

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
NOVEMBER 2008 AT A GLANCE
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OCCUPATIONAL DISEASE/FIREFIGHTER PRESUMPTION/REMAND

- The presumption set forth by Section 301(e) offers a procedural or evidentiary advantage to a claimant who proves an occupational disease and employment in an occupation where such disease is a hazard. The presumption applies once the WCJ determines that the claimant, who is employed as a firefighter, was disabled. After the claimant meets his or her burden under Section 301(e) claimant becomes entitled to a non-conclusive presumption that the occupational disease arose out of employment.

An employer may rebut the presumption through competent medical expert testimony.

- The WCJ should restrict remand proceedings to the purpose indicated by the Board's remand order.

Repash v. WCAB (City of Philadelphia), No. 114 C.D. 2008 (Decision by Judge Smith-Ribner, November 10, 2008).

CREDIT/WCJ

- The amount of workers' compensation benefits a claimant receives is within the jurisdiction of the WCJ and the WCAB. Although neither the Board nor a WCJ have subject matter jurisdiction over proceedings that relate to benefits other than workers' compensation benefits, where the WCJ is responsible for addressing an alleged entitlement under the Act, it may be permitted to rule upon questions that would ordinarily be outside his jurisdiction.

The mere existence of a Collective Bargaining Agreement does not preclude a WCJ from adjudicating a petition filed concerning the receipt of workers' compensation benefits. WCJ's are permitted to rule on issues that would ordinarily be outside of their jurisdiction when addressing an alleged entitlement to workers' compensation benefits.

Therefore, the WCJ had jurisdiction to rule upon a claimant's Review Petition that challenged a pension offset that the employer took against the claimant's workers' compensation benefits pursuant to a Collective Bargaining Agreement stated that the employer was entitled to an offset for 100 percent of whatever

workers' compensation benefits the claimant was receiving as a result of his service connected disability, which differed from the language of Section 204(a) which provides the employer directly liable for the payment of compensation and the benefits from the pension plan is entitled to the offset to the extent funded by the employer directly liable for the payment of the compensation.

- Upon applying Section 204(a) the claimant's own funds should not be used by an employer to satisfy its workers' compensation obligation.

Jones v WCAB (City of Chester), No. 621 C.D. 2008 (decision by Judge Flaherty, November 12, 2008).

COLLATERAL ESTOPPEL/RES JUDICATA

- Technical *res judicata* precluded a claimant from litigating a second petition to review the Notice of Compensation Payable that sought to add cervical injuries where the claimant had filed a prior petition to Review the Notice of Compensation Payable to add as a compensable injury a definitive description of her shoulder injury and that stipulation was adopted by the WCJ in an order that granted the claimant's First Review Petition.

This is because technical *res judicata* may be applied to bar claims that were actually litigated as well as those that should have been litigated and the record showed that the claimant should have litigated the issue relating to the causal relationship of her alleged cervical injury to her work injury when she filed her First Review Petition since the claimant testified that she experienced pain in her neck immediately following her work injury and her medical expert testified that the claimant had several complaints at the time he initially treated her.

Therefore, since claimant attempted to raise the issue related to her cervical spine by her Second Review Petition and that issue should have been litigated during the early prior petition to review, her second Review Petition was barred.

- Under the doctrine of technical res judicata, often refer to as claim preclusion, when a final judgment on the merits exists, a future suit between the parties raising the same cause of action is precluded. In order for a technical *res judicata* to apply, there must be:
 1. Identity of the things sued upon or for;
 2. Identity of the cause of action;
 3. Identity of the persons and parties to the action;
 4. Identity of the quality or capacity of the parties suing or sued.
- The doctrine of collateral estoppel, often referred to as issue preclusion, is

designed to prevent relitigation of an issue in a later action, despite the fact that the later action is based on a cause of action different from the one previously litigated. Collateral estoppel applies where:

1. The issue decided in the prior case is identical to the one presented in the later case;
2. There was a final judgment on the merits;
3. The party against who the doctrine is asserted was a party or in privity with a party in the prior case and had a full and fair opportunity to litigate the issue; and
4. The determination in the prior proceeding was essential to the judgment.

Weney v. WCAB (Mac Sprinkler Systems, Inc.), No. 678 C.D. 2008 (Decision by Judge Jubelirer, November 26, 2008).

PSYCHIATRIC CLAIM/REASONED DECISION/FINDINGS

- A claimant seeking workers' compensation benefits because of a mental stimulus resulting in a disabling psychic injury must show that she has suffered a psychic injury that the injury is more than a subjective reaction to normal working conditions. To classify working conditions as normal or abnormal, there is no bright-line or generalized standard. Rather, one must consider the specific work environment of the claimant. Consequently, compensation is denied for events that are expected in the relevant working environment, whether it is an office workers' change in job title or responsibility or a police officer's involvement in life-threatening situations. In assessing whether work conditions are abnormal, the Court recognizes that the work environment is a microcosm of society. It is not a shelter from rude behavior, obscene language, incivility, or stress

The claimant was subjected to abnormal working conditions where the WCJ found credible claimant's testimony that she was subjected to sexual harassment by her boss and religious harassment by the employer where the claimant was non-Moslem working in an environment that employed predominantly Moslems and the claimant was frequently asked to "wrap up", she was recognized as the "individual" because she was not a Moslem and a purification ceremony took place that involved the burning of incense, chanting and splashing of water by a person who was not an employee who was given an office space by the employer. This was all a departure from the normal business practice.

- Generally, in mental/mental injury cases, corroborative evidence is required to support the claimant's description of the abnormal working environment that caused the injury. If, however, actual event is described as occurring and found by the WCJ to have occurred, corroborative evidence is not required. Therefore, corroborative evidence is not necessary where events are found by the WCJ have occurred or are based on the claimant's credible testimony.

- A medical opinion is not competent if it is based on inaccurate or false information. However, the fact that a medical expert did not have all of the claimant's medical records upon formulating his opinion only go to the way of the experts' testimony, not its competency.
- A WCJ may adopt, verbatim, findings of fact submitted by a party as long as substantial evidence in the record supports the findings.
- On appeal, the prevailing party below is entitled to all inferences that can be reasonably drawn from the evidence. Moreover, it does not matter that there is other evidence of record that supports a factual finding other than that made by the WCJ. Rather, the proper inquiry is whether there is any evidence that supports the WCJ's factual findings.
- Pursuant to Section 422(A) of the Act, 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 had the opportunity to assess their demeanor, a mere conclusion as to which witnesses are deemed credible is sufficient to render the decision reasoned.

In instances where credibility assessment cannot be tied to inherently subjective circumstances, i.e. when a witness appears via deposition, some articulation of an actual objective basis for a credibility determination must be offered for the decision to be considered reasoned.

Community Empowerment Association v. WCAD (Porch) No. CD 2008 (Decision by Judge Flaherty, November 25, 2008).

CREDIT/REMAND/APPEAL

- Although a Board's remand order that is interlocutory is generally not appealable, there are two circumstances under which a Board's interlocutory order may be appealed to the Commonwealth Court pursuant to Pennsylvania Rule of Appellate Procedure Rule 311(App.):
 - (1) an order of a ... government unit remanding a matter to an administrative agency or hearing officer for execution of the adjudication of the reviewing tribunal in a manner that does not require the exercise of administrative discretion; or
 - (2) an order of a ... government unit remanding a matter to an administrative agency or hearing officer that decides an issue which would ultimately evade appellate review if an immediate appeal is not allowed.

The employer was permitted to appeal the Board's Interlocutory Order pursuant to Pennsylvania Rule of Appellate Procedure Rule 311(f)(2) where the employer

successfully argued that denial of its right to appeal the Board's remand of a WCJ's Order that denied the claimant's Petition to Review, wherein the WCJ granted the employer's offset against the claimant's workers' compensation entitlement based upon the finding that the pension fund realized a 8.5 percent rate of return from the claimant's contributions, would have resulted in denying the employer's right to appeal the WCJ's initial decision resulting any evasion of appellate review.

- An employer can use an expert actuarial opinion to establish its contribution to an employee's retirement annuity. This is because an employer may not be able to provide evidence of actual contributions by an individual member to a defined benefit pension plan. Employer's expert evidence, if accepted as credible, is legally sufficient to establish the extent to which employer funded claimant's defined benefit pension for purposes of offset.

Commonwealth of Pennsylvania/Department of Public Welfare v. WCAB (Harvey), No. 802 C.D. 2008 (decision by Judge Leavitt, November 26, 2008.)

CREDIT/RETROSPECTIVE –PROSPECTIVE APPLICATION

- A WCJ has jurisdiction to decide whether the employer properly took a credit for pension benefits received by the claimant notwithstanding the existence of a Collective Bargaining Agreement (CBA) because the mere existence of a CBA does not preclude a WCJ from adjudicating a petition filed concerning the receipt of workers' compensation benefits. This is because disputes concerning workers' compensation benefits are to be adjudicated by a WCJ and the employer's credit for pension benefits would have lessened the benefits that the claimant was receiving.
- Section 204(a), enacted by Act 57 and effective as of June 24, 1996, only applies to injuries sustained on or after June 24, 1996. This section states "the benefits from a pension plan to the extent funded by the employer directly liable for the payment of compensation which are received by an employee shall also be credited against the amount of the award."
- Prior to the enactment of Act 57, a Credit was allowed for pension benefits paid in lieu of compensation in the event the claimant sustained a work related injury prior to the effective date of Act 57. However, rather than taking the credit pursuant to a statutory mandate, the employer was required to show its entitlement to credit on a case by case basis. The factors to be considered include the employee's contribution to the pension, if any; whether the benefits can be depleted; whether pension payment amounts would vary depending on years of service; whether the pension ceased upon recovery from the disability, and the pension vesting period. payments are in relief of inability to labor.

- All employers whether self insured or privately insured, may seek an offset under Section 204(a) of the Act.

Bingnear v. WCAB (City of Chester), No. 335 C.D. 2008 (Decision by Judge Flaherty, November 19, 2008).