

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
FEBRUARY 2010 AT A GLANCE
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IRE, LITIGATION COSTS, REASONED DECISION

- The WCJ did not commit an error of law and his decision was reasoned upon finding valid an IRE of 7% notwithstanding the fact that the IRE examiner relied upon the DRE model and not the range of motion model although the AMA guides indicate that you should use both models. This is because, as required by Section 422(a), the WCJ articulated his reasons for finding credible the IRE examiner's testimony and he explained that the IRE examiner was certified by the Bureau to conduct IRE's. The WCJ further noted that the IRE examiner thoroughly explained the IRE system for evaluating claimant's shoulder, neck and back.
- Where an employer sends the claimant a notice that it intends to change the claimant's disability status as a result of an IRE, the claimant may appeal. However, the claimant must do so within 60 days of the notice. If the claimant does not challenge a notice before the change in status becomes effective, the claimant can no longer challenge the initial IRE determination. At that point, Section 306(a.2)(4) becomes applicable and the claimant must then obtain a new impairment rating of at least 50 % in order to file a petition to change his disability back to total. See Johnson v. WCAB (Sealy Components Group), 982 A.2d 1253 (Pa. Cmwlth. 2009).

Therefore, claimant was entitled to depose the IRE examiner, who performed the IRE as a result of a Bureau Assignment, because the claimant timely a filed Review Petition that challenged the change in status within 60 days the employer issued the notice of change.

- Since the IRE examiner only performed an Impairment Rating Evaluation and not an Independent Medical Examination his testimony was not relevant to the issue raised by employer's Petition for Termination but was solely relevant to the claimant's petition that challenged the employer's IRE. Accordingly, since the claimant did not prevail on his IRE Challenge Petition claimant's counsel was not entitled to reimbursement of litigation costs he incurred when he deposed the IRE examiner.

This is because the determination of impairment and the determination of disability are separate and unrelated. The purpose of the IME is to determine whether a claimant can do his pre-injury job, and the purpose of the IRE is to

determine the extent of permanent impairment, which impairment may, or may not, affect the claimant's ability to work. The IRE examiner's testimony necessarily pertained only to claimant's challenge of the IRE determination.

Claimant's counsel was not entitled to reimbursement of litigation costs incurred when it deposed the IRE examiner because for litigation costs to be considered reasonable, and thus reimbursable, they must relate to the matter at issue on which claimant prevailed. In this case, the claimant did not prevail on the IRE challenge.

- Supersedeas Fund Reimbursement is not available for litigation costs and because the employer paid counsel's litigation costs after the WCAB reversed the WCJ's denial of litigation costs those costs, the employer was not entitled to reimbursement of those costs back from the Fund.

Accordingly, the Commonwealth Court ordered the claimant's counsel to directly refund the payment of the litigation costs to the employer. The Commonwealth Court, while recognizing that such an order was unusual, stated it was not without precedent noting that the Commonwealth Court had affirmed in the past a WCJ's order that claimant's counsel disgorge \$35,109.27 that had been improperly awarded as counsel fees. See Lucey v. WCAB (Vy-Cal Plastics PMA Group), 557 Pa. 272, 732 A.2d 1201 (1999) (Changed to Supreme Court not Commonwealth Court).

Barrett v. WCAB (Sunoco, Inc.), No. 793 C.D. 2009 (Decision by Judge Leavitt, February 2, 2010). 3/10

RETIREMENT/CREDIT

- Where a claimant has accepted a pension, the claimant was presumed to have voluntarily left the workforce entitling the employer to a suspension of benefits unless the claimant established that: 1) he was seeking employment, or 2) the work-related injury forced him to retire.

This is because an employer is not required to offer suitable alternative employment when the claimant has voluntarily left the workforce having no intention of working.

- The WCJ did not commit an error of law by finding the claimant had not retired from the workforce where the claimant did not receive a pension but rather through collective bargaining an Enhanced Income Security Plan as compensation for being forced out of his job after the job was eliminated. In essence, the Enhanced Income Security Plan was consideration for termination of the claimant's employment. Moreover, the claimant was forced to leave the

workplace when the employer told him that his job was being eliminated and no other work was available within his medical restrictions.

Since the claimant was deemed not to have retired and the claimant's compensation status was that of suspension with restrictions attributable to his work-related injury at the time of layoff, the claimant was entitled to a presumption that his loss of earning power was causally related to the continuing work injury. That being the case, the employer was required to demonstrate suitable employment was made available to the claimant in order to establish the claimant's earning power following his layoff.

Moreover, there is no presumption that the claimant had retired from the workforce where the claimant's supervisor and not the claimant had filled out forms indicating that the claimant was retiring.

- Where the claimant was laid off by the employer effective September 15, 2006 but subsequently received monies through the Enhanced Income Security Plan in the form of a monthly gross benefit of \$1,375.00 per month for four years commencing September 15, 2006, the WCJ did not commit an error of law upon ordering that the claimant's compensation be reinstated effective September 16, 2010 and not September 16, 2006.
- Severance benefits paid by the employer directly liable for payment of compensation which is received by the employee is to be credited against the amount of the award made under Section 108 and Section 306(a) and (b) pursuant to Section 204(a) of the Act.

In this matter, if the claimant had received workers' compensation in addition to severance benefits during the same time period he would have been receiving more compensation than he was entitled under the Act. Accordingly, the WCJ did not miscalculate the claimant's benefits and no error was committed by ordering benefits reinstated effective September 16, 2010 and not September 16, 2006.

Polis v. Verizon Pennsylvania, Inc., No. 1549 C.D. 2009 (Decision by Judge Pellegrini, February 5, 2010). 3/10

VOCATIONAL

- Where the employer recognized the nature of the claimant's injury as being to the right knee and right ankle as a result of a September 15, 2003 injury, the employer's labor market survey was not flawed because the employer's vocational expert failed to consider a low back injury of June 10, 1999 and a neck injury of 2002 where the claimant never filed a Claim Petition as a result of those injuries and they were considered medical-only cases.

- There is no requirement that the WCJ determine the claimant’s earning capacity based upon a Labor market Survey by averaging the average weekly wage of each job identified by the labor market survey. The calculation of the claimant’s average weekly wage under Section 309, which is based on actual earnings, has no relation to the determination of claimant’s earning power reflected by the labor market survey.

Accordingly, the WCJ did not commit an error of law by finding the claimant had an earning capacity of \$376.60 per week, based upon the availability of a Mail Filer Job, notwithstanding the average salary of the eight positions identified by the labor market survey would have paid the claimant \$213.95 per week.

- The employer’s vocational expert was qualified to perform an earning power assessment although she possessed a bachelor’s degree but no specific certification. This is because she was supervised by an individual who had a CRC certification and had analyzed labor market since 1999.

This is consistent with Regulation Section 123.202(a)(3), which provides that a vocational counselor who has a bachelor’s degree is qualified to be a vocational expert if she was under the direct supervision of an individual who has Commission on Rehabilitation Counselor Certification and one year experience analyzing labor market conditions as required by Section 123.202(a)(1).

Marx v. WCAB (United Parcel Service) No. 1176 C.D. 2009 (decision by Judge Friedman, February 9, 2010). 3/10

COURSE AND SCOPE

- An injured employee may be eligible for benefits for injuries sustained traveling to or from work if:
 1. The employment agreement between a claimant and employer included transportation to and from work;
 2. The employee has no fixed place of work;
 3. The employee is injured while on a special assignment for the employer;
 or
 4. Special circumstances indicate that the employee was furthering the business of the employer.
 - The claimant was not entitled to benefits pursuant to the “No Fixed Place Of Work” exception set forth by exception two because, although she

worked for a temporary agency, her assignment, as a home health nurse, was for all actual and practical purposes a permanent assignment requiring her to drive to the same location everyday, which she had done for one and a half years. Therefore, the claimant who was involved in a motor vehicle accident on her way driving directly from her home to her patient's home was not in the course and scope of employment because she had a fixed place of employment.

- The permanency of a work location is the key component in both the “temporary” employee context and the “traveling” employee context.
 - The claimant’s injury also was not compensable consistent with the exception set forth by number four, which would require that special circumstance indicate that the claimant was furthering the business of the employer.

Special circumstances are required to trigger this fourth exception to the coming and going rule to support a finding that at the time of the injury the claimant was acting specifically for the benefit and convenience of the employer and not merely commuting to or from her work.

In a general sense it is always in the employer’s interest that employees come to work, particularly if some circumstance of the job, such as its duties or location, makes it unattractive. This interest, far from being a special circumstance is a universal one. The mere fact that the claimant was a home health aide, which is a laudatory profession, who risked her health by driving to her patient under inclement conditions was not enough to constitute a special circumstance that was furthering the employer’s interest pursuant to element four.

It was further significant that:

1. Employer paid the claimant only for the time that she was actually working at the patient’s home;
 2. Employer did not pay her for the time she traveled to the patient’s home; and
 3. Employer did not pay claimant for the mileage to and from the patient’s home or for other vehicle related costs such as insurance.
- It is true that the Pennsylvania Supreme Court has held that a temporary employee, who is employed by an agency, never has a fixed place of work. The

Court went on to hold that when an agency employee travels to an assigned workplace, the employee is furthering the business of the agency. Therefore, as a matter of law, such a claimant has no fixed place of work and her injury occurred while she was in furtherance of her employer's business. See Peterson v. WCAB (PRN Nursing Agency), 528 Pa. 279, 597 A.2d 1116 (1991).

Peterson did not apply to this case, because in Peterson the employer regularly assigned the claimant to different clients and the assignments were of short duration. In this matter, the claimant, though employed by a temporary agency, had worked for the same client for one and a half years and the employer had never indicated that it intended to change her assignment.

Mackey v. WCAB (Maxim Healthcare Services), No. 1903 C.D. 2009 (Decision by Judge Brobson, February 19, 2010). 3/10

NOTICE OF TEMPORARY COMPENSATION PAYABLE/PENALTY/PAYMENT

- The employer did not violate Section 406.1(d)(5)(i) of Act, which requires that it issue the Notice of Stopping Temporary Compensation or the Notice of Compensation Denial within five days of the last payment made, where it issued a Notice of Temporary Compensation Payable on June 15, 2007 and sent the claimant a check dated June 15, 2007 for the pay period of June 2, 2007 through June 15, 2007 but on June 15, 2007 it changed its mind deciding the injury was not disabling and then stopped payment on the one check sent to the claimant. Thereafter, the employer issued the Notice Stopping Temporary Compensation Payable on July 11, 2007.

This is because the payment by check constitutes a conditional payment. The condition of the payment is not accomplished until payment of the monetary funds is actually received. Once that condition is fulfilled, the payment date then relates back to the date that the person received the check.

For example, if a claimant receives a check on the first day of the month, deposits the check, and the funds are made available in his account on the fifth of the month the condition is fulfilled. Accordingly, the payment date relates back to the date the check was received. On the other hand, if the transfer of funds never occurs, then payment is never made.

Barrett v. WCAB (VisionQuest National), No. 984 C.D. (2009) (Dec. by Judge Leavitt, filed November 5, 2009, amended February 24, 2010). 3/10

UTILIZATION REVIEW

- An employer who files a Utilization Review Request to contest the reasonableness and necessity of physical therapy prescribed by a doctor and

administrated in that doctor's facility or under his supervision is not required to file a separate Utilization Review Request against every individual physical therapist who performs the physical therapy.

The employer may name the doctor prescribing the physical therapy and the facility where the claimant received that physical therapy within the Utilization Review Request in order to contest the receipt of all physical therapy received by the claimant in the doctor's office irrespective of the fact that multiple physical therapist might be providing the physical therapy.

If the employer only names the physical therapist as a provider under review, and not the doctor who prescribed the physical therapy, the Utilization Review will only apply to that specific physical therapist.

- The facts of this case are distinguished from the facts in Bucks County Community College v. WCAB (Nemes, Jr.), 918 A.2d 150 (Pa. Cmwlth. 2007) and Schenck v. WCAB (Ford Electronics), 937 A.2d 1156 (Pa. Cmwlth. 2007), where the Court held that pursuant to 34 Pa. Code Section 127.452(d) a review of one provider's treatment cannot be expanded to include a review of another provider's treatment.

This case was distinguished because both Nemes and Schenck dealt with treatment provided by physicians who have the power to act independently of each other whereas physical therapy in this case was prescribed by a physician and then carried out by physical therapists acting under the doctor's supervision. Although the claimant might see different physical therapists at each physical therapy session, it is not reasonable to require an employer to name each individual physical therapist as a "provider" when seeking review of the reasonableness and necessity of the entire course of physical therapy the claimant is receiving. Further, it would make no sense to have different Utilization Reviewers separately reviewing the same course of physical therapy, under the direction of the same physician and potentially reaching different conclusions as to its reasonableness and necessity.

MV Transportation v. WCAB (Harrington), No. 974 C.D. (2009) (Dec. by Judge Leavitt, February 25, 2010). 3/10