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Pennsylvania Workers' Compensation Bulletin

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When to Assert a Social Security Benefit Offset

Section 204(a) of the Pennsylvania Workers' Compensation Act provides that: "Fifty per centum of the benefits commonly characterized as 'old age' benefits under the Social Security Act…shall also be credited against the amount of the [workers' compensation] payments made…" This provision recently came under the Commonwealth Court's scrutiny in the case of Francis Ropoch v. Workers' Compensation Appeal Board (Commonwealth of PA/DPW), No. 1638 C.D. 2007, Filed January 18, 2008. Mr. Ropoch suffered a work-related low back injury on July 3, 1997. As a result, he received weekly compensation benefits. On May 6, 2003, the employer filed a notice of workers' compensation benefit offset as a result of the claimant's receipt of Social Security benefits beginning on April 3, 2006. On that date, claimant's Social Security disability benefits converted to Social Security old age benefits. Mr. Ropoch then filed a petition to review compensation benefits offset, alleging that the employer was inappropriately taking an offset because his benefits converted automatically and not by his choice.

Mr. Ropoch did not succeed in persuading the Workers' Compensation Judge, the Board, or the Commonwealth Court that the offset was not available to the employer. Noting the clear language of the statute, the employer was entitled to the offset.

How did the employer know when Mr. Ropoch's benefits converted from "disability" benefits to "old age" benefits? The answer is in the Social Security Act, which provides that disability ends the month preceding the month in which the individual attains "retirement age."

"Retirement age" in turn depends, in part, upon an individual's "early retirement age." If the claimant is receiving widow's or widower's benefits, his or her early retirement age is 60. If the claimant is receiving old-age benefits, a wife's or husband's benefit, his or her early retirement age is 62. Only after determining the early retirement age may the retirement age be determined and the offset may be asserted. A chart setting forth how to determine an individual's retirement age is set forth on page 11.

For example, if a claimant, like Mr. Ropoch, is receiving Social Security disability benefits, and reaches the age of 62 by the end of this year, the employer or adjuster should note that the claimant's benefits will convert to old age benefits when he turns 66. At that point, a Notice of Workers' Compensation Benefit Offset (LIBC-761) should be filed with the Bureau, served on the claimant and his or her counsel, and the offset amount should then be deducted 20 days after service of the notice.

The more difficult situation arises when the claimant is not receiving "disability benefits," but is receiving benefits as a spouse or widow or widower. These benefits do not automatically convert to old age benefits, although the claimant may elect to apply for and receive old age benefits rather than benefits based on the earnings of his or her spouse. It is not possible to accurately predict if or when that individual's benefits will be converted to old age benefits. In that case, we strongly recommend that an Employee's Report of Benefits for Offsets (LIBC-756) be sent to the claimant at or near the time he or she will attain retirement age under the Social Security scheme. While the employer is then dependent upon the honesty and accuracy of the claimant's response, it is probably the best way to find out if an offset is available. Another means of doing so would be to assume that the claimant has applied for conversion of his or her benefits when he or she attains retirement

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COMMONWEALTH COURT CASE REVIEWS

Loc, Inc. and Nationwide Insurance/Wausau Insurance Company v. Workers' Compensation Appeal Board (Graham), No. 536 C.D. 2007, Filed November 8, 2007.

(Utilization Review—A WCJ may consider a petition for review of a utilization review determination where the provider forwards only a portion of his treatment records to the URO.)

Claimant suffered a work injury in May of 1998. In June of 2005, employer filed a Utilization Review Request questioning treatment rendered to claimant by Dr. Joseph Thomas.

The Utilization Review Organization assigned the matter to Dr. Stephen Thomas. On August 21, 2005, Dr. Stephen Thomas issued a UR Determination stating that the absence in the medical records of information required for the prescription of opioid or other analgesics made the treatment under review not reasonable or necessary on and after April 14, 2005.

Claimant then filed a Petition for Review. At hearings before the Workers' Compensation Judge, claimant presented testimony from Dr. Joseph Thomas. Employer objected to that testimony given the Commonwealth Court's decision in *County of Allegheny (John J. Kane Center-Ross) and UPMC-Work Partners v. Workers' Compensation Appeal Board (Geisler),* 875 A.2d 1222 (Pa.Cmwlth. 2005). In *Geisler*, the Court held that it is inappropriate for a WCJ to consider a petition for review of a utilization review determination when the provider never provides his or her records to the URO.

The WCJ overruled employer's objection and held that *Geisler* did not apply inasmuch as the reviewer in this case did have some of the records of Dr. Joseph Thomas, including office notes and procedure notes. The WCJ concluded that the fact that the reviewer did not have all of the office notes did not make the case factually similar to *Geisler*.

The WCJ then granted claimant's petition, finding the treatment at issue to be reasonable and necessary, and ordering employer to pay for the treatment of Dr. Joseph Thomas from April 14, 2005 and ongoing. On appeal, the Workers' Compensation Appeal Board agreed with the WCJ's dismissal of employer's *Geisler* motion, and affirmed the WCJ's decision.

Employer then sought review by the Commonwealth Court. The Court noted that the report issued by Dr. Stephen Thomas, the UR reviewer, included a lengthy listing of the records he received from the provider. The Court held that, because the provider supplied records to the URO, and the reviewer's report was then issued, *Geisler* does not apply.

Thus, the WCAB affirmed the WCJ's decision.

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Karen Mosley v. Workers' Compensation Appeal Board (City of Pittsburgh), No. 1200 C.D. 2007, Filed November 30, 2007.

(Pension Benefit Offset—Claimant need not be suffering from an occupational disease in order for employer to be entitled to pension benefit offset.)

Claimant suffered a work injury on July 19, 2002, for which employer accepted liability by way of a notice of compensation payable. On August 12, 2005, employer filed a Notice of Workers' Compensation Benefit Offset, seeking an offset against claimant's workers' compensation for pension benefits that claimant was also receiving.

Section 204(a) of the Workers' Compensation Act, in pertinent part, provides:

> "The severance benefits paid by the employer directly liable for the payment of compensation and 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 employe shall also be credited against the amount of the award made under *sections 108* ***and*** *306,* except for benefits payable under section 306(c)."

Section 108 of the Act deals with occupational diseases. Section 306 of the Act deals with benefits payable for all other of injuries. Section 306(c) addresses specific loss benefits.

On September 19, 2005, claimant filed a petition arguing that employer is not entitled to a pension benefit offset because she is not suffering from occupational disease. Claimant maintained that the above stated section of the Act means that an employer is entitled to an offset against benefits payable under sections 108 *and* 306, and that, therefore, the offset is available to an employer *only* if the employee is receiving indemnity benefits for an occupational disease.

The Workers' Compensation Judge rejected claimant's argument as nonsensical and denied claimant's petition. The Workers' Compensation Appeal Board affirmed, agreeing that claimant's interpretation of the Act is absurd.

Claimant then sought review by the Commonwealth Court. The Court noted that the word "and" normally acts as a conjunctive, but also noted that statutes are to be construed so as to effectuate the intent of the legislature. The Court then examined the legislative history of §204 of the Act, as well as the case law interpreting that section. Given the 1996 amendments to the Act, an employer may now take a credit against disability payment not only for unemployment compensation but for Social Security, severance and pension benefits as well. The Courts have repeatedly read these amendments as demonstrating the legislature's

intent to enlarge the scope of an employer's right to an offset under §204(a). Claimant's interpretation of the Act would render the amendments to §204(a) a nullity.

The Court agreed with the WCJ and the WCAB that claimant was proposing an absurd construction of the statutory provision and affirmed the WCAB's decision.

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Sign Innovation v. Workers' Compensation Appeal Board (Ayers), No. 681 C.D. 2007, Filed December 4, 2007.

(Modification—An employer may seek a modification of benefits based on an IME and earning power assessment even where a subsequent IRE determines claimant to be at least 50% disabled.)

Claimant submitted to an independent medical evaluation (IME) with Dr. Adelsheimer, who opined that claimant could perform medium-duty work, with certain restrictions. Employer's vocational expert then performed an earning power assessment and labor market survey based on Dr. Adelsheimer's opinion.

In the meantime, claimant reached 104 weeks of total disability benefits. At employer's request, claimant underwent an impairment rating evaluation (IRE) with Dr. Mustovic, who determined claimant had a whole person impairment of 50%. Under the Act, a 50% impairment means that claimant is presumed to be totally disabled and his status as totally disabled may not be changed, unilaterally, by employer.

Employer then filed a modification petition based on the labor market survey. The Workers' Compensation Judge denied the petition because the IRE had determined that claimant was 50% disabled.

Employer appealed. The Workers' Compensation Appeal Board affirmed, holding that while employer could rebut the presumption of claimant's total disability with evidence of earning power, employer could not do so on the basis of evidence that pre-dated the IRE.

Before the Commonwealth Court, employer argued that the IRE determination was irrelevant to employer's ability to pursue a modification petition based upon an IME and earning power assessment. Employer argued that, while an impairment rating of 50% fixes a presumption of total disability status, it is a presumption that can be rebutted by evidence that claimant can perform some work.

The Court agreed. While an individual may be impaired physically, that impairment does not necessarily affect the individual's earning capacity. Impairment is not the same as disability, i.e., loss of earning power.

Because employer was entitled to pursue its modification petition based on earning power and simultaneously pursue an IRE remedy, the WCJ and the WCAB erred in dismissing employer's modification petition. Accordingly, the WCAB's order was vacated and the matter was remanded to the WCJ for proceedings on the merits of the modification petition based on earning power.

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Ann Schenck v. Workers' Compensation Appeal Board (Ford Electronics), No. 1011 C.D. 2007, Filed December 5, 2007.

(Utilization Review—An employer may not refuse payment of medical bills based on a prior utilization review determination that similar treatment rendered by a different provider was unreasonable and unnecessary.)

In December 1996, employer filed a utilization review (UR) request of medical treatment received from Dr. Zaslow. The utilization reviewer issued a UR determination, concluding that all treatment provided by Dr. Zaslow from September 25, 1996 and ongoing, was medically unnecessary and unreasonable.

Seven years later, in 2004, claimant returned to Dr. Zaslow's office with the intention of obtaining treatment. Dr. Zaslow was no longer at that location; however, Dr. Yarus was at Dr. Zaslow's former location. Dr. Yarus saw claimant on two occasions and prescribed pain medication. The treatment rendered by Dr. Yarus was essentially the same as that rendered by Dr. Zaslow. Employer declined payment of Dr. Yarus' bills based on the prior UR determination.

Claimant filed a penalty petition, asserting that employer failed to pay for reasonable, necessary and causally related medical expenses. Claimant asserted that she did not seek treatment from Dr. Zaslow, but from another provider who was not subject to the UR determination.

The Workers' Compensation Judge denied claimant's petition, noting that Dr. Yarus rendered the same or similar treatment as Dr. Zaslow. Claimant appealed to the Workers' Compensation Appeal Board, which affirmed.

On appeal before the Commonwealth court, claimant contended that the prior UR determination only concerned her treatment with Dr. Zaslow, not Dr. Yarus. Claimant argued that a UR determination is "provider specific" and limited to treatment by a given provider, not treatment in general.

The Court agreed, stating: "Employer cannot refuse payment for treatment rendered by Dr. Yarus based on a prior UR determination concerning the reasonableness and necessity of treatment rendered by Dr. Zaslow. Rather, if employer wishes to challenge the reasonableness and necessity of Dr. Yarus' treatment, it must file a UR request to review that treatment."

The case was remanded to the WCJ for a determination as to the amount of penalties, if any, to be assessed.

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Clear Channel Broadcasting v. Workers' Compensation Appeal board (Marie Perry, Widow of

Dwayne Perry, Decedent), No. 179 C.D. 2007, Filed December 7, 2007.

(Coming and Going Rule—Where employee is given a company car that he was expected to drive to and from various employer events, an exception to the coming and going rule exists.)

In a fatal claim petition, claimant alleged that decedent, who worked as employer's Director of Sales, died as a result of blunt trauma to his chest suffered from an automobile accident. As Director of Sales, decedent managed sales staff, went on sales calls, interacted with clients and visited employer-sponsored events at various nightclubs. Decedent had no set working hours and employer provided decedent with a BMW for use 24 hours per day.

On the night of September 27, 2002, decedent visited a nightclub where a live broadcast sponsored by employer was taking place. From the nightclub, decedent was required to travel Route 55 to go to his home. During the early morning hours of September 28, 2002, decedent's car struck another vehicle and then a concrete pillar on Route 55. He was taken to the hospital and pronounced dead shortly thereafter.

Claimant presented testimony from several of decedent's coworkers who interacted with decedent at the nightclub and thereafter. All testified that he did not appear to be impaired or intoxicated.

Employer presented testimony from its Market Manager and Regional Vice-President, who stated that decedent was instructed not to go to the nightclub event, although he also agreed that decedent's major responsibility was to maximize advertising revenues and that the event was within the scope of his job duties.

The Workers' Compensation Judge found claimant and her witnesses to be credible. The WCJ also found that decedent's attendance at the nightclub event was part of his responsibilities and that the accident occurred in the course and scope of his employment. Benefits were thus awarded.

Employer appealed and the Workers' Compensation Appeal Board affirmed.

Before the Commonwealth Court, employer argued that decedent's death does not fall within any of the four exceptions to the coming and going rule, under which an injury sustained off the employer's premises is not considered to have occurred in the course of employment: 1) the claimant's employment contract includes transportation to and from work; 2) the claimant has no fixed place of work; 3) the claimant is on a special mission for the employer; or 4) special circumstances are such that the claimant was furthering the business of the employer.

The Court disagreed. Decedent was provided a vehicle as a part of his employment package for use 24 hours per day, without any restrictions. Additionally, decedent was expected to drive the car to and from various sales related calls. As such, decedent was in the course and scope of his employment at the time of the accident when he was on his way home after completing his job duties.

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Marie Ingram, deceased employee, and Marc A. Hicks, Sr., parent and natural guardian of minor dependent, claimant, Marc A. Hicks, Jr., v. Workers' Compensation Appeal Board (Ford Electronics & Refrigeration Corporation, and Ford Electronics/Self-Insured), Nos. 491 –493 C.D. 2007, Filed December 12, 2007.

(Fatal Claim Petition—Dependent claimant in a fatal claim proceeding is barred from litigating the compensability of decedent's lifetime disability where lifetime claim was withdrawn under a compromise and release agreement.)

Decedent sustained work-related injuries in the form of bilateral carpal tunnel syndrome and left shoulder pain. Her last day of work was May 16, 1995. Four months later, decedent filed an occupational disease claim alleging that she had been exposed to hazardous fumes while employed.

In March 1998, decedent and employer entered into a compromise and release agreement that resolved liability for decedent's accepted injuries. In exchange for the lump sum payment, decedent withdrew her occupational disease claim and relieved employer of liability for the acknowledged wrist and shoulder injuries.

More than 300 weeks after her last day of work, decedent died from lung cancer. Shortly before she died, decedent adopted claimant as a grandson. After decedent passed away, claimant filed a fatal claim petition. Employer responded that the petition was barred because decedent did not establish a compensable disability within 300 weeks following her last hazardous exposure.

The Workers' Compensation Judge found that, in exchange for a lump sum settlement, decedent gave up her right to pursue a lifetime claim based on an occupational disease. Consequently, a compensable disability was not established within 300 weeks of decedent's last hazardous exposure. Thus, the WCJ dismissed the petition.

The Workers' Compensation Appeal Board affirmed, noting that decedent's release of employer from liability for an occupational disease precluded any subsequent determination that her occupational disease was compensable.

Claimant sought review by the Commonwealth Court. The Court noted that a fatal claim petition must be filed within 300 weeks after the date of last exposure if a lifetime claim has not been filed. If, however, the employee filed a lifetime claim, death benefits may be awarded beyond the 300 week period because the fatal claim is viewed as a continuation of the

original claim.

Here, however, before adopting claimant, decedent extinguished her original occupational disease claim by compromise and release. Where, as here, the C&R Agreement resolves all outstanding petitions and contains very broad release language, it will be considered final as to all outstanding issues.

Moreover, at the time of decedent's death after the expiration of the 300 week period, decedent's occupational disease claim had not been adjudicated compensable and was not pending.

The decision of the WCAB was affirmed.

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Angelo Ballerino v. Workers' Compensation Appeal Board (Darby Borough), No. 1113 C.D. 2007, Filed December 13, 2007.

(Average Weekly Wage—The Act does not permit stacking of claimant's actual earnings with the "presumed" weekly wage established by statute for volunteer firefighters when calculating the average weekly wage.)

Claimant sustained a disabling injury while working as a volunteer firefighter for employer. Employer issued a notice of temporary compensation payable entitling claimant to collect disability in the amount of $477.85 per week, using the statutory formula for volunteer firefighters injured in the line of duty.

Claimant filed a petition seeking to increase his compensation, asserting that his weekly earnings as a truck driver should have been added to his presumed statutory wage to calculate his compensation award.

The Workers' Compensation Judge denied the petition, and the Workers' Compensation Appeal Board affirmed.

The Commonwealth Court noted that §601 of the Act creates an irrebutable presumption that a volunteer firefighter injured in the line of duty is entitled to wages at least equal to the statewide average weekly wage. Claimant argued that §601 establishes the *minimum* compensation for volunteer firemen and that the WCJ and the WCAB erred by treating it as the *maximum*.

The Court rejected claimant's argument, stating that volunteer firefighting is not done under a "concurrent contract" of employment. While it is true that §309(e) of the Act states a general rule that wages from all employers should serve as the basis for calculating disability, a volunteer firefighter receives no wage for his services. The "presumed" statutory wage set forth in §601 is not a contractual wage. Consequently, §309(e) has no application to the calculation of claimant's disability award.

Here, claimant receives disability compensation in an amount higher than if he had been injured in his work as a truck driver. That is all that the Act authorizes. The Court refused to find the Act unjust.

The decision of the WCAB was affirmed.

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Visteon Systems v. Workers' Compensation Appeal Board (Steglik), No. 1179 C.D. 2007, Filed December 14, 2007.

(Termination—During course of litigation of termination petition, where claimant's expert testifies that claimant remains disabled due to new problem areas that relate back to work injury, it is employer's burden to show an independent cause for claimant's new medical conditions; claimant need not file a review petition to expand the description of injury.)

Employer employed claimant as an assembler. Her job duties required daily repetitive activities, including reaching, carrying, twisting and neck and arm posturing. After 22 years, claimant began experiencing pain in her left shoulder and upper back. Employer acknowledged that claimant suffered a work-related injury in the nature of a left shoulder sprain/strain as a result of repetitive use.

Claimant eventually returned to work, although her condition continued to deteriorate. After reporting the severe onset of pain in her right shoulder, employer's plant physician removed claimant from work.

Claimant ultimately filed a claim petition. The Workers' Compensation Judge granted claimant's petition, finding that she suffered from "chronic cervical strain and sprain, cervical spondylosis and a tendonopathy of the paraspinal tendon of the left shoulder." Neither party appealed the WCJ's decision.

Several months later, following an independent medical examination performed by Dr. Trabulsi, employer filed a petition to terminate, alleging claimant had fully recovered from her work-related injuries. Dr. Trabulsi testified that claimant had fully recovered from her recognized injuries, and further attributed her complaints to normal degenerative changes in her spine.

In response, claimant presented her own testimony as well as the testimony of her treating physician, Dr. Fried. Dr. Fried opined that the claimant suffered from "supraspinatus tendonitis and shoulder strain, a paracervical injury with involvement of her brachial plexus nerve, long thoracic nerve injury, repetitive strain injury in both right and/or left upper extremity, a posterior occipital neuralgia, radial neuropathy, and ulnar neuritis at both elbows," all of which he related back to her original work injuries.

The WCJ found Dr. Fried more credible and convincing than Dr. Trabulsi. Employer's petition was denied. The WCJ's decision was affirmed by the Workers' Compensation Appeal Board.

Employer appealed to the Commonwealth Court, arguing that the WCJ improperly placed the burden upon the employer to show full recovery from injuries not recognized as compensable. Employer further argued that the WCJ effectively expanded the

description of claimant's work injuries without requiring her to file a review petition. The Court disagreed.

The Court noted that, generally speaking, when defending against a termination petition, if the claimant alleges a new and distinct physical or psychiatric condition not contemplated by the original agreement or award, the burden rests with the claimant to establish that the new condition was work-related. Where, however, the claimant's ongoing disability is related to an injury or condition which is of a very similar nature and/or affects the same body parts which have been recognized as compensable, the burden remains with the employer to establish an independent cause for same.

Here, Dr. Fried specifically related claimant's radial neuropathy, ulnar neuritis at both elbows, thoracic nerve injury and involvement of her brachial plexus nerve back to the original work injury, stating that these new problems stem from claimant's original repetitive trauma to the nerves surrounding her neck, back and shoulder.

The WCJ did not err, and the denial of the termination petition was affirmed.

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Paul E. Stock v. Workers' Compensation Appeal Board (Food Chek Shopping Bag), No. 1296 C.D. 2007, Filed December 19, 2007.

(Statute of Limitations—Payment of specific loss benefits following a commutation of disability benefits doe not toll the running of the 3-year limitation period set forth in §413(a).)

In 1997, the Workers' Compensation Appeal Board approved the commutation of claimant's benefits and awarded claimant a lump sum payment of $100,000, which employer paid on April 4, 1997.

On July 29, 1999, claimant filed a review petition seeking specific loss benefits for scarring and disfigurement. The petition was granted, and employer paid claimant specific loss benefits for the period of march 21, 2002 through February 5, 2004.

Shortly thereafter, claimant filed petitions seeking to reinstate total disability benefits effective March 1, 1999. The Workers' Compensation Judge held that claimant's petitions were barred by the statute of limitations, noting that claimant filed his petition more than three years after his disability compensation had been finally paid in April 1997. The WCJ rejected claimant's argument that the subsequent payment of specific loss benefits tolled the limitations period set forth in §413(a) of the Act. The WCAB affirmed.

Claimant appealed to the Commonwealth Court arguing that the WCJ and WCAB erred in concluding that payment of specific loss benefits does not constitute payment of "compensation" as that term is used in §413(a) of the Act.

The Court disagreed. The purpose of the three year limitation in §413 is to encourage the prompt resolution of legal rights and to protect an employer from having to defend against stale claims.

Section 413 provides that "no notice of compensation payable, agreement or award shall be reviewed, modified, or reinstated, unless a petition is filed with the department within 3 years after the date of the most recent payment of compensation made prior to the filing of such petition." Here, the commutation order and award was the last document that addressed claimant's earning power and paid him wage loss benefits. The award of disfigurement benefits did not review or address claimant's disability status and no compensation for disability was paid in that context. In fact, claimant did not need to establish disability in order to be entitled to disfigurement benefits. Consequently, it would be illogical to hold that such payments, made irrespective of disability status, could toll the time period within which to seek a review of total disability.

The dismissal of claimant's petition was affirmed.

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Harry Riddle v. Workers' Compensation Appeal Board (Allegheny City Electric, Inc.), No. 1390 C.D. 2007, Filed January 8, 2008.

(Labor Market Survey—Where claimant resides in West Virginia and has an Ohio driver's license, employer may establish job availability in West Virginia, as well as nearby areas of Ohio and Pennsylvania, rather than the location of the injury.)

Claimant sustained a work-related injury to his shoulder in August of 2000.

In March of 2005, employer filed a modification/suspension petition alleging that work was available within claimant's residual work skills, education, experience and geographic area. In support of its petition, employer presented expert medical testimony as well as evidence regarding a labor market survey conducted by James DeMartino, a vocational specialist and certified disability manager.

The Workers' Compensation Judge found employer's medical expert and DeMartino to be credible. Claimant's benefits were modified to reflect claimant's earning power.

The Workers' Compensation Appeal Board rejected claimant's argument on appeal that employer failed to meet its burden under §306(b)(2) of the Act to prove job availability in the correct geographic area.

Claimant advanced the same argument before the Commonwealth Court. Claimant argued that because he does not reside in Pennsylvania, under §306(b)(2) of the Act, an earning power assessment was required to have been performed in the "usual employment area where the injury occurred" - i.e., Pittsburgh, Pennsylvania. None of the jobs identified by DeMartino were in the Pitts-

burgh area.

The Court noted that the 1996 amendments to the Act were designed, in part, to reduce compensation costs and to restore efficiency to the compensation system. The legislature did not intend a result which is absurd or unreasonable. Where claimant has a residence in Wheeling, and stays with his father in Ohio, where he holds a driver's license, employer should not be precluded from attempting to establish job availability in the Wheeling, West Virginia area, as well as nearby areas of Ohio and Pennsylvania, rather than the location of the injury.

The WCAB's decision was affirmed.

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M & B Inn Partners, Inc. v. Workers' Compensation Appeal Board (Petriga), No. 1201 C.D. 2007, Filed January 18, 2008.

(Personal Animus Exception—For the personal animus exception to apply, the assailant must *intend* to inflict injury on the employee for personal reasons.)

Claimant worked as an administrative assistant at the Host Inn. While working, a guest at the inn placed his hand on claimant's buttocks, lifted her shirt and touched her abdomen. He then told claimant that she was fit and that he would be in his jacuzzi all night. Claimant reported the incident to the manager, who assured claimant that the guest would be removed. However, the next morning the same guest grabbed claimant. The police were summoned and claimant filed criminal charges against the guest.

Thereafter, claimant sought treatment from a psychologist for anxiety, depression, nightmares, insomnia and fatigue. Claimant attempted to return to the Host Inn several times after the incident, but would begin to sweat, shake, and experience muscle spasms. Claimant was diagnosed with chronic post-traumatic stress disorder.

Claimant subsequently filed a claim petition. The guest appeared before the Workers' Compensation Judge and testified that, although he poked and touched the claimant, he considered his actions to be minor infractions. He testified further that he did not intend to harm claimant.

Employer filed a motion to dismiss claimant's petition under the "personal animus" exception to the Workers' Compensation Act. The WCJ found claimant and her psychologist to be credible. The WCJ further found that the guest did not *intend* to harm, or even to sexually harass, claimant. Accordingly, the WCJ concluded that the personal animus exception did not apply and that claimant had established that she sustained a work-related, disabling injury in the nature of chronic post-traumatic stress disorder.

Employer appealed to the Workers' Compensation Appeal Board, which affirmed the award of benefits.

On appeal to the Commonwealth Court, employer again argued that benefits could not be awarded where claimant's psychological injuries were the result of the guest's alleged sexual harassment of claimant for reasons personal to him. The Court disagreed.

The personal animus exception to the Act is found in §301(c)(1), which provides that a compensable injury "shall not include an injury caused by an act of a third person ***intended*** to injure the employee because of reasons personal to him." Thus, for the exception to apply, there must be some intention on the part of the assailant to inflict injury for personal reasons.

Here, the WCJ found that the guest did not intend to harm claimant by his actions. Moreover, employer failed to show any evidence of a pre-existing relationship between claimant and the guest. Because employer failed to prove that the guest intended to injure claimant for personal reasons, the personal animus exception to the Act does not apply.

The decision of the WCAB was affirmed.

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Sysco Food Services of Philadelphia v. Workers' Compensation Appeal Board (Sebastiano), No. 817 C.D. 2007, Filed January 23, 2008.

(Violation of Positive Work Order—A standing order that there shall be "no horseplay" does not necessarily make injuries sustained during horseplay non-compensable.)

While engaged in his regular work duties in employer's warehouse, claimant was grabbed from behind by a co-worker who shouted: "Let's get him." The co-worker then pulled claimant across the floor. After wrestling for a while, they both fell to the floor. Claimant suffered a fractured left ankle, as well as injuries to the lumbar spine, low back and reflex sympathetic dystrophy.

Employer defended claimant's claim petition on the basis that horseplay was prohibited by its work rules. Claimant argued that he was not a participant in the horseplay, but rather a victim of it.

The Workers' Compensation Judge noted that claimant's co-workers testified that horseplay was common at employer's warehouse and that no one intended to harm claimant. The WCJ granted claimant's petition and awarded benefits. Employer appealed to the Workers' Compensation Appeal Board, which affirmed.

On appeal to the Commonwealth Court, employer argued that the WCJ erred in granting benefits because claimant was injured while violating a positive work order prohibiting horseplay. Employer maintained that the WCJ failed to use the correct legal analysis, and asserted that the proper test is to determine 1) whether horseplay was a violation of employer's work rule, 2) whether claimant was aware of the work rule, and 3) whether the injury arose from a violation of the rule.

The Court disagreed. When a claimant is injured on the employer's premises by the act of a co-worker, there is a rebuttable presumption that the claimant is covered by the Act. Moreover, injuries that arise out of horseplay have been found to be compensable. Denying benefits based on a 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 under the Act. Indeed, the claimant must have been engaged in an activity at the time of his injury that was so disconnected with his regular work duties so as to be considered nothing more than a "stranger" or "trespasser" with respect to the employer.

Here, whether claimant was a "victim" of horseplay or a mutual participant in the rough-housing, there is no dispute that the injury occurred as a result of horseplay. The real question is whether the act of horseplay is so disconnected with claimant's regular work duties so as to render him a "stranger" or "trespasser." Under the facts of the case, the answer is: "No." Horseplay on the premises is normally considered in the course of employment despite a standing order or rule of "no horseplay."

The order of the WCAB was affirmed.

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Chris Gumm v. Workers' Compensation Appeal Board (J. Allan Steel), No. 599 C.D. 2007, Filed January 28, 2008.

(Notice of Temporary Compensation Payable—A Notice of Compensation Denial may be properly issued following the issuance of a Notice of Temporary Compensation Payable if the claimant's disability has ceased during the 90-day period.)

Claimant, a crane man, sustained a work injury on February 3, 2003 when his foot became lodged between two steel beams. Employer issued a notice of temporary compensation payable (NTCP) for a right ankle sprain.

On April 15, 2003, Dr. Kahn released claimant to modified duty as of that date and to full duty as of April 21, 2003. On April 21, 2003, employer simultaneously filed a notice stopping temporary compensation and a notice of compensation denial. (NCD). The notice stopping temporary compensation indicated employer decided not to accept liability for claimant's injury and advised him to file a claim petition. On the NCD, employer placed an "x" beside reason #4 of the NCD form for declining benefits: "Although an injury took place, the employee is not disabled as a result of this injury within the meaning of the [Act]."

Claimant subsequently filed claim petitions and a penalty petition, alleging employer violated Section 406.1 of the Act by improperly filing an NCD as opposed to a notice of compensation payable (NCP) inasmuch as the medical evidence indicated a compensable injury.

The Workers' Compensation Judge granted claimant's petitions and awarded ongoing total disability benefits effective from the date of injury. Additionally, the WCJ imposed a 50% penalty on the unpaid balance of claimant's compensation. Despite the marking of preprinted reason #4 on the NCD, the WCJ determined employer violated the Act by failing to file an appropriate document acknowledging the injury.

The Workers' Compensation Appeal Board reversed the award of penalties.

On appeal to the Commonwealth Court, claimant asserted that employer's conduct merited the imposition of a penalty. The Court noted, however, that, in order for a penalty to be imposed, there must be a violation of the Act. Here, there was no such violation. To the contrary, employer complied with the requirements of §406.1 of the Act in stopping claimant's temporary compensation and denying liability for his injury. Where an employer properly issues an NCD to deny liability, a violation of the Act does not occur.

Employer here denied liability because: "the employee is not disabled as a result of this injury…" Employer did not "misuse" an NCD. Rather, employer complied with the procedures required by the Act. Employer used the NCD to controvert claimant's claim on the basis that claimant's disability did not result from the injury but rather related to a pre-existing condition.

Section 406.1(d) of the Act permits an employer, in cases where it is uncertain as to the compensability of a claim or the extent of its liability under the Act, to file an NTCP without admitting liability under an NCP.

The WCAB's reversal of the WCJ's penalty award was affirmed.

(Editor's Note: This case illustrates the proper use of the NTCP. A NTCP should be issued so as to allow for the opportunity to investigate a claim. If it then becomes apparent that the claimant's disability relative to the work injury has ceased, a timely NCD should be issued, marking #4 on the form as the reason for the denial. Please make certain to issue the NCD within the requisite 90-day period so as to avoid having the NTCP automatically convert to a NCP.)

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Colleen Rosenberg v. Workers' Compensation Appeal Board (Pike County), No. 17 C.D. 2007, Filed February 5, 2008.

(Modification—Employer's failure to introduce evidence establishing a lack of suitable in-house positions for claimant is not necessarily fatal to employer's modification petition.)

Claimant, a corrections officer, suffered a work injury to her knee in January 2002. Thereafter, she returned to light duty work with employer for about 10 months in a clerical position.

In December 2002, employer terminated her clerical employment because a functional capacity evaluation revealed that she would never return to her full duties as a corrections officer and employer had no permanent light duty positions.

A vocational rehabilitation counselor then performed a labor market survey based on claimant's release to light to medium duty work. In July 2003, employer filed a modification petition based on the results of the labor market survey.

At hearings, employer presented testimony from its medical expert and the rehabilitation counselor. The rehabilitation counselor testified that he was not aware whether additional light duty employment with employer was available. In response, claimant testified that after she was terminated from her clerical position, another person was hired by employer to replace her.

The Workers' Compensation Judge relied upon the case of Burrell v. WCAB (Philadelphia Gas Works & Compservices, Inc.), 849 A.2d 1282 (Pa.Cmwlth. 2004), for the proposition that an employer need not prove the absence of specific jobs with an employer as a prerequisite to expert testimony of earning power. Thus, the WCJ granted a modification of benefits. The Workers' Compensation Appeal Board affirmed.

Claimant appealed to the Commonwealth Court, contending that the Burrell decision is limited to the facts of that case, which involved a modification based on surveillance and not, as here, on medical testimony and a labor market survey. Claimant argued instead that her case was controlled by South Hills Health System v. WCAB (Kiefer), 806 A.2d 962 (Pa.Cmwlth. 2002), which holds that the Act requires an employer seeking modification based on a labor market survey to show lack of in-house positions between the time that the Notice of Ability to Return to Work form is issued and the time that the petition is filed.

The Commonwealth Court noted that Burrell does hold that, where a claimant obtains other employment, an employer need not address available positions it has as a part of its case-in-chief.

The facts of this case are, however, different. After employer submitted its evidence, claimant offered evidence of a suitable position with employer, i.e., the same light duty clerical position she had been performing after her injury. The Act requires that "if the employer has a specific job vacancy the employe is capable of performing, the employer shall offer such job to the employe."

The Court noted that where, as here, the question of an available, suitable job with the employer is raised with evidence, the employer ignores the question at its peril. Once the issue is raised by evidence of a possible opening with employer, the employer has the burden of proof. The Court did not state that the employer has the burden of affirmatively showing that it did not have a suitable position available within the requisite time frame; but rather, if the issue is raised through the claimant's evidence, then the employer has the burden to refute that evidence if it is to succeed in modifying claimant's benefits.

Here, claimant offered unrefuted testimony that the clerical position that she was capable of performing was announced and filled between the time that the Notice of Ability to Return to Work form was issued and employer filed its petition. Because the WCJ did not give any reason for rejecting claimant's evidence, the WCAB's decision was vacated with directions to further remand the case to the WCJ.

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Margaret Coyne v. Workers' Compensation Appeal Board (Villanova University and PMA Group), No. 610 C.D. 2007, Filed February 11, 2008.

(Suspension-Bad Faith– Benefits may be suspended due to claimant's bad faith conduct, even if that conduct occurred prior to the work injury.)

Claimant, a reference librarian, sustained an injury to her right foot on March 23, 1999 when she fell off the stool on which she was standing. She was off work for two weeks, but then returned to modified duty with no loss of earnings.

At the time of her injury, claimant was working under a one-year employment contract that ran from June 1, 1998 through May 31, 1999. On May 11, 1999, claimant was informed that her contract would not be renewed. She was asked to leave on that date, but was paid through the end of her contract. She also received severance, holiday and vacation pay. Claimant applied for unemployment compensation benefits and employer did not contest her claim.

Claimant subsequently filed a claim petition seeking workers' compensation benefits for the injury to her ankle.

At hearings before the Workers' Compensation Judge, employer presented testimony establishing that numerous complaints had been received from claimant's co-workers and supervisors, as well as students, during the 1997 to 1998 and 1998 to 1999 school years. The complaints concerned a lack of teamwork, lack of communication, and erratic behavior. For that reason, claimant's contract was not renewed. Although employer felt that there was evidence of claimant's misconduct due to her inability to cooperate, employer wrote a letter to the unemployment compensation authorities stating simply that her contract was not renewed and that employer was

not alleging willful misconduct.

The Workers' Compensation Judge found that employer never mentioned to claimant before her injury that she was going to be disciplined or terminated because of the complaints filed against her. Relying on the case of United Parcel Service v. Workers' Compensation Appeal Board (Portanova), 594 A.2d 829 (Pa.Cmwlth. 1991), the WCJ granted benefits. In Portanova, the Court held that a claimant is entitled to disability benefits if she is discharged for misconduct that took place prior to the work-related injury.

The Commonwealth Court disagreed, effectively overruling Portanova. The Court noted that an employer is entitled to a suspension of benefits if it can establish that the claimant was fired for conduct amounting to bad faith even if that conduct does not amount to willful misconduct under the unemployment compensation law. It is irrelevant whether the conduct occurred before or after the work injury. The only relevant issue is whether the claimant's loss of earnings is due to the work injury or to her bad faith conduct. While willful misconduct will satisfy a showing of bad faith in the workers' compensation context, it is not the sole means to show bad faith sufficient to warrant a suspension of benefits.

The case was remanded for a determination as to whether claimant's contract was not renewed because of conduct tantamount to bad faith.

Supreme Court Case Reviews

Marilyn Knechtel v. Workers' Compensation Appeal Board (Marriott Corporation), No. 3 WAP 2007, Decided November 20,2007.

(Independent Medical Examination—Claimant's healthcare provider may participate in IME by engaging in passive, non-disruptive activity during the exam, such as taking notes and/or audio or videotaping the examination.)

The Workers' Compensation Judge granted claimant's request to have her healthcare provider participate in the examination requested by employer, but rejected claimant's assertion that "participation" means tape recording the evaluation, questioning the evaluator, making comments or otherwise assisting claimant during the procedure.

The Workers' Compensation Appeal Board affirmed the WCJ's decision, as did the Commonwealth Court. *(A summary of the Commonwealth Court's decision may be found at TR&C Workers' Compensation Bulletin, Vol. X, No. 3, pp. 9-10.)*

Claimant then sought review by the Supreme Court. The Court affirmed the Commonwealth Court, and Justice Baer filed the following concurring statement:

"Today the Court affirms by per curiam order the Commonwealth Court's construction regarding the legislature's enactment of 77 P.S. §651(b), allowing a claimant's healthcare provider to "participate" in the examination conducted by an employer's physician. In so doing, we affirm the court's holding that the legislature intended to afford the opposing expert a first-hand view of the examination process, through attendance and observation, but did not intend to permit such expert to engage in any active conduct which might disturb the examining physician. I write to express my opinion that nothing in our affirmance of the Commonwealth Court's opinion, limiting a healthcare provider to attending and observing an employer's physician's examination, should be seen as precluding such a provider from engaging in other passive, non-disruptive activity during the exam. Specifically, I believe that a workers' compensation judge retains the discretion to grant a claimant's reasonable request to take notes and/or audio or videotape the examination, so long as such activity will not interfere with an employer's physician's ability to conduct an examination."

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J.G. Furniture Division/Burlington and Liberty Mutual Insurance Company v. Workers' Compensation Appeal Board (Kneller), Nos. 149-150 MAP 2005, Decided December 27, 2007.

(Specific Loss Benefits—An amputation resulting from an earlier injury is neither a recurrence nor an aggravation of the initial injury, but is a separate compensable specific loss injury.)

Claimant suffered a work-related injury to his left index finger on January 21, 1976. He received benefits through August 29, 1978, when the parties executed a final receipt.

In 1983, claimant filed a petition to set aside the final receipt, alleging that he continued to have impairment of his finger due to circulatory problems. Several decisions were issued by the Workers' Compensation Judge, each of which was appealed to the Workers' Compensation Appeal Board and subsequently remanded.

Before a final decision was issued on claimant's petition, in 1996, employer filed a suspension/review petition, alleging claimant sustained a specific loss of his entire finger. The finger had been amputated in 1984.

The parties stipulated that claimant was entitled to specific loss benefits, but disagreed as to whether the specific loss benefits should be calculated based on claimant's average weekly wage at the time of injury in 1976 or the date of amputation in 1984.

The WCJ concluded that benefits should be calculated based on claimant's 1976 wages. On appeal, the WCAB disagreed, and

remanded for recalculation of benefits using claimant's 1984 wages. The Commonwealth Court agreed.

Employer then sought review by the Supreme Court. The Court noted that, clearly, an initial injury occurred in 1976, but the permanent loss occurred with the amputation in 1984. The Court further noted that existing case law treats an "aggravation" of a prior compensable injury as a new injury, entitling a claimant to benefits based on wages at the time of the aggravation, while a "recurrence" is treated as a continuation of the initial injury, entitling claimant to benefits based on wages at the time of the original injury. The amputation in 1984 was not a mere recurrence of the prior temporary injury. The Court stated that, to lose the finger entirely is, at the very least, an aggravation.

Despite this line of reasoning, the Court went on to conclude:

"[a]n amputation occasioned by that earlier injury, for which a final receipt was executed, is neither a recurrence nor an aggravation of the initial injury; it constitutes a separate compensable specific loss injury. Therefore, we hold claimant is entitled to permanent loss benefits based on his wage on the date of the specific loss injury, September 6, 1984."

The order of the Commonwealth Court was, thus, affirmed.

(Continued from page 1)

age and send out the Notice of Workers' Compensation Benefit Offset, and then allow the claimant to challenge that notice. Unfortunately, such a tactic would most likely result in increased litigation costs.

In short, the retirement date of each claimant should be noted in his or her file. When that date comes to pass, appropriate action should be taken to assert the offset. Keep in mind, of course, that the Social Security offset is not available if old age Social Security benefits were received *prior* to the date that the compensable injury occurred. Also, the offset does not apply to benefits to which the claimant may be *entitled*, but is not actually *receiving*.

FOR INDIVIDUALS RECEIVING OLD-AGE, WIFE'S OR HUSBAND'S SOCIAL SECURITY INSURANCE BENEFITS

If age *62* before	01/01/ 2000	**offset available at age**	65
	01/01/ 2001		65 + 2 months
	01/01/ 2002		65 + 4 months
	01/01/ 2003		65 + 6 months
	01/01/ 2004		65 + 8 months
	01/01/ 2005		65 + 10 months
	01/01/ 2006		66
	01/01/ 2007		66
	01/01/ 2008		66
	01/01/ 2009		66
	01/01/ 2010		66
	01/01/ 2011		66
	01/01/ 2012		66
	01/01/ 2013		66
	01/01/ 2014		66
	01/01/ 2015		66
	01/01/ 2016		66
	01/01/ 2017		66
	01/01/ 2018		66 + 2 months
	01/01/ 2019		66 + 4 months
	01/01/ 2020		66 + 6 months
	01/01/ 2021		66 + 8 months
	01/01/ 2022		66 + 10 months
	01/01/ 2023 and later		67

FOR INDIVIDUALS RECEIVING WIDOW'S OR WIDOWER'S SOCIAL SECURITY INSURANCE BENEFITS

If age *60* before	01/01/2000	**offset available at age**	65
	01/01/ 2001		65 + 2 months
	01/01/ 2002		65 + 4 months
	01/01/ 2003		65 + 6 months
	01/01/ 2004		65 + 8 months
	01/01/ 2005		65 + 10 months
	01/01/ 2006		66
	01/01/ 2007		66
	01/01/ 2008		66
	01/01/ 2009		66
	01/01/ 2010		66
	01/01/ 2011		66
	01/01/ 2012		66
	01/01/ 2013		66
	01/01/ 2014		66
	01/01/ 2015		66
	01/01/ 2016		66
	01/01/ 2017		66
	01/01/ 2018		66 + 2 months
	01/01/ 2019		66 + 4 months
	01/01/ 2020		66 + 6 months
	01/01/ 2021		66 + 8 months
	01/01/ 2022		66 + 10 months
	01/01/ 2023 and later		67

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TR&C

ATTENTION READERS: The editors of the 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, Pittsburgh, PA 15219.

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