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Pennsylvania Workers' Compensation Bulletin

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GOVERNOR SIGNS LEGISLATION AMENDING WORKERS' COMPENSATION ACT

On November 9, 2006, Governor Rendell signed bi-partisan legislation into law that makes some significant changes to the Pennsylvania Workers' Compensation Act. One of Act 147's sponsor's, State Representative Todd Eachus, D-Luzerne, released the following statement:

> "This reform will benefit both employers and employees by reducing litigation costs in workers' compensation and streamlining the process. This will free up more money for businesses to invest in expanding their operations and hiring new employees."

We can only hope that Representative Eachus and the bill's other co-sponsors will accomplish their goal.

One of the most significant changes that will have an impact upon employers is the creation of an "Uninsured Employers Guaranty Fund." This fund will cover injured workers whose employers have failed to insure or self-insure their workers' compensation liability.

Where will the money come from? Initially, $1,000,000 will be transferred from the previously established Workmen's Compensation Administration Fund. The Act sets forth the following provisions for maintaining the fund on and after June 30, 2007:

> "The department shall calculate the amount necessary to maintain the fund and shall assess insurers and self-insured employers as is necessary to provide an amount sufficient to pay outstanding and anticipated claims the following year in a timely manner and to meet the costs of the department to administer the fund….In no event shall any annual assessment exceed 0.1% of the total compensation paid by all insurers or self-insured employers during the previous year."

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Donna Kidd-Parker v. Workers' Compensation Appeal Board (Philadelphia School District), No. 2122 C.D. 2005, Filed April 25, 2006, Reported September 6, 2006.

(Subrogation - Employer's subrogation right against third party settlement is not limited to amount not recovered from Supersedeas Fund.)

Claimant sustained a work-related injury on May 6, 1996. In April of 1997, employer filed a termination petition alleging that claimant had fully recovered. Employer also requested supersedeas, which was denied. In October of 1999, the Workers' Compensation Judge granted employer's petition and terminated claimant's benefits effective April 8, 1997. Claimant appealed that decision, which was affirmed in August of 2001.

In the interim, in November of 1999, claimant settled her claim against the third party tortfeasor responsible for her injury and received $184,775.

On February 11, 2002, employer applied to the Supersedeas Fund for reimbursement of the benefits paid to claimant from April of 1997 through October of 1999, when it was determined that the benefits were not owed. The Supersedeas Fund granted the application and reimbursed employer $93,870.29. Employer did not advise the Supersedeas Fund that claimant had settled her third party claim.

On November 13, 2002, employer filed a modification petition asserting its right under §319 of the Act to subrogation against the proceeds of the third party action. Employer did note in its petition that it had received $93,870.29 from the Supersedeas Fund, but sought $93,569.15, which included $19,141.82 (the amount paid to claimant from the date of injury through the date of her recovery) plus $54,725.88 (the amount owed to the Supersedeas Fund). Claimant agreed that employer was entitled to subrogation, but disagreed as to the amount. Claimant took the position that employer was entitled to only $19,141.83. The Bureau, however, as conservator of the Fund, contacted the WCJ and asserted its right to recoup monies collected by employer from the third party recovery.

The WCJ determined that employer had a right to $73,868.54 from claimant's tort recovery, and directed employer to remit $54,725.88 to the Fund. Claimant appealed to the Workers' Compensation Appeal Board, which affirmed the WCJ's determination.

Claimant then sought review by the Commonwealth Court. The Court noted that the employer's right to subrogation under §319 is absolute. An employer or insurer must seek subrogation for the full amount of compensation it is owed from the third-party tortfeasor, not that amount less an amount recovered from the Supersedeas Fund.

The purpose of the Supersedeas Fund is to protect an employer from bearing the burden of paying benefits to which a claimant is not entitled. The Fund does not provide benefits to claimants, nor does it assume responsibility for injury caused by a third party.

The Court found the decision of the WCAB to be fully consistent with the purposes of the Act. By allowing the employer to assert its right to subrogation but then ordering employer to reimburse the Fund, the

WCAB did not create a direct subrogation right in the Supersedeas Fund. Further, the WCAB prevented claimant from retaining benefits to which she was not entitled. Accordingly, the WCAB's order was affirmed.

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Constructo Temps, Inc. and Workers' Compensation Security Fund v. Workers' Compensation Appeal Board (Tennant), No. 1562 C.D. 2005, Filed September 8, 2006.

(Penalty - Penalties may not be assessed against the Security Fund under Section 401 of the Act, nor may an employer, who is fully insured, be assessed a penalty as a result of the conduct of the Security Fund.)

Claimant sustained a work-related injury on March 6, 2000. Employer maintained workers' compensation insurance coverage through Reliance Insurance Company, which was placed into liquidation by order dated October 3, 2001. As successor in interest to Reliance, the Security Fund became responsible for administering and paying all of the Pennsylvania claims for which coverage had been provided by Reliance prior to its liquidation.

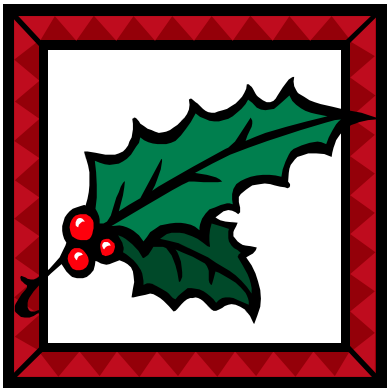
In March of 2004, claimant filed a penalty petition alleging that his work-related medical expenses had not been paid. After hearings, the Workers' Compensation Judge assessed a penalty

against "employer/insurance carrier" in an amount equal to 20% of the re-priced value of claimant's outstanding medical bills.

Employer and the Security Fund appealed to the Workers' Compensation Appeal Board, arguing that neither can be held liable for penalties. The WCAB disagreed, and affirmed the penalty award. Again, employer and the Security Fund appealed.

The Commonwealth Court noted that the Security Fund Act establishes procedures for the Insurance Commissioner to 1) review and address pending claims, and 2) make payments of claims already reduced to award. It is a statutorily created government entity that pays workers' compensation benefits. It is not, however, an "insurer" within the meaning of the Act. Under §435 of the Act, penalties may only be assessed against "employers" and "insurers." Accordingly, the Court held that the imposition of penalties against the Security Fund was in error.

The Court also concluded



that the employer could not be penalized for the Security Fund's failure to pay claimant's medical expenses in a timely fashion. The Court noted that, under §305 of the Act, once an employer insures its liability with an insurance company, the insurer assumes the employer's liability. Here, employer insured its liability through Reliance. Employer complied with the Act and, through no fault of employer, the licensed insurance company with whom it contracted went into liquidation. The imposition of penalties against employer would amount to an attempt to penalize into compliance an already compliant employer.

Accordingly, the Court concluded that, just as employer is not liable for payment of compensation, it is also not liable for payment of penalties due to the conduct of the Security Fund in handling or processing the claim. (Of course, had the record shown that the Security Fund's delay in payment was in any way attributable to the employer, a contrary decision would have resulted.)

Because the WCAB erred in awarding penalties to claimant, the order of the WCAB was reversed.

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Phyllis Agnello v. Workers' Compensation Appeal Board (Owens-Illinois), No. 629 C.D. 2006, Filed September 14, 2006.

(Disfigurement - Loss of three lower front teeth is serious and permanent

resulting in unsightly appearance and entitling claimant to an award.)

Claimant fell, sustaining injuries to her neck, jaw and teeth. A Notice of Compensation Payable was issued recognizing her injuries as a "chin contusion, cervical strain and a loosening of two of her lower front teeth." It was ultimately determined that claimant suffered a break in her lower jaw requiring removal of three teeth. Thereafter, claimant had her remaining lower teeth removed for non-work related reasons and replaced with a full lower denture.

Claimant then filed a petition seeking benefits for permanent disfigurement related to the loss of three of her lower front teeth. In support of her petition, she offered a pre-injury photograph of herself exhibiting a "large toothy grin." The Workers' Compensation Judge denied benefits stating: *"When I asked her repeatedly to show us a similar large toothy grin with and without her lower dental plate, I was unable to see her lower teeth above her lower lip and was really unable to see a difference with or without her lower teeth. Her upper teeth are artificial. Several of her lower molars were missing immediately before the subject work injury."*

The Workers' Compensation Appeal Board affirmed stating that, because claimant has a lower denture, the absence of three teeth is not noticeable."

Judge Pellegrini, writing for the majority of the Commonwealth Court, noted that dentures are not be considered when determining whether there is a disfigurement. As such, *"the WCJ clearly abused his discretion when he found that claimant did not suffer from any disfigurement. When he had claimant remove her lower denture and he saw that she had no lower front teeth, even though only three of them were from the work injury, the removal of that piece detrimentally affected her overall appearance....When reviewing disfigurement cases involving teeth, the WCJ needs to evaluate the claimant without his or her prosthesis. Only then can the WCJ get a true idea of the damage that has been done and the "unsightly appearance" that the claimant must face on a daily basis when not wearing it. Because claimant had no teeth when she removed her denture, she proved that her disfigurement was serious and permanent and resulted in an unsightly appearance, and she was entitled to an award."*

The decision of the WCAB was reversed and the case was remanded to the WCJ to make an appropriate award.

Judge McCloskey dissented, noting that the majority opinion essentially carves out a completely new category of specific loss benefits, i.e., "loss of teeth."

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Daniel McElheney v. Workers' Compensation Appeal Board (Kvaerner Philadelphia Shipyard), No. 806 C.D. 2006, Filed September 27, 2006.

(Longshore and Harbor Workers - Preemption - Where a ship is in graven dry dock, it is physically on land. Hence, both the Workers' Compensation Act and the LHWCA apply. Workers' compensation jurisdiction is not preempted.)

Claimant was employed by Kvaerner as a pipe-fitter welder at the Philadelphia Navy Yard. While working on a ship in dry dock, claimant tripped and fell, injuring his right knee, right shoulder and right foot. Claimant was paid under the Longshore and Harbor Workers' Compensation Act (LHWCA) until June 11, 2004, when those benefits ended.

Claimant then filed a claim petition seeking workers' compensation benefits. Employer denied the petition, arguing that the LHWCA was the claimant's sole source of benefits.

Before the Workers' Compensation Judge, claimant contended that his job was land-based because the ship was not on navigable waters when the injury occurred, entitling him to access to the Pennsylvania workers' compensation system. Employer argued that working on a ship in dry dock is a traditional maritime activity occurring on "navigable waters," making the LHWCA the claimant's exclusive remedy. The WCJ agreed with employer and denied benefits. The Workers' Compensation Appeal Board affirmed.

Before the Commonwealth Court, claimant argued that he is entitled to benefits under both the Workers' Compensation Act and the LHWCA where his injuries were land-based. In response, the Court reviewed the history of the LHWCA in detail, noting that the Act was amended by Congress in 1972 so as to allow a maritime worker to seek compensation for injuries as follows:

- Injuries on navigable waters to workers whose employment is not "local" in nature are covered exclusively by the LHWCA.
- "Maritime but local" injuries on navigable waters may be compensated either under the LHWCA or through the state workers' compensation system.
- Injuries to maritime workers occurring on land could be compensated either under the LHWCA or through the state workers' compensation system.

The question then before the Court was whether claimant's injuries, sustained while working on a ship in dry dock, were "land-based." The Court noted that the LHWCA recognizes three types of dry dock: 1) a floating dry dock, which floats on the water with the vessel resting on the bottom of the dry dock after the water is removed; 2) a graven dry dock, which is dug into the land, so that the vessel floats in but then rests on the land after the water is pumped out; and 3) a marine railway,, on which the vessel is drawn out of the water instead of the water being drawn away from the vessel.

The Court concluded that a ship is no more and no less on land when it rests in a graven dry dock than when it rests on a marine railway. The Court also concluded that if an injury did, in a physical sense, occur on land, then jurisdiction of the state workers' compensation system may not be precluded.

Thus, because claimant was injured in a graven dry dock while the ship was not afloat, claimant has access to both LHWCA and Pennsylvania workers' compensation benefits.

The decision of the WCJ and the WCAB was reversed.

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Sharon Tube Company v. Workers' Compensation Appeal Board (Buzard), No. 2354 C.D. 2005, Filed June 23, 2006, Reported September 28, 2006.

(Reinstatement - Where claimant returned to work briefly and no Notice of Modification was issued, then claimant left work after one week, and employer issued a Supplemental Agreement with no reservation of rights, the Supplemental Agreement reinstating total disability benefits precluded a modification of benefits based on evidence of work availability prior to date of Supplemental Agreement.)

Claimant sustained a disabling work-related injury on November 13, 1995. On July 21, 2003, he returned to work with a loss of wages, and employer modified his benefits to reflect his earned wages. No supplemental agreement was filed, nor was a Notification of Modification under §413(d) issued. One week later, claimant's physician took claimant off work. On August 11, 2003, the parties executed a Supplemental Agreement, which specifically acknowledged a recurrence of claimant's total disability effective July 28, 2003.

Employer did not reserve the right in the supplemental agreement to contest claimant's right to total disability benefits.

Thereafter, on October 8, 2003, employer filed a modification petition seeking a reduction of claimant's benefits effective July 21, 2003. Although employer's petition acknowledged that claimant had stopped working on July 28, 2003, employer alleged that claimant had an earning capacity. In response, claimant asserted that, in the supplemental agreement, employer admitted that claimant again became totally disabled effective July 28, 2003 and was, thus, estopped from seeking modification for any period other than July 21, 2003 through July 27, 2003.

The Workers' Compensation Judge disagreed with claimant and denied his motion to dismiss. In addition, the WCJ rejected claimant's evidence and accepted the testimony of employer's witnesses as more credible and persuasive. The modification petition was granted.

The Workers' Compensation Appeal Board

reversed. The WCAB concluded that the supplemental agreement was binding. As such, in order for employer to succeed on its modification petition, employer had the burden of showing that claimant had regained some or all of his earning capacity after July 28, 2003, the date employer acknowledged claimant's total disability. Because employer failed to present such evidence, the WCAB reversed the WCJ's decision.

On appeal to the Commonwealth Court, employer argued that the supplemental agreement only reflected that claimant stopped working as of July 28, 2003 and that employer no longer had a legal basis to withhold benefits. The Court disagreed.

Section 407 of the Act provided that all notices of compensation payable, agreements for compensation and supplemental agreements are valid and biding. A supplemental agreement may be modified at any time under §413(a), but may not be modified retroactively. In the absence of language in the supplemental agreement evidencing employer's intent to contest claimant's entitlement to total disability benefits as of July 28, 2003, the language acknowledging claimant's total disability in the supplemental agreement is valid and binding.

Accordingly, the decision of the WCAB was affirmed.

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Raymond Seekford v. Workers' Compensation Appeal Board (R.P.M. Erectors), No. 393 C.D. 2006, Filed October 11, 2006.

(Statute of Limitations - Where claimant fails to file a review petition within three years of payment of commutation award for the original injury, the claim is time=barred.)

Claimant, an iron worker, sustained injury on July 27, 1994 when he slipped and fell while carrying a 200-pound steel panel. A Notice of Compensation Payable was issued recognizing the injuries to claimant's "lower back and thigh."

Claimant underwent back surgery in December of 1994. Because his upper extremities were not adequately padded during surgery, claimant suffered nerve damage resulting in loss of control of his right arm.

Thereafter, claimant commuted his benefits in exchange for a lump sum of $131,250, stipulating that his injury had resolved into a permanent partial disability as of July 10, 1996. Employer remained responsible for payment of claimant's medical expenses incurred relative to the work injury. The last medical expense paid by employer, however, was for an examination by Dr. Bonfiglio on September 7, 2000.

On May 16, 2002, claimant filed a claim petition for specific loss benefits,

asserting the loss of use of his right arm as a result of complication of the December 2004 surgery. Employer admitted claimant sustained a compensable arm injury, but contended that, since his benefits were commuted in 1996, the claim was time-barred by the three-year statute of limitations in §413 of the Act.

The Workers' Compensation Judge concluded that claimant's petition was not time-barred because the date of injury for purposes of the statute of limitations was December 2, 2002, when Dr. Bonfiglio told claimant the loss of use of his right arm was permanent and job-related. The WCJ granted claimant's petition.

Employer appealed to the Workers' Compensation Appeal Board, which reversed the WCJ's decision. The WCAB reasoned that, inasmuch as claimant essentially sought to amend the NCP to include a specific loss directly resulting from the acknowledged work injury, claimant was required to file a review petition within three years under §413 of the Act. Because claimant filed the petition nearly six years after July 15, 1996, the WCAB held that claimant's attempt to amend the NCP was time-barred.

On appeal to the Commonwealth Court, claimant argued that his injuries qualifying for specific loss are separate and distinct from the original injury. The Court disagreed. Where medical treatment for a work

injury aggravates the existing disability or causes a new or additional injury, the injury is deemed to have been caused by the original work injury. Thus, the WCAB properly treated claimant's claim petition as a review petition, subject to §413(a) of the Act.

Claimant also argued that the statute of limitations under §413(a) was tolled by operation of the discovery rule. The Court rejected this argument as well, noting that claimant was aware of the problem with his right arm immediately following his surgery in December 1994. His loss did not gradually develop over time.

Because the claimant received a final compensation check on July 15, 1996, the statue of limitations expired on July 15, 1999. Claimant did not file his petition until May 16, 2002. As such, the petition was bared by the time limitations set forth in §413 of the Act.

The order of the WCAB was affirmed.

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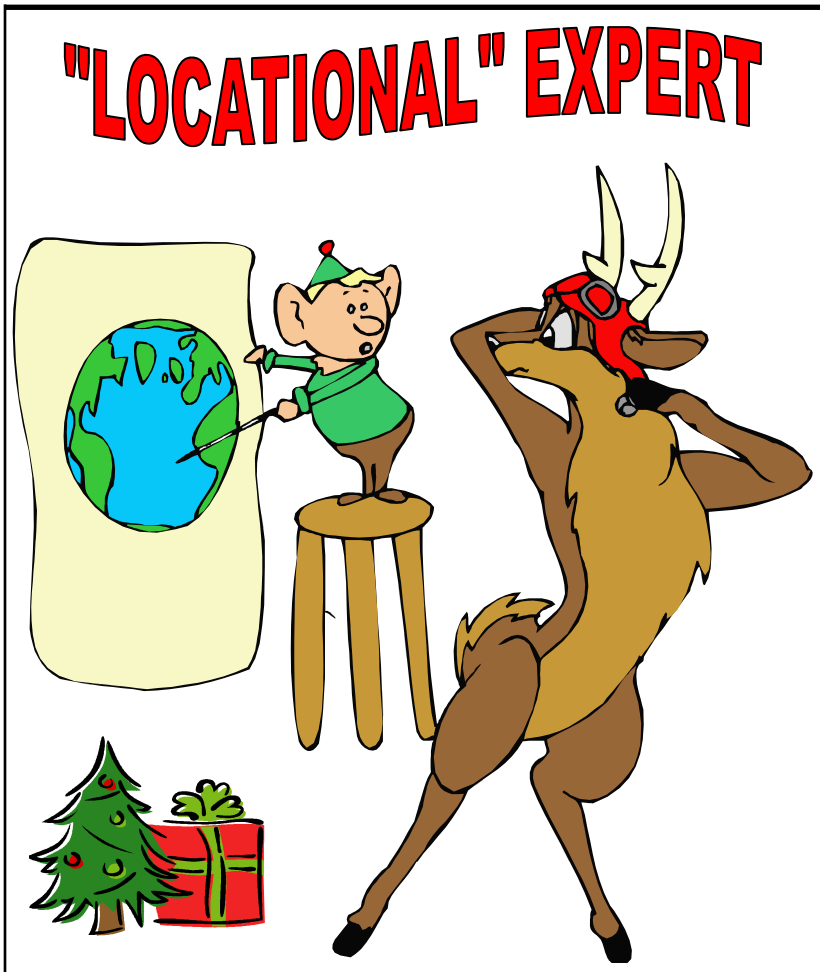
J.P. Lamb Construction, Inc. and Zurich North America v. Workers' Compensation Appeal Board (Bureau of Workers' Compensation), No. 923 C.D. 2006, Filed October 11, 2006.

(Supersedeas Fund Relief - Where parties stipulated that claimant was disabled medically, but continued to argue over whether benefits were due in light of a statute of limitations issue, and benefits were awarded and then reversed on appeal, Supersedeas Fund relief was appropriate.)

By decision of the Worker's Compensation Judge, Claimant was awarded temporary total disability benefits for six weeks commencing on August 9, 1992. His benefits were suspended September 19, 1992 and terminated November 3, 1995.

Over four years later, claimant filed a petition to reinstate his benefits, alleging his total disability recurred January 1, 1998. Employer raised the affirmative defense that claimant's petition was barred by the three year statute of limitations set forth in §413 of the Act.

The parties stipulated that claimant *was totally disabled* as a result of his work-related injury between January 1, 1998 and January 23, 2001, when he returned to work for another employer. The parties also stipulated that claimant would be entitled to temporary total disability benefits during that period of time, *except for the statute of limitations defense raised by employer.*



"OKAY, DASHER— THIS YEAR, JIMMY'S AT GRANDMA'S HOUSE. SKIP SUZIE—SHE WAS A BAD GIRL AND HAD A WORK INJURY. BILLY IS STAYING WITH AUNT BETTY. EMMA IS WITH PAP PAP….."

The parties agreed that, while there was no *medical* issue as to claimant's entitlement to benefits, a *legal* issue existed as to whether claimant's petition was timely filed.

The WCJ concluded that it was undisputed that employer reimbursed claimant the sum of $2,050.28 on December 8, 1997 for payment of medical expenses. Since claimant filed the petition to reinstate within three years of employer's last reimbursement of medical expenses, the petition was timely filed and benefits were granted.

Employer appealed and requested a supersedeas. The Workers' Compensation Appeal Board granted supersedeas, but ultimately held that the reimbursement of medical expenses tolled the statute of limitations.

Employer then filed a petition for review with the Commonwealth Court and filed a supersedeas request with the WCAB. The WCAB denied supersedeas, and employer then filed a supersedeas request with the Court, which was denied on June 2, 2004. As a result of the supersedeas denial, employer made payments to claimant and his counsel totaling $51,791.49.

On August 24, 2004, however, the Court reversed the WCAB's decision and determined that claimant's petition to reinstate was time barred because the payment of medical expenses does not constitute "compensation" so as to toll the statute of limitations.

Employer then filed an Application for Supersedeas Fund Reimbursement. The Bureau filed an answer asserting that employer was not entitled to reimbursement.

A hearing was then held. The WCJ concluded that employer failed to satisfy the requirements for reimbursement set forth in §443(a) of the Act. This was so because the WCJ's original decision was predicated upon the stipulation of the parties rather than an arm's length or adversarial type determination.

The WCAB affirmed the WCJ's decision. Employer then sought further review by the Court.

The Court noted that, in this case, the parties stipulated that there was no *medical* issue as to claimant's entitlement to compensation, but disagreed as to claimant's *legal* entitlement to such. The parties never stipulated that the benefits were *not payable*. To the contrary, they stipulated that the benefits *were* payable. Thus, there was no danger here of the employer "invading" the Supersedeas Fund by

stipulation, which is the problem prior case law sought to avoid.

Because the Court's reversal on the statute of limitation issue constituted an "adversarial determination that benefits were not, in fact, payable," employer was entitled to reimbursement from the Fund.

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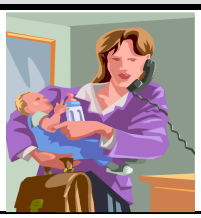
Joseph Schachter v. Workers' Compensation Appeal Board (SPS Technologies), No. 320 C.D. 2006, Filed October 12, 2006.

(Impairment Rating Evaluation - Termination - An impairment rating evaluation is not *res judicata* as to the permanency of a claimant's disability for purposes of a subsequently filed termination petition.)

Claimant sustained a compensable injury to his

EMPLOYER'S CORNER



PRE-EMPLOYMENT INQUIRIES: IS MARITAL AND MATERNAL PROFILING LEGAL UNDER THE PENNSYLVANIA HUMAN RELATIONS ACT?

At present, the general rule is that pre-employment questions about marriage and family status are legal. However, they are <u>not</u> advisable and in some situations can be illegal. Therefore, the best management practice is not to ask such questions.

The Pennsylvania Human Relations Commission provides the following guidance on these subjects:

Maiden Name: This is not relevant to a person's ability to perform a job and could be used for a discriminatory purpose. For example, a woman's maiden name might be used as an indication of her religion or national origin. This item also constitutes an inquiry into marital status, which is information that may be legitimately requested after the decision to hire is made.

If, however, a prospective employer needs to verify education and employment history, the question could be asked, "If any of your employment or education was under a different name, please indicate and provide the name."

Marital Status: It is recommended that questions regarding marital status not be asked since it is doubtful the information could be job-related and has been used discriminatorily in the past. Information regarding family needed for tax, insurance, social security, or other similar legitimate business purposes may be obtained after employment.

Dependents: The number of persons dependent upon the applicant for support is not relevant to a determination of whether or not the applicant can perform the job. This information can be requested after hire.

Childcare Arrangements: It is illegal to require pre-employment information about childcare arrangements from female applicants only. An employer may not have different hiring policies for men and women with pre-school age children. However, even if asked of both men and women, the question may still be suspect. In the past, such information has been used discriminatorily because of society's general presumption that the woman is the primary caregiver. If the employer's concern is whether or not the employee will be able to attend work regularly, the question that could be asked is, "Is there anything which would interfere with your attending work regularly?"

Pending Legislation: Legislation is pending in Pennsylvania (HB 352 and SB 440) which would amend the 50-year-old Pennsylvania Human Relations Act and make it illegal to ask "marital" or "familial" questions of job applicants.

For information about this subject and other matters pertaining to pre-employment inquiries, contact Jerry Hogenmiller, Esquire at 412-316-8689.

right knee on December 1, 2000. At employer's request, on November 24, 2003, Dr. Fried conducted an impairment rating evaluation (IRE) and determined that claimant had a "6% impairment of the total person." As a result, employer filed a Notice of Change of Workers' Compensation Disability Status to reflect a change from total disability to partial disability.

Thereafter, on February 27, 2004, employer filed a termination petition, alleging claimant had fully recovered as of January 5, 2004, the date employer's independent medical examiner evaluated claimant.

Both parties submitted medical evidence in support of their respective positions. The Workers' Compensation Judge accepted the claimant's evidence and found that the claimant had not, in fact, recovered. Employer's petition was thus denied. The WCJ also found that employer's contest was unreasonable and awarded claimant attorney's fees in the amount of $7,545.00.

Employer appealed. The Workers' Compensation Appeal Board affirmed the denial of the termination petition, but reversed the award of unreasonable contest attorney's fees. Claimant then sought review by the Commonwealth Court.

Claimant argued that the IRE established that he was 6% permanently disabled and that employer was precluded, therefore, from seeking to

terminate his benefits. He argued that the IRE was, in effect, *res judicata* as to the permanency of his condition and that employer's contest in filing the termination petition was *per se* unreasonable.

The Court rejected claimant's argument. *Res judicata* only precludes a challenge to a claimant's current disability status if the claimant's "permanent" disability is clearly irreversible. The Court noted that adopting claimant's position would mean that an impairment greater than 0% would forever foreclose an employer from modifying or terminating benefits, which would discourage employers from availing themselves of the IRE process.

The decision of the WCAB was affirmed.

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Central Dauphin School District and Old Republic Insurance Company c/o School Claims Services, LLC, v. Workers' Compensation Appeal Board (Siler), No. 612 C.D. 2006, Filed October 17, 2006.

(Independent Medical Evaluation — A WCJ may compel a claimant to give up medical records as part of an IME.)

Claimant sustained a work-related injury when she slipped and fell to the floor, hitting her knee, hip, elbow, arm and face. The Workers' Compensation Judge found that she suffered from "work-related fibromyalgia, neurological problems, musculoskeletal problems" and "altered states of consciousness." The WCJ noted that claimant's symptoms were not "purely psychological, but had psychological components."

Thereafter, employer requested claimant to attend one IME by a neurosurgeon and a second by a psychiatrist. During the course of the psychiatric evaluation, claimant stated that she had previously been treated for psychiatric problems. The psychiatrist stated that he could not then render an opinion without reviewing claimant's prior psychiatric medical records. Employer requested claimant to release these prior records, but claimant refused.

Employer then filed a petition to compel a physical examination, requesting the WCJ to direct claimant to release her psychiatric treatment records or face suspension of her benefits. The WCJ denied employer's petition, stating only that the parties are bound by the provisions of the Workers' Compensation Act.

Employer appealed to the Workers' Compensation Appeal Board, which affirmed the WCJ's decision. The

WCAB concluded that because claimant had established a work-related psychological injury in the course of her claim petition proceeding, employer should have sought the records in question during the litigation of the claim petition.

Employer then sought review by the Commonwealth Court, arguing that the WCJ erred in concluding that he lacked authority to order claimant to release her medical records as part of her independent physical examination. The Court agreed.

A claimant must cooperate in IMEs, and cooperation requires more than mere attendance at the appointed time and place. If a claimant can be compelled to undergo additional diagnostic tests as part of a physical examination conducted under §314, then a claimant can be required to release medical records and test results that preceded the §314 examination. Indeed, a medical opinion that is rendered by a medical professional who has not reviewed the claimant's medical history and records may be found incompetent.

Because prior medical records fall within the meaning of §314, a WCJ may order the release of these records when refused by a claimant. The decision of the WCAB was, thus, reversed.

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Penske Truck Leasing v. Workers' Compensation Appeal Board (Brunkel), No. 87 C.D. 2006, Filed October 19, 2006.

(Subrogation—Medical bills paid by union fund are reimbursable to the fund with interest even though the fund is not an employer or insurer.)

Claimant was employed as a truck driver when he allegedly sustained a work-related myocardial infarction as well as certain orthopedic injuries. During the litigation of the claim petition, the parties agreed to resolve the matter pursuant to a Compromise and Release Agreement.

The agreement provided that employer was responsible for claimant's reasonable, necessary and causally related medical expenses through the date of the agreement. Further, the claimant reserved the right to submit bills paid by outside sources for reimbursement by the employer.

Claimant subsequently filed a claim petition seeking payment of medical expenses paid by the Teamsters Health and Welfare Fund (hereinafter "Fund"). Employer denied the allegations of the petition.

The Workers' Compensation Judge found that the Fund is an entity separate from the unions that participate and the employers that contribute. The Fund paid claimant's medical expenses of $232,120. The Fund and claimant agreed that the Fund would be reimbursed should claimant recover through the workers' compensation system and that the fund had a right to be paid in the same way that claimant had a right to be paid. Hence, the WCJ concluded that claimant was entitled to be reimbursed for the medical expenses paid on his behalf by the Fund. The Workers' Compensation Appeal Board affirmed.

Employer sought review by the Commonwealth Court contending that the WCJ erred in entertaining the claimant's petition when the C&R barred any future claims. The Court noted, however, that the agreement specifically left open the issue of liability for medical expenses paid by third parties.

Employer next argued that the WCJ erred in entertaining the petition because claimant had no standing to seek recovery for his union. The Court disagreed. The medical bills were determined to be related to a compensable injury. Therefore, employer was responsible for them, without regard to the fact that another source initially paid the medical bills.

Employer was directed to reimburse the Fund $232,120 for medical bills paid on behalf of claimant, plus interest.

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The fact remains that insurers (who will by necessity pass the expense on to their policyholders) and self-insured employers will bear the expense of providing workers' compensation coverage for employees of those employers who break the law.

Will this new law allow employers to recoup this added expense? Perhaps.

A second important aspect of the new law is that mandatory mediation will now be required in all claims. Mediation can be a very effective tool to reduce litigation costs. In addition, workers' compensation judges will be required to set forth a mandatory trial schedule at the first hearing. The intended purpose will be to prevent delay and higher litigation costs. Compromise and Release Agreements will now be heard in an expedited manner, cutting down the period of time during which the settling claimant continues to receive benefits. Judges will now be required to issue decisions relative to Compromise and Release Agreements within five business days of the hearing, thereby allowing the carrier or self-insured employer to cease paying benefits to or on behalf of the claimant in a timely fashion.

A third significant change in the law is the structure of the Workers' Compensation Appeal Board, as well as the establishment of a code of ethics for the Board to follow. The Board has recently made great strides in issuing opinions in a timely manner. The new legislation should result in the issuance of even quicker decisions.

Will Act 147 benefit Pennsylvania businesses? Will the end justify the means? Only time will tell.

(For more information concerning the new legislation, or for a complete copy of Act 147, please send an e-mail setting forth your request to wc@trc-law.com.)

ATTENTION READERS: The editors of Thomson, Rhodes & Cowie Pennsylvania Workers' Compensation Bulletin invite you to submit questions you may have dealing with workers' compensation issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified workers' compensation attorney.

Send questions to: Harry W. Rosensteel, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center,