

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
SEPTEMBER 2010 AT A GLANCE
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COMMON LAW MARRIAGE /REASONED DECISION

- The Supreme Court decision PNC Bank Corporation v. WCAB (Stamos), 831 A.2d 1269 (Pa. Cmwlth. 2003) prospectively abolished the doctrine of Common Law Marriage.

Act 144 Amended Section 1103 of the Marriage Law to provides:

“No common-law marriage contracted after January 1, 2005, shall be valid. Nothing in this part shall be deemed or taken to render any common-law marriage otherwise lawful and contracted on or before January 1, 2005, invalid.”

This means that any common law marriage contract entered into prior to January 1, 2005 remains valid.

- A common law marriage can only be created by an exchange of words in the present tense, spoken with specific purpose of creating the legal relationship of husband and wife. Although no magic words are required, proof of the actual intention of the parties to form a marriage contract is indispensable to the existence of common law marriage. The validity of common law marriage is a mixed question of fact and law.

When one party is unable to testify regarding *verba in praesenti*, there is a rebuttable presumption in favor of common law marriage when the burdened party proves constant cohabitation and a reputation of marriage. Reliance on such a presumption based on proof of cohabitation and reputation is only proper where direct evidence of the alleged marriage agreement is unavailable.

However, cohabitation, reputation are not a marriage; they are but circumstance from which a marriage may be presumed, and such presumption may always be rebutted and will wholly disappear in the fact that proof that no marriage has occurred.

- The employer did not fulfill its burden of proving that the claimant was engaged in a common law marriage, which would have resulted in the end of her entitlement to death benefits, where both parties were present and available to testify, evidence of words *in praesenti* sufficient to establish a definite agreement to marry were required in order for Employer to satisfy its burden. Reliance on

any presumption of common law marriage based on proof of cohabitation and reputation was unavailable to Employer.

The employer also failed to fulfill its burden of proving the claimant was engaged in a common law marriage although the claimant and the man she was sleeping with each other and presented themselves on a limited occasion as being husband and wife, filed joint tax returns and did represent to claimant's male friend's employer that they were married in order to obtain health benefits.

The employer did not fulfill its burden of proving that the claimant was involved in a common law marriage because it did not prove that both parties showed present intent to engage in a marriage. Evidence of cohabitation and reputation is not enough to show actual intent to enter into a common law marriage.

In order to prove a common law marriage both alleged participants in a common law marriage must offer evidence of words in the present tense spoken with specific purpose of creating the legal relationship of husband and wife. Since the employer did not prove this could not succeed as a matter of law.

- Proof of common law marriage by reputation must be general and not confined to few select individuals. The mere fact that parties were known to a few people as man and wife is not sufficient evidence to establish marriage.
- Section 422(a) of the Act provides that all parties to an adjudicatory proceeding are entitled to a reasoned decision. Where the fact-finder has had the advantage of seeing the witnesses testify live and the opportunity to assess their demeanor, a mere conclusion as to which witnesses he deems credible is sufficient to render the decision adequately "reasoned. A decision is reasoned if it allows for adequate review without further elucidation.

The WCJ's decision was reasoned notwithstanding the fact he found the claimant not to be credible on the issue of common law marriage but found the claimant's male partner to be credible. This is because both alleged participants in a common law marriage were present and neither offered evidence of words in the present tense, spoken with specific purpose of creating the legal relationship of husband and wife. This means that employer cannot have succeeded as a matter of law.

PPL v. WCAB (Redo), No. 2264 C.D. 2009 (Decision by Judge Flaherty, September 10, 2010). 10/10

CREDIT/TERMINATION/NOTICE OF COMPENSABLE PAYABLE/EQUITY

- Where a WCJ makes findings upon denying Termination Petition based on non-recovery from work injuries not accepted in the Notice of Compensation Payable,

those injuries become part of the accepted injury even in the absence of a formal amendment to a Notice of Compensation Payable. Moreover, the WCJ's findings that expand the description of injury in a Notice of Compensation Payable, if unchallenged, are binding on parties in subsequent proceedings.

Although the first WCJ did not formally indicate she was amending description of the injury, by crediting the claimant's medical expert's testimony and denying the First Petition for Termination the WCJ implicitly expanded the description of injury to include an aggravation of claimant's preexisting stenosis, as well as L4-5 radiculopathy .

In order to prevail on a subsequent Termination Petition the employer must establish that the claimant recovered from the additionally recognized injuries.

Therefore, WCJ committed an error of law upon granting the employers Second Petition for Termination where upon denying the First Petition for Termination the WCJ found credible the claimant's medical expert who had diagnosed the claimant as having severe stenosis at L4-5 with L4-5 radiculopathy post fall and mild L3-4 stenosis but the second WCJ, upon granting the Second Petition for Termination, found that the claimant had recovered from a lumbar strain and sprain and L4-5 radiculopathy.

- This holding is also consistent with the Supreme Court decision of Cinram Manufacturing, Inc. v. WCAB (Hill), 601 Pa. 524, 975 A.2d 571 (Pa. 2009), where the Pa. Supreme Court held that where there is an inaccuracy in the identification of an existing injury, the applicable statutory language is found in the first paragraph of Section 413(a) of the Workers' Compensation Act which "specifies that amendments under its terms may be made 'in the course of the proceedings under *any* petition pending before the WCJ.
- The employer was entitled to an offset against the claimant's future compensation entitlement where the carrier paid the claimant partial disability notwithstanding the fact the employer continued to pay the claimant full salary. Pursuant to Section 306 (a.1) an employer or insurer is not required to pay total or partial disability benefits for any period during which the employee is employed and receiving wages equal to or greater than the employee's prior earnings.

The Courts have previously recognized that in certain circumstances an employee may recover overpayments through credits against future payments of benefits in order to prevent unjust enrichment and double recovery.

The Court's finding that the employer was entitled to an offset was supported by Judge Castille's reasoning in the decision Lucey v. WCAB (Vy-Cal Plastics), 557 Pa. 272, 732 A.2d 1201 (Pa. 1999) where the Court noted that a person who has paid another an excessive amount of money because of an erroneous belief

induced by a mistake of fact that the sum paid was necessary for the discharge of a duty, for the of a condition, or for the acceptance of an offer, is entitled to restitution of the excess.

Moreover, a breakdown in communication between Employer and its carrier does not change the fact that Claimant received both his full salary and workers' compensation benefits, which is more compensation than he was entitled to receive, and that he failed to provide notice of, and/or return, the overpayment. Claimant's receipt of both his full salary and workers' compensation benefits amounts to a double recovery, and Claimant is not entitled to a double recovery under the Act.

- The doctrine of laches is available in the administrative proceedings where no time limitation is applicable, where the complaining parties failed to exercise due diligence in instituting an action, and where there is prejudice to the other party.

Here Claimant knew or should have known that he was receiving more income after sustaining his work-related injuries than he had been paid prior to sustaining his work-related injuries because he was receiving both his salary and workers' compensation benefits.

Claimant was not prejudiced by the timing of employer's offset petition, and the doctrine of laches does not bar employee's right to an offset based on the theory of unjust enrichment.

Julio Paz Y Mino v. WCAB (Crime Prevention Association), 990 A.2d 832 (Pa. Cmwlth. 2010). 10/10

RES JUDICATA/COLLATERAL ESTOPPEL/ATTORNEY FEES/MODIFICATION PETITION

- The doctrine of *res judicata* or collateral estoppel did not bar the litigation of the employers Modification Petition based upon a labor market survey performed in 2006 because an earlier Petition for Modification based upon the performance of a labor market survey in 2001 was denied.

This is because new Petition for Modification was based upon a subsequent IME and a labor market survey performed years following the initial 2001 labor market survey.

- The principle of *res judicata* and collateral estoppel bar the re-litigation of claims and issues that have previously been decided.

Res judicata, or claim preclusion, prevents a future suit between the same parties on the same cause of action after final judgment was entered on the merits of the action.

Collateral estoppel, also known as issue preclusion, prevents re-litigation of an issue of law or fact between the same parties upon a different claim or demands.

It is often difficult to distinguish between *res judicata* and collateral estoppel. Both doctrines foreclose re-litigation of an issue of fact or law which was actually litigated and which was necessary to the original judgment. Therefore, the Court must consider whether the ultimate and controlling issues presented in a proceeding and have been decided in a prior proceeding in which the parties actually had an opportunity to appear and assert their rights.

These doctrines do not preclude the employer's filing of a Second Petition for Modification because an employer may file a Modification Petition whenever an injured employee's loss of earning power has changed. A change in loss of earning power is not limited to a change in the claimant's physical condition. A modification or suspension petition may also be based upon the discovery of a position that the claimant can perform even in the absence of a change in medical condition.

- Where a vocational interview reveals that the claimant's vocational or medical status has changed, or where the employment market has changed, the employer may file a Second Petition for Modification supported by information acquired during the new interview.

Successive vocational interviews over the course of the claimant's receipt for workers' compensation are permitted under Section 306 (b)(2) of the Act because the skills of an employee may change over time should the injured worker return to school and obtain an additional degree or skill that would make him more marketable on the workplace. Moreover, a vocational interview is the only mechanism by which an employer can determine a change to a claimant's vocational status because the claimant is not required to report any changes in his educational skills to the bureau.

- The WCJ committed an error of law upon assessing unreasonable contest fees against the employer premised upon its conclusion that the employer's contest was unreasonable based upon the weight of the evidence. A contest is reasonable when it is undertaken to resolve the genuinely disputed issue, rather than to harass the claimant.

In this matter, employer presented new employment opportunities that had become available to the claimant. An expert testified that those jobs were within claimant's vocational and physical abilities. Had employer's evidence been

credited, claimant's benefits would have been modified thus, the employer's contest was reasonable.

Linton v. WCAB (Amcast Industrial Corporation), 991 A.2d 376 (Pa. Cmwlth. 2010). 10/10

REINSTATEMENT/RETIREMENT

- It is the employer's burden to show by the totality of the circumstances, that efforts to return a claimant to the workforce would be unavailing because the claimant has chosen to retire rather than return to the workforce. Circumstances that could support a holding that a claimant has retired include: (1) where there is no dispute that the claimant retired; (2) the claimant's acceptance of a retirement pension; or (3) the claimant's acceptance of a pension and refusal of suitable work within her restrictions.

Upon fulfilling its burden of proving that the claimant voluntarily retires, the claimant bears the burden of showing either that her work-related injury has forced her out of the entire workforce or that she was looking for work after retirement.

If employer proves the claimant retired and voluntarily removed herself from the labor market need not prove the availability of suitable work.

- However, the employer is not relieved of its obligation to help a claimant reenter the workforce, by identifying the claimant's residual work abilities and finding available positions within those abilities, unless it is clear from the totality of the circumstances that such efforts would be unavailing due to claimant's retirement from the workforce.
- Upon determining whether acceptance of a pension should create a presumption that a claimant has terminated her career, it is important to look at the facts involved and the type of pension.

For example, there are both retirement pensions and disability pensions. There are also different types of disability pensions. Some disability pensions, such as one in this matter, require only a showing that the recipient cannot perform her time-of-injury job.

A claimant's receipt of a disability pension that she is entitled to solely because she is unable to perform the time-of-injury job due to a work-related injury would not, without more, indicate that the claimant had voluntarily left the entire workforce. Rather, it is merely an acknowledgement that the claimant cannot perform her time-of-injury job, which has already been determined through a granted Claim Petition or Notice of Compensation Payable.

- An employer is not required to help a claimant find available work or prove the availability of that work if the claimant has indicated, by retiring from the workforce, a desire not to work. In this matter, because the employer failed to show claimant was retired, the employer was required to show availability of suitable work within claimant's restrictions and ability to sustain its burden on the Petition for Suspension.

City of Pittsburgh v. WCAB (Robinson), No. 1770 C.D. 2009 (Decision by Judge Jubelirer, September 22, 2010). 10/10

IRE/STATUTORY CONSTRUCTION

- Pennsylvania Supreme Court holds that that an employer seeking to reduce a claimant's disability status based upon an untimely IRE, and without a change in the amount of compensation, need not present evidence of earning power or job availability. The results of the IRE, if found credible by a WCJ, may be sufficient evidence to support a change in the claimant's disability status.
- Impairment is to be distinguished from disability as used in the Act.

Impairment is statutorily defined as "an anatomic or functional abnormality or loss that results from the compensable injury and is reasonably presumed to be permanent.

Disability is "the loss of earning power attributable to the work-related injury.

Impairment, therefore, deals with the physical aspects of the claimant's injury without regard to the impact on the claimant's earning power occasioned by the injury.

Disability concerns loss of earning power without focusing on the physical limitations responsible for the loss of earning potential.

- What constitutes proof of impairment would necessarily vary greatly from evidence of disability
- Because the definition of impairment does not contemplate or encompass earning power, the evidence required to establish impairment would be different from that required by Section 306(b). The purpose of an IRE is to establish a claimant's degree of impairment, not to determine the claimant's earning power.

The means by which an employer can establish that a claimant's disability status has changed from total disability to partial disability is through an IRE, regardless of whether the IRE is requested within the 60-day window.

If the IRE is requested within the 60-day period and the claimant's impairment rating is less than 50 percent, then the change in disability status is automatic.

If, however, the employer requests the IRE outside of the 60-day window and claims that the claimant's impairment rating is less than 50 percent, the IRE merely serves as evidence that the employer may use at a hearing before a WCJ on the employer's modification petition to establish that the claimant's disability status should be changed from total to partial. In that event, the IRE becomes an item of evidence just as would the results of any medical examination the claimant submitted to at the request of his employer. It is entitled to no more or less weight than the results of any other examination. The physician who performed the IRE is subject to cross-examination, and the WCJ must make appropriate credibility findings related to the IRE and the performing physician. The claimant, obviously, may introduce his own evidence regarding his degree of impairment to rebut the IRE findings.

- Pursuant to the Statutory Construction Act, a court's proper role in interpreting and construing a statute is to determine the intent of the General Assembly. Generally, when the language of a statute is clear and free from all ambiguity, a court should not disregard the letter of the statute in order to pursue its spirit.

Diehl v. WCAB (IA Construction), No. 26 WAP 2009 (Decision by Chief Justice Castille, September 29, 2010 10/10)