interpretation of a statute by an administrative agency is entitled to great weight, the interpretation may be disregarded if the interpretation is clearly erroneous or inconsistent with the statute under which the regulation is promulgated.
- 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. An administrative agency's regulations cannot conflict with the statutory intention. The statute is always controlling. Although an interpretation of a statute by an administrative agency is entitled to great weight, the interpretation may be disregarded if the interpretation is clearly erroneous or inconsistent with the statute under which the regulation is promulgated.

*Stanish v. WCAB (James J. Anderson Construction Company), No. 1870 C.D. 2009 (Decision by Judge Flaherty, December 7, 2010). 1/11*

### **PARTIAL DISABILITY/REINSTATEMENT**

- The claimant was not entitled to partial disability as a result of loss of overtime where the claimant, though not recovered, returned to work without restrictions and overtime had been eliminated for all employees for economic reasons.

In order to have his suspended benefits reinstated the claimant would have had to prove that his earning power was once again adversely affected by the injury that formed the original basis of his original claim. Since the employer proved that the claimant's loss of earnings was attributable to something other than his work

injury, such as the economic elimination of overtime, the claimant's Petition for Reinstatement was denied.

- The Pennsylvania Supreme Court recently removed the “*through no fault of his own*” construct from its analysis with respect to a claimant's entitlement to reinstatement of compensation following a suspension. See Bufford v. WCAB (N. Am. Telecom), 2 A.3d 548 (2010).

This Court decision clarified that the employer may rebut the claimant's evidence in suspension/ reinstatement cases pursuant to Section 413(a) by showing some circumstances by showing some circumstance barring receipt of benefits that is specifically described under provisions of the Act or in the Court's decisional law.

- Pennsylvania decisional case law reflects that where a claimant returns to work under a suspension, without restriction, to his or her pre-injury job and is subsequently laid off and then files a Petition for Reinstatement, the claimant has the burden to establish affirmatively that it is the work-related injury which is causing his or her present loss of earnings. That is, while the claimant still enjoys the presumption that some work-related medical injury continues, the claimant is not entitled to the presumption that his or her present disability, i.e., loss of earnings, is causally related to that work injury
- Even claimants who return to their time of injury jobs with restrictions that do not require a modification of their duties are considered “without restriction,” and must prove their work injury has caused their loss of earnings. Where a claimant's wage loss is attributable to economic factors as opposed to the work injury, the claimant is not entitled to wage loss benefits.
- Even though the claimant's treating physician found credible warned that the claimant might need for “accommodations”, claimant's representations that he sometimes relied upon his co-workers for help prior to his injury reflected these “modifications” did not constitute a modification of his job because he relied upon his co-workers prior to his injury.

*Trevdan Buildings Supply v. WCAB (Pope), No. 1522 C.D. 2010 (decision by Judge Butler, December 13, 2010). 1/11*

### **TERMINATION/SUSPENSION/NOTICE OF COMPENSATION PAYABLE**

- An employer is not precluded from obtaining to granting of a Termination, Suspension or Modification premised upon a medical exam conducted prior to the date the Notice of Compensation Payable was issued.

Neither the Act nor Regulations specifically spell out the significance of the date the Notice of Compensation Payable was issued with respect to subsequent litigation.

Accordingly, the Commonwealth Court reversed its prior decision and reversed the WCAB upon finding the WCJ did not commit an error of law by granting the employer's Petition for Termination that alleged the claimant was recovered as of October 20, 1995 notwithstanding the fact that the Notice of Compensation Payable was not issued until November 7, 1995.

- An NCP acknowledges the existence of a work injury, and the employer/carrier can limit this acknowledgement to a "medical only" NCP, meaning that the injury did not result in a loss of earning power. An NCP can acknowledge that the work injury requires both medical compensation and disability compensation.

The NCP frames the issues where an employer seeks to terminate or suspend benefits.

A termination of compensation, which ends both medical and disability benefits, will not be granted unless the claimant is recovered from each and every injury listed in the NCP.

A suspension of disability benefits is appropriate where the claimant continues to need medical treatment for the injuries listed in the NCP but is able to work.

- The Supreme Court decision of Beissel v. WCAB (John Wanamaker, Inc.), 502 Pa. 178, 465 A.2d 969 (1983) established the principle that an employer is bound by the contents of its own Notice of Compensation Payable and the employer cannot seek a termination on the basis that the injury, described in the NCP and for which the employer accepted liability, was not work related.

Beissel did not apply to this matter because the claimant was alleging a change in the claimant's condition subsequent to the date of injury but was not alleging that the claimant's injury described in the Notice of Compensation Payable was not work related.

*City of Philadelphia v. WCAB (Butler), No. 1245 C.D. 2009 (Decision by Judge Leavitt, December 16, 2010). 1/11*