

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
AUGUST 2008 AT A GLANCE
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COLLATERAL ESTOPPEL/EVIDENCE/INTOXICATION DEFENSE

- The denial of employer's intoxication defense against a Claim Petition based upon the finding that the employer failed to establish the required chain of custody for claimant's urine sample, collaterally estopped the employer in the subsequent Petition for Suspension from arguing that a job would be available to the claimant but for the claimant's termination from employment because he failed a drug screening test.
- Although the evidence of a drug screening testing is relevant to determining whether a claimant's loss of earnings was no longer related to the work related disability, the employer must first establish a chain of custody for the claimant's urine/blood sample and that that the claimant did fail the test.
- To establish an affirmative defense under Section 301(a) of the Act, an employer must demonstrate a causal connection between the claimant's violation of the law and his or her injuries. Where a drug test was not taken by the laboratory that prepared the test report, the chain of custody of the test sample must be independently proven before the report may be admitted
- The doctrine of collateral estoppel only requires that a party be given a full and fair chance to litigate the issue. The fact that more conclusive evidence might be presented at a subsequent hearing is neither sufficient nor relevant ground for disallowing the application of the doctrine.
- In order to the suspend benefits where the claimant was terminated for cause the employer must establish either that work within the claimant's restrictions was available or that the claimant's disability was caused by something other than the work injury. The employer can meet this burden by demonstrating that suitable work was available and would have been available but for claimant's wrongful conduct or circumstances, which merit allocation of the consequences of discharge to the claimant, such as the claimant's lack of good faith.

Erisco Industries v. WCAB (Luvine), No. 657 C.D. 2008 (Decision by Judge Leadbetter, September 3, 2008).

ATTORNEY FEES

- The employer presented a reasonable contest in defense against the claimant's Claim Petition even though the employer's medical expert did not conduct an IME until nine months after the employer issued its Denial because at the time it issued its denial the employer did not have a medical report that definitively related the claimant's carpal tunnel syndrome to her job duties, and the claimant had been working in the Service Industry for five and a half years, four of which preceded her work injury.

The employer also presented a reasonable contest because they promptly obtained medical benefits after the claimant filed her Claim Petition and obtained an IME within two months of the filing of the Claim Petition within five weeks it filed its Answer.

- The employer bears the burden of proving a reasonable contest and a question of whether a reasonable basis exists to contest liability depends on both facts and legal issues involved. A reasonable contest is established when medical evidence is conflicting or susceptible to contrary inferences, and there is an absence of evidence that an employer's contest is frivolous or filed to harass a claimant. Because the issue of reasonable contest is a question of law, the Court must examine the entire record to determine the evidence presented to support a WCJ's conclusion.

In the absence of medical evidence, lay testimony may establish a reasonable contest. The basis for a reasonable contest can also be found based upon the employer's evidence produced through cross-examination of a witness.

Hansen v. WCAB (Stout Road Associates) No. 524 C.D. 2008 (Decision by Judge Simpson, September 26, 2008)

COURSE AND SCOPE/VIOLATION OF POSITIVE WORK ORDER/LOSS OF USE

- An employer may raise the affirmative defense to a claimant's claim for benefits that his actions violated a Positive Work Order and that therefore his injuries were sustained outside the course and scope of employment. The employer has the burden of proving that the claimant's actions were in violation of a Positive Work Order.

The employer must show that the injury was in fact caused by the violation of the work rule, the employee actually knew of the order or rule and the rule implicated an activity not connected with the employee's work activities.

- Denying benefits based on the violation of a Positive Work Order is a very rare exception to the broad general principle that all injuries sustained by an employee arising in the course of his employment and causally related thereto are compensable. The claimant must have been involved in an activity at the time of his injuries so disconnected with his regular work duties as to be a stranger or trespasser, with respect to the employer.

Put another way, the employer must show that the injury was caused by a violation of the work rule, the employee actually knew the rule, and the rule implicated an activity not connected with the employee's work duties.

- The employer did not prove that the violated rule implicated an activity not connected with the employee's work duties where the claimant suffered an amputation of a portion of his finger because the claimant lost his finger after he attempted to remove steel that had become stuck in a press.

This is because although the employer testified that maintenance was available to remove any jammed material from the machine, he did not testify that it was mandatory that maintenance be called in the event of a jam. Thus, the claimant was not involved in an activity in which he would be considered nothing more than a stranger or trespasser.

Therefore, while the claimant might have violated a work rule in trying to dislodge a piece of steel that got stuck in the machine, the evidence of record established that he was permitted unjam the machine so long as he followed proper procedure in order to maintain production. The claimant engaged in activity that was part of his work duties at the time of injury even though his specific actions were in violation of a direct order.

- When a claimant's injury results in a specific loss, specific loss benefits are the exclusive remedy. Specific loss benefits are compensation for the damage resulting from the loss of the members there named, without regard to one's ability to labor or their loss of earning power. Consequently, when Claimant tested positive for marijuana and was discharged from his employment following his work injury, this does not preclude an award of specific loss benefits. Such a fact can only be used to attempt to establish Claimant was not entitled to indemnity benefits.

Scott v. WCAB (Ames True Temper, Inc.) No. 647 C.D. 2008 (Decision by Judge Flaherty, September 29, 2008)