

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
JULY 2009 AT A GLANCE
BY MITCHELL I GOLDING, ESQ.
KENNEDY & LIPSKI
(W) 215-430-6362**

Suspension/Vocational

- An employer was entitled to suspend a claimant's compensation where the claimant subsequent to his work injury moved to Portugal and showed no intention of moving back to the US without first presenting vocational evidence and or demonstrating earning capacity and without first demonstrating that, pursuant to the first prong of Kachinski, that the claimant had a change in medical condition.

This is because it would be a futile undertaking for employer to find job suitable for the claimant since the claimant has moved himself from the United States. Prior case law has held that such a claimant has removed himself from the workplace with as much certainty as one who becomes incarcerated or one who decides to retire.

Braz v. WCAB (Nicolet, Inc.), No. 2226 C.D. 2008 (Decision by Judge McGinley, March 31, 2009). 8/09

**CREDIT/SUBROGATION/MUTUAL MISTAKE/COMPROMISE AND
RELEASE AGREEMENT**

- The claimant's private insurer protected its lien and was entitled to reimbursement of its lien where prior to entering into a Compromise and Release Agreement claimant's counsel on behalf of the private insurer identified the amount of the insurer's lien and the fact that counsel was to receive a 20 percent fee against the lien. The lien was also preserved because claimant's counsel attached to the Compromise and Release Agreement his fee agreement with the private insurer and the WCJ in an amended Order granting the Compromise and Release Agreement, which was not appealed by either party, directed that the Workers' Compensation carrier to reimburse the private insurer its lien.

Therefore, the employer violated the Act and was subject to penalties where it failed to repay the private insurer its lien notwithstanding the fact the employer had already paid the health care providers the outstanding medical bills that were subject to the lien, which resulted in a double payment by the employer.

- Pennsylvania courts have long held that underestimating damages or entering into a settlement before damages are adequately assessed is not a mutual mistake of fact. Therefore, mutual mistake did not preclude the payment of the lien where the specific amount of the lien was not set forth in the Compromise and Release Agreement.
- The Court requires that a subrogation might be raised and established before the WCJ

Lusby v. WCAB (Fischler Company and Sapparmon, Inc.), No. 804 C.D. 2008 (decision by Judge Simpson, July 9, 2009).8/09

PETITION TO REVIEW/SUBSTANTIAL EVIDENCE:

- The Pennsylvania Supreme Court rules that whether a WCJ may amend a Notice of Compensation Payable in the absence of the filing of a Petition to depends upon whether the changes sought to the Notice of Compensation Payable are sought pursuant to the first or second paragraph of Section 413(a).

- The first paragraph of Section 413(a) provides that:

A Workers' Compensation Judge... *may, at any time*, review and modify or set aside a Notice of Compensation Payable... if it be proved that such Notice of Compensation Payable... was in any material respect incorrect. (Emphasis added)

The language of this first paragraph applies to a corrective amendment and the language utilized in this paragraph shows that the legislature intended to allow corrective amendments at any time and in any procedural context. Therefore, a WCJ may make a corrective amendment to a Notice of Compensation Payable in the absence of the filing of a Petition to Review or Claim Petition by the claimant.

- ❖ This second paragraph of Section 413(a) states:

A Workers' Compensation Judge... may, at any time, modify, reinstate, suspend, or terminate a Notice of Compensation Payable, an original or supplemental agreement or an award of the department or its Workers' Compensation Judge, *upon petition filed by either party* with the department upon proof that the disability of an injured employee has increased, decreased, recurred, or has temporarily or finally ceased or that the status of any such dependent has changed.

This second paragraph of Section 413(a) relates to amendment to the Notice of Compensation Payable based upon consequential conditions and such changes are only to be made upon consideration of a specific Review Petition.

Accordingly, the legislature intended to allow corrective amendments at any time and in any procedural context; whereas, amendments based on consequential conditions are to be made only upon consideration of a specific Review Petition.

- The procedures applied by a Workers' Compensation Judge to make a corrective amendment pursuant to the first paragraph of Section 413(a) must comport with due process norms. Therefore, reasonable prior notice and a fair opportunity to respond must be provided to the employer prior to the implementation of a corrective amendment. Additionally, the burden rests with the claimant to establish the existence of an additional compensable injury giving rise to the corrective amendment, regardless of the procedural context in which the amendment is asserted.
- Although the Court does not specifically distinguish between a corrective amendment and an amendment based upon a consequential condition, it does comment that in a prior Supreme Court Determination the claimant sought to make a consequential amendment pursuant to the second paragraph of Section 413(a) therefore requiring the filing of a petition where the employer had recognized the physical injury and the claimant alleged a subsequently arising psychiatric condition. See Commercial Credit v. WCAB (Lancaster), 556 Pa. 325, 728 A.2d 902(1999).
- The Court does not offer discussion of the distinction between a corrective amendment and a consequential amendment. However it gives an example of each in footnote four and five.

In footnote four of the decision the Court states a consequential conditions are regarded as increasing disability for purposes of Section 413(a). .

In footnote five the Court states that The Legislature may have made corrective amendments more readily available to lessen the potential that claimants might suffer benefits reductions based upon inaccuracies occasioned by employers, intentionally or unintentionally, in the framing of a Notice of Compensation Payable.

- The Pennsylvania Supreme Court clarifies that to the extent its prior case, Jeanes Hospital v. WCAB (Hass), 582 Pa. 405, 872 A.2d 159 (2005) suggested, contrary to Section 413(a) that a Review Petition must be filed by the claimant as a

necessary prerequisite to corrective amendments, such proposition was nonbinding dictum.

- Substantial evidence is evidence which a reasonable mind would accept as adequate to support a conclusion. The main focus of substantial evidence review is on the evidence presented by the prevailing party. Generally, arguments centered on the weight of countervailing evidence are framed as claims of capricious disregard of evidence by the fact finder. In this vein, the Court has stressed that such evaluation is not applied in such a manner that would intrude upon the administrative agency's fact finding role. There is absolutely no doubt that in workers' compensation jurisprudence that the WCJ has the sole power to evaluate the evidence and to determine witness credibility and that the WCJ may accept or reject the testimony of any witness in whole or in part, including a medical witness.

Cinram Manufacturing, Inc. v. WCAB (Hill) No. 37 MAP 2008 (Decision by Justice Saylor, July 21, 2009) 8/09

SUBROGATION

- The calculation of the employer's obligation to reimburse the claimant its *pro rata* share of attorney fees and costs is based upon the actual attorney fees and costs incurred by the claimant and not based upon the larger fee that was originally agreed upon by the attorney's contingent fee agreement.

Therefore, the employer's obligation to pay its *pro rata* share of attorney fees and costs was premised upon the actual attorney fee obtained by claimant's third-party counsel where claimant's third-party counsel received his 40 percent contingent fee and then, upon depositing his share of the recovery in his law firm's account, refunded the claimant \$9,205.92.

This is because a statutory right of subrogation is clear and unambiguous. It is written in mandatory terms and, by its terms, admits no expressed exceptions equitable or otherwise. Employer is obligated under the Act to pay a *pro rata* share of fee paid to generate the fund subject to subrogation, not some hypothetical fee which might have been paid.

Good Tire Service v. WCAB (Wolfe), No. 729 C.D. 2008 (Decision by Judge Leadbetter, July 15, 2009) 8/09.

VOCATIONAL/SUBSTANTIAL EVIDENCE/LITIGATION COST

- Substantial evidence supported the Judge's finding that the employer timely filed the Notice of Ability to Return to Work (LIBC-757), though the form itself was

undated, where the WCJ credited the carrier's testimony that it was sent as soon as she received the results of an FCE and a report of the claimant's treating physician but before the labor market survey was performed. This is because the WCJ is the ultimate finder of fact and the findings of the WCJ may not be disturbed unless they are not supported by substantial competent evidence. As a fact finder, the WCJ is permitted to draw reasonable inferences from the evidence.

- The Act requires an employer to inform a claimant when the employer learns that the claimant can return to work. Specifically, Section 306(b) (3) directs the employer to give the claimant a written "Notice of Ability to Return to Work" in a "prompt" manner. This requirement is a threshold burden that an employer must meet in order to obtain a modification or suspension of benefits.

The Commonwealth Court has held that determining what constitutes "prompt" written notice under Section 306(b)(3) necessarily requires an examination of the facts and timeline in each case to determine if the claimant had been *prejudiced* by the timing of the notice. The claimant must be given notice before the employer attempts to modify benefits.

- When performing the labor market survey under Section 306(b) (2) of the Act, the employer must show that the jobs are in the "usual employment area" in which the claimant lives. The Court has stated that jobs are available to a claimant if they are "within the geographic area where others in the claimant's community would accept employment."

The WCJ did not commit an error of law by finding credible employer's vocational expert testimony that she searched for jobs within a 25 mile radius of claimant's home which is the "industry standard for a geographic area." The vocational expert was not required to use the magic words "that 25 miles is *Claimant's* usual geographic area or that others in his neighborhood travel 25 miles to work."

- In order to be awarded litigation costs, the claimant must prevail on an issue that was actually contested.

The claimant was not entitled to reimbursement of litigation cost where the WCJ, upon granting the employer's Petition for Modification, found all jobs located were available to him though the Board made a Technical correction of the date of modification from January 22, 2003 to May 5, 2003. This change resulted from a technical correction by the Board and not the result of a successful defense of the Modification Petition by the claimant.

Bentley v. WCAB (Pittsburgh Board of Education), No. C.D. 2008 (Decision by Judge Leavitt, January 29, 2009). 8/09

Specific Loss

- A claimant who suffered disfigurement as a result of surgery performed upon her compensable cervical injury was not entitled to the concurrent receipt of partial disability and disfigurement benefits. This is because the claimant suffered a specific loss resulting from a medical procedure performed to treat her original work-related injury and not because of a separate and distinct injury. Where the specific loss is not caused by a separate and distinct injury payments for that specific loss may not begin until disability payments are no longer due and owing.

The claimant who had disfigurement caused by surgery performed upon her compensable cervical spine injury was not entitled to the concurrent receipt of disfigurement benefits and partial disability, which the claimant received after her total disability was modified from total to partial following the performance of an IRE.

- Pursuant to Section 306(d) a claimant can prove that he or she sustained either a specific loss or disability from each separate injury; however, payment of specific loss benefits does not begin until after his receipt of total disability payments ends. An exception exists that allows for payment of specific loss benefits, such as disfigurement, if the specific loss was incurred in a separate and distinct injury from the one for which compensation is being paid or suffered injuries to separate and distinct parts of the body .
- It is well established that where medical treatment for a work injury aggravated the existing disability or causes a new additional injury, the injury is deemed to have been caused by the original work injury. Therefore, claimant's disfigurement was not a separate and distinct injury since it was caused by surgery performed upon the claimant's cervical spine.

Community Service Group v. WCAB (Peiffer), No. 90 C.D. 2009 (Decision by Judge Pellegrini, May 5, 2009). 8/09