THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
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UTILIZATION REVIEW

- The WCJ did not commit an error of law upon granting the employer's Petition to Review a Utilization Review Determination notwithstanding the fact that the employer's medical expert found credible by the WCJ examined the claimant after the employer filed its Petition to Review a Utilization Review Determination. This is because a WCJ's review of a UR Determination is a *de novo* proceeding in which either party is free to offer evidence beyond that considered in the UR process upon meeting their burden of proof.

  It is true that the Pennsylvania Supreme Court in United States Steel Corporation v. WCAB (Luczki), 887 A.2d 817 (Pa. Cmwlth. 2005) (en banc) held that when an employer appeals a UR determination without contrary medical evidence in its possession at the time of the filing, the employer has not presented a reasonable contest and attorney's fees will be awarded; however, this Supreme Court decision dealt only with what constituted a reasonable contest as the term is used in Section 440 of the Workers' Compensation Act, which deals with attorney's fees. It did not deal with what evidence is competent to be considered by the WCJ on the merits.

The Road Toad, Inc. v. WCAB (McLean) No. 2581 C.D. 2009 (Decision by Judge Leadbetter, August 12, 2010) 12/10

HEARING LOSS/MEDICAL TESTIMONY

- The Act does not require a claimant who has filed a petition alleging occupationally related binaural hearing loss to produce evidence that his hearing loss is greater than 10 percent at the time of retirement. Rather, it requires the claimant to show that he has permanent hearing loss greater than 10 percent; that the hearing loss is work related; and that a petition for compensation was filed within three years of retirement.

  Therefore, the WCJ do not commit an error of law upon granting the claimant's Claim Petition for binaural hearing loss where the claimant's audiogram upon

which his claim was premised was conducted one year following his retirement rather then immediately at the time of retirement.

The decision of Maguire v. W.C.A.B. (Chamberlain Manufacturing Company, Inc.) 821 A 2d 178 (Pa. Cmwlth. 2003) did not bar the Claimant's Petition because the audiogram was performed one year following retirement. Maguire involved the claimant whose pre-retirement hearing examination showed a hearing loss of 4 percent, which increased six months later to a loss of 15.65 percent. Because the medical expert in Maguire established that the hearing loss caused by noise exposure could not have increased following the claimant's retirement, the claimant had to explain how the dramatic increase in his hearing loss from his retirement to the date of the exam could be work-related.

In this matter, there was no pre-retirement audiogram upon which to make a comparison.

- Section 306(c)(8)(viii) of the Act requires the claim to be filed within three years after the date of last exposure to hazardous occupational noise in the employ of the employer against whom benefits are sought. Pursuant to Section 306(c) (8) (iv) hearing loss must be established by an audiogram, which conforms to OSHA Occupational Noise Exposure Standards. Pursuant to Section 306(c) (8) (i) hearing loss must be permanent to be compensable. Finally, pursuant to Section 306(c) (8) (iii) if the hearing "impairment as calculated under the Impairment Guides … is equal to or less than ten per centum, no benefits shall be payable." of the Act.

  Case law has established that the Claimant must present medical evidence to meet his burden of proving that his permanent hearing loss of more than 10 percent was caused by exposure to occupational noise.

- For claimant's medical evidence to be competent, it cannot be equivocal. Where medical testimony is necessary to establish a causal connection, the medical witness must testify, not that the injury or condition might have or possibly came from the assigned cause, but that in his professional opinion the results in question did come from the assigned cause. Medical evidence which is less than positive or which is based upon possibilities may not constitute legally competent evidence for the purpose of establishing the causal relationship. Upon determining whether medical testimony is equivocal, the entire testimony of the medical witness is considered.

City of Philadelphia v. WCAB (Seaman) No. 2564 C.D. 2009 (decision by Judge Leavitt, November 5, 2010). 12/10

HEARING LOSS/STATUTORY CONSTRUCTION

- A claimant who has suffered monaural hearing loss to one ear caused by acoustical trauma or head injury is entitled to the percentage of hearing loss in that one ear multiplied by 60 weeks pursuant to 306(c) (ii), but only if, pursuant to Section 306(c) (iii), there is a level of binaural hearing impairment as calculated under the Impairment Guides which is greater than 10 percent.

  Section 306(c) (iii) states:

  > *(iii) Notwithstanding the provisions of subclauses (i) and (ii) of this clause, if there is a level of binaural hearing impairment as calculated under the Impairment Guides which is equal to or less than ten per centum, no benefits shall be payable. . .*

  The words "notwithstanding the provision of sub-clauses (i) and (ii) of this clause" used in Section 306 (c)(8)(iii) reflects the intention of the General Assembly that whether a claimant is alleging a binaural hearing loss resulting from long term exposure to hazardous occupational noise, or monaural hearing loss resulting from a single incident or trauma, the claimant is barred from an award of hearing loss benefits if his binaural impairment is not greater than 10 percent

  Therefore, notwithstanding the fact the claimant had monaural hearing loss in his right ear because of his compensable motor vehicle accident in the amount of 31.88 percent, the claimant was not entitled to benefits for loss of hearing of that one ear because his binaural hearing impairment was less than 10 percent.

- The Statutory Construction Act directs that the object of interpretation and construction of all statutes is to ascertain and effectuate the intention of the General Assembly. The clearest indication of legislative intent is generally the plain language of a statute. When the words of a statute are clear and free from all ambiguity, they are presumed to be the best indication of legislative intent. It is only when the 'words of the statute are not explicit' on the point at issue that resort to statutory construction is appropriate. Courts must also read statutes, if possible, to give effect to all of their provisions. Thus, courts should not interpret the words of a statute in isolation from each other, but rather, in light of the context in which they appear.

  A fundamental presumption in ascertaining the intention of the General Assembly in the enactment of a statute is that the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.

  Section 306(c)(8)(iii) of the Act clearly states that if there is a level of binaural hearing impairment as calculated under the Guides that is equal to or less

than 10%, no benefits shall be payable, notwithstanding the provisions of subclauses (i) and (ii). What this means is that the General Assembly intended that monaural hearing loss under 306(c)(8)(ii) could only be awarded if the claimants binaural hearing loss was in excess of 10% consistent with 306(c)(8)(iii)

Duncannon Borough & Authority v. WCAB (Bruno), No. 1191 C.D. 2010 (Decision by Judge Butler, November 10, 2010). 11/10

HEARING LOSS/MEDICAL TESTIMONY

- All a claimant must do to meet his or her burden under section 306(c)(8)(i) of the Act is to *prima facie* establish that the claim was timely filed by showing he or she was exposed to occupational noise while working for the employer during the three years preceding the claim. The claimant can *prima facie* establish that the claim was timely filed by showing he or she was exposed to occupational noise while working for the employer during the three years preceding the claim.

  The claimant, who continued to be employed by the employer at the time he filed his Claim Petition, met his burden by testifying that he continued to be exposed to loud noise.

- Whether an employee has been exposed to hazardous occupational noise is not part of the claimant's burden of proof. Instead, the employer may assert as an affirmative defense that the claimant's exposure to such noise was not hazardous or long-term.

  In order to establish this affirmative defense the employer must show either 1) that the claimant was not exposed to sound levels equal to or in excess of 90 DBA during the alleged period of exposure to long-term hazardous noise; or 2) that such exposure did not exceed the permitted daily exposure for three days a week for 40 weeks in any one year for which exposure to long-term hazardous exposure is claimed.

  The WCJ did not commit an error by determining the employer did not fulfill its affirmative defense where the dosimetry noise readings were based upon the noise exposure of other employees of the employer but not the claimant and the employer's expert acknowledged that noise intensity will vary from day to day depending on the production techniques used and that, when he was not there to measure the noise, he could not say whether the noise levels exceed 90 dB.

- Whether a claimant is exposed to hazardous noise is to be measured without use of hearing protection devices.

- Where an employer could have deposed a claimant's medical expert on any inconsistencies it believed affected the competency of his opinion, an employer's failure to do so precludes it from raising the issue at a later time.

Therefore, the employer's failure to depose the claimant's medical expert concerning inconsistencies between his report and the claimant's testimony precluded the employer from raising the issue of inconsistencies because the parties litigated this matter by medical report because the claim was for less than 52 weeks of compensation.

- A medical witness' opinion must be viewed as a whole, and inaccurate information will not defeat the opinion unless the opinion is dependent upon the inaccuracy. Any inconsistencies between the doctor's testimony and Claimant's testimony regarding his work history and noise exposure are a matter of the weight to be given to the doctor's testimony, not the competency of his testimony.

Joy Mining Machinery Co. v. WCAB (Zerres), No. 485 C.D. 2010 (decision by Judge Friedman, November 19, 2010). 11/10