TR&C

Pennsylvania Workers' Compensation Bulletin

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A PUZZLING PROCEDURE?

As any crossword enthusiast will agree, "IRE" is a three-letter word meaning "anger" or "wrath." As a practical matter, in the world of workers' compensation in Pennsylvania, the phrase "IRE" can bring about those feelings to many an employer or adjuster.

"IRE," or "impairment rating evaluation," is a process governed by Section 306(a.2) of the Workers' Compensation Act. Section 306(a.2) defines the procedures to be followed to determine whether a claimant, who has received 104 weeks of total disability benefits, should continue receiving total disability benefits, or if his or her disability status should be modified to reflect only a partial disability.

The effect on the claimant's continued receipt of benefits is based upon the degree of impairment as determined by an IRE physician in accordance with Section 306(a.2). Specifically, an impairment rating equal to 50% gives rise to a presumption of continuing total disability, such that the claimant continues to receive temporary total disability benefits. On the other hand, an impairment rating of less than 50% can result in a modification of the claimant's status to reflect a partial disability status (upon 60 days notice to the claimant using LIBC-764). Because the claimant's benefits are then characterized as "partial," he or she is limited to receiving benefits for a maximum of 500 weeks.

How and when can an employer or carrier take advantage of this process? The Commonwealth Court has addressed these issues in a number of recent decisions.

The first case to deal with the IRE process was Gardner v. WCAB (Genesis Health Ventures), 814 A.2d 884 (Pa.Cmwlth. 2003). In Gardner, the employer requested that the claimant attend an IRE. The claimant objected, however, noting that the employer failed to make its request within 60 days after the 104-week period. The claimant had been injured on October 2, 1996 and, as of October 2, 1998, had received 104 weeks of total disability benefits. The employer did not file its request for an IRE until June of 2001 – well over two years after the expiration of 104 weeks. The Court ultimately sustained the claimant's objection to the IRE, holding that upon receipt of 104 weeks of total disability, an employer must request an IRE within 60 days thereafter or lose the right to do so.

The Court further addressed the issue as to "when" an IRE may be requested in the case of Dowhower v. WCAB (Capco Contracting), 826 A.2d 28 (Pa.Cmwlth. 2003). In that case, the employer requested an IRE on May 20, 1999, alleging that the claimant's receipt of 104 weeks of total disability benefits expired on April 14, 1999. After hearings, it was determined that the 104-week period actually expired on July 23, 1999, *after* employer requested the IRE. The WCJ, therefore, found the employer's request to be untimely. The Board reversed, noting that because the claimant had already submitted to the IRE, the claimant had waived its right to dispute the timeliness of the employer's request. The Commonwealth Court disagreed. A claimant does not waive his or her challenge to the timeliness of an IRE request, merely by attending the evaluation. The Court went on to note, however, that the claimant's challenge in this case was without merit. Al-

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Commonwealth Court Case Reviews

James J. McIlnay v. Workers' Compensation Appeal Board (Standard Steel), No. 1048 C.D. 2004, filed March 11, 2005.

(Hearing Loss - Statute of Limitations - Three year statute of limitation (from last date of exposure) does not violate claimant's right to equal protection under the law.)

Claimant filed a petition on May 15, 2003 alleging that he suffered a work related hearing loss. Claimant's last date of employment with employer was July 31, 1994.

The Workers' Compensation Judge dismissed claimant's petition because it was not filed within three years of his last exposure to occupational noise as required by §306(c)(8)(viii) of the Act. The WCJ rejected claimant's argument that §306(c)(8)(viii) violates the Equal Protection clauses of both the Pennsylvania and United States Constitutions.

The Workers' Compensation Appeal Board affirmed the WCJ's decision without addressing the constitutional issue, which is beyond the WCAB's scope of review.

Claimant then filed an appeal with the Commonwealth Court, again asserting his constitutional argument.

The Court noted that under §315 of the Act, a claimant must file a petition within three years after the injury occurs or his claim will be barred. However, this three-year statute of limitations does not begin to run until a claimant discovers that his injury is work-related. Prior to the passage of Act 1 of 1995, this discovery rule applied to hearing loss cases. Section 306(c)(8)(viii), however, was enacted as a part of Act 1 and provides, in pertinent part: "...the claim shall be barred unless a petition is filed within three years after the date of last exposure to hazardous occupational noise..." Consequently, the so-called "discovery rule" does not apply to hearing loss cases.

Claimant argued that, because he is not allowed to benefit from the discovery rule applicable to other claims under the Workers' Compensation Act, then his right to equal protection is violated.

The Court noted that, under a "rational basis test," there must be a reasonable relationship to a legitimate state objective for treating the class of individuals with hearing loss claims differently from other claimants. The Court found that there are many reasons why it is reasonable to apply the discovery rule to other injuries, such as occupational diseases, and not to apply the discovery rule to hearing loss cases. The symptoms of a disease may not show up for many years after the last exposure to the disease causing substance. Similarly, other injuries that occur over long periods of time, such as repetitive stress injuries, may not be readily recognizable as work-related until a doctor makes that determination. Such concerns are not present, however, with hearing loss cases. On the last date of exposure to hazardous noise, the continuing injury to the ears stop. Because the injury to the ears stops with the last date of exposure to hazardous noise, the Legislature acted within its powers in establishing three years as a sufficiently long duration of time within which to assert a claim for hearing loss.

Further, to allow claimant to file a claim nine years after he quit working and six years after he could have filed a petition would be unfair to employer, who has a right to the protections afforded by a statute of limitations.

Consequently, there is a reasonable or rational basis for the Legislature to require that hearing loss claims be filed within three years and to not apply the discovery rule, such that the equal protection clauses of the state and federal constitutions have not been violated.

The order of the WCAB was affirmed.

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David Cohen v. Workers' Compensation Appeal Board (City of Philadelphia), No. 1277 C.D. 2004, filed March 15, 2005.

(Collateral Estoppel - The doctrine of collateral estoppel will foreclose a workers' compensation proceeding if the same issues of law or fact were previously litigated to final judgment by the same parties before another tribunal.)

Claimant, a police officer, suffered disabling injuries while in the course and scope of his employment on February 5, 2000. Employer recognized the injuries by issuing a Notice of Compensation Payable; however, claimant was paid his full wages in lieu of compensation benefits under Philadelphia Civil Service Regulation 32.09.

On May 20, 2000, claimant was released by his physician to limited duty. Employer then issued a notification of suspension, indicating that claimant had returned to work without a loss of earnings.

Thereafter, claimant underwent an IME. Following those evaluations, claimant was directed to return to full duty status.

Claimant then filed an appeal with the Civil Service Commission of the City of Philadelphia. The Commission conducted several hearings and ultimately denied claimant's appeal.

Claimant sought further review by the Court of Common Pleas alleging that the Commission's deci-

sion was not supported by substantial evidence. The court determined that claimant's release to full duty was based upon medical testimony received by the Commission indicating that claimant had fully recovered. Therefore, the court affirmed the Commission's decision. The order of the Court of Common Pleas was subsequently affirmed by the Commonwealth Court.

Meanwhile, claimant had returned to full duty, but worked only a few hours before he ceased working allegedly due to pain in his back and ankle. Claimant filed a petition seeking to reinstate his workers' compensation benefits, alleging a worsening of his condition. Claimant's then treating physician testified that, in his opinion, claimant continued to suffer from the work injury and, as such, he was unable to return to full duty.

In response, employer presented medical testimony from two of the claimant's prior treating physicians. Each indicated that the claimant had, indeed, fully recovered and was capable of returning to full duty status. Employer also offered a copy of the Commission's decision returning claimant to full duty status, and arguing that the present reinstatement petition was barred by the doctrine of collateral estoppel.

Ultimately, the Workers' Compensation Judge found claimant and his expert to be more credible and entered an order reinstating claimant's benefits. The WCJ found that she was not bound by the Commission's decision.

Employer then filed an appeal with the Workers' Compensation Appeal Board, which reversed the WCJ's decision granting claimant's reinstatement petition. The WCAB concluded that the doctrine of collateral estoppel applied such that the Commission's prior determination finding claimant capable of returning to full duty precluded a finding that claimant continues to suffer a loss of earning power as a result of his injuries.

Claimant filed an appeal with the Commonwealth Court, arguing that the WCAB erred in applying the doctrine of collateral estoppel. The Court disagreed, noting that collateral estoppel applies when: (1) the issue decided in the earlier case is identical to the one presented in the later action; (2) there was a final judgment on the merits in the earlier action; (3) the party against whom the plea is asserted was a party, or in privity with a party to the earlier adjudication; (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior action; and (5) the determination in the prior proceeding was essential to the judgment.

Here, the issue presented in the reinstatement petition is the same issue that had been previously decided by the Commission, later affirmed by both the Court of Common Pleas and the Commonwealth Court, and, based upon the fact that all of the other elements necessary to the application of the doctrine of collateral estoppel have been met, the WCAB did not err in reversing the decision of the WCJ.

The order of the WCAB was, therefore, affirmed.

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Universal Am-Can, Ltd. and AIG Claim Services, Inc., v. Workers' Compensation Appeal Board (Minteer), No. 1487 C.D. 2004, filed March 16, 2005.

(Supersedeas Fund Reimbursement - Interest is not payable on funds reimbursed by the Supersedeas Fund. Additionally, litigation costs and fees are not reimbursable.)

Insurer filed an application for supersedeas fund reimbursement alleging that supersedeas had been requested and denied, such that insurer was required to make payments to claimant from 04/16/1993 through 11/27/2000, at which time it was ultimately determined that benefits were not payable. In addition to wage loss and medical benefits, insurer paid employer's litigation costs and fees. Consequently, insurer sought reimbursement of $189,395.33 for indemnity benefits paid, $193.95 for medical benefits paid, $52,578.21 for litigation costs and fees, and $134,144.97 for interest on the reimbursement of litigation costs and fees.

The Workers' Compensation Judge granted the application as to the indemnity benefits paid, and denied the application as to the litigation costs, attorney's fees and interest. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

The Commonwealth Court reviewed §443(a) of the Act, noting that it provides for reimbursement from the Supersedeas Fund of "compensation," which includes both wage loss benefits and medical expenses. Litigation costs and attorney's fees are not "compensation" but are in addition to compensation.

The Court further noted that §443 does not authorize the payment of interest, and the Court was not willing to create a "judicial amendment" to the Act by directing the payment of interest by the Fund.

Accordingly, the decision of the WCAB was affirmed.

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US Airways and Reliance National c/o Sedgwick Claims Management Services v. Workers' Compensation Appeal Board (McConnell), No. 1978 C.D. 2004, filed March 17, 2005.

(Dismissal for Failure to Prosecute - Where WCJ found prejudice in claimant's failure to attend IME and move forward with her claim petition, WCJ appropriately dismissed claimant's petition "with prejudice.")

Claimant, a flight attendant, filed three separate claim petitions alleging three separate dates of injury, each involving multiple body parts.

At the first hearing, claimant appeared by telephone and gave

brief testimony. Due to telephone problems, the hearing was continued and it was agreed that claimant's testimony would be concluded by deposition. The Workers' Compensation Judge directed employer's counsel to schedule an IME within 45 days after the completion of claimant's testimony.

By the time of the second hearing, claimant's deposition had been completed, but claimant had still failed to produce a medical report setting forth a causal relationship between the claimant's alleged injuries and her employment. The WCJ warned claimant's counsel of the possible dismissal of the petitions if appropriate medical evidence was not filed of record by the time of the next hearing.

At the third hearing, no evidence was presented.

At the fourth hearing, both parties presented various exhibits. Employer also noted its intention to have claimant attend an IME on November 6, 2002, an arrangement which was satisfactory to claimant.

Claimant then failed to appear for the IME as scheduled. The exam was then rescheduled, twice. In the interim, a fifth hearing was held at which time the WCJ gave claimant's counsel a second warning that that petitions might be dismissed for failure to prosecute if claimant failed to attend the required IME.

Employer's counsel subsequently informed the WCJ by letter that claimant did not attend any of the scheduled IMEs. The WCJ then asked claimant's counsel to show cause why the claim petitions should not be dismissed for failure to prosecute. Claimant's counsel did not respond. The WCJ then cancelled the sixth scheduled hearing and entered an order dismissing the claim petitions, with prejudice for failure to prosecute.

The Workers' Compensation Appeal Board affirmed the dismissal, but deleted the "with prejudice" aspect of the WCJ's order, noting that employer would not be prejudiced if claimant were to reassert her petitions prior to the expiration of the three year statute of limitations.

Employer then appealed to the Commonwealth Court, noting that the WCAB erred in deleting the words "with prejudice" from the WCJ's order when the WCJ specifically found that employer would be prejudiced if the claim petitions were not dismissed and claimant were permitted to simply re-file her petitions. The Court agreed.

The WCJ properly found that the ongoing delay caused by claimant was prejudicial to employer. The WCAB erred in ordering the deletion of the words "with prejudice" from the WCJ's order.

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Steven George v. Workers' Compensation Appeal Board (Conway Central Express), No. 2190 C.D. 2004, filed March 29, 2005.

(Reinstatement - Where liability had been prorated between two employers and claimant entered into a compromise and release agreement with one employer, claimant is not entitled to reinstatement of total disability benefits from second employer.)

On July 18, 1996, claimant suffered a work-related injury to his head and neck while employed by Conway. As a result, claimant received total disability benefits through July 29, 1996, at which time he returned to work.

In 1997, claimant left his employment with Conway and began working for JEM Industries. On October 7, 1997, claimant suffered a work-related injury to his head, thoracic spine and left knee.

Claimant underwent three surgeries on his knee. He also began experiencing neck pain, headaches and numbness in his hands and arms which he related to his 1996 injury at Conway.

Claimant filed claim, reinstatement and review petitions against Conway, as well as claim and review petitions against JEM. Conway filed a joinder petition against JEM. JEM filed a modification petition, alleging part-time suitable employment was available to the claimant.

In August of 2000, the Workers' Compensation Judge found that each of claimant's work injuries "mutually preclude the claimant from performing either of his pre-injury positions of employment" and that each work injury is "mutually and equally responsible for claimant's continuing disability." The WCJ consequently determined that claimant was entitled to total disability benefits, and apportioned responsibility for payment between Conway and JEM on a pro rata basis, based upon claimant's earnings with each employer.

Three years later, claimant entered into a Compromise and Release Agreement with JEM, pursuant to which claimant received $100,000 in exchange for his release of JEM from any and all claims for wage loss or medical benefits.

Claimant then filed a reinstatement petition against Conway, seeking reinstatement of total disability benefits for his 1996 work injury effective the date of the execution of his C&R with JEM. Claimant did not allege any change in his condition but rather sought reinstatement of total disability benefits for his 1996 injury solely as a consequence of the C&R releasing JEM of its obligation to pay for the 1997 injury.

The Workers' Compensation Judge determined that claimant's release of JEM had no effect on Conway's proportional liability, and the Workers' Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, claimant argued that, because the WCJ found each employer to be 100% responsible for claimant's disability and JEM is no longer in the case, then Conway should be held responsible to pay the full amount of claimant's total disability compensation.

The Court stated the following: "Claimant cites no authority for these arguments, and we are not surprised, since there is nothing in workers' compensation law or civil law that sanctions the windfall claimant seeks. Therefore, claimant is not entitled to a reinstatement of total disability benefits from Conway solely on the grounds that he voluntarily extinguished his claim against JEM."

Accordingly, the order of the WCAB was affirmed.

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Keys-Pealers, Ltd./Pealers' Flowers v. Workers' Compensation Appeal Board (Bricker), No. 1705 C.D. 2004, filed January 4, 2005, reported March 18, 2005.

(Modification/Suspension - Job offers made to claimant who is under house arrest are not "available" to claimant, even though claimant is able to leave the house for period of time for personal business.)

Claimant suffered a work-related low back injury on September 22, 1999. As a result, he underwent surgery, resulting in limitations on his physical activities. While off work, claimant took a job with another employer, but failed to report his wages to employer's carrier. He was thus convicted of insurance fraud, and placed under house arrest from February through May of 2002. During that time period, claimant's benefits were suspended.

Employer subsequently filed a suspension/modification petition alleging that claimant was capable of returning to alternate employment that he failed to pursue while under house arrest.

Employer presented testimony from a vocation expert, who testified that he referred claimant to two jobs approved by claimant's physician as within his physical limitations. Claimant had been requested to appear and fill out applications for the positions on February 27, 2002 and March 1, 2002. Claimant refused to do so because he was under house arrest.

Claimant admitted that, while under house arrest, he was permitted to leave his home two days a week from 7:30 am to 10:00 am, as well as 15 minutes each morning and evening to attend to personal business. He claimed that he did not apply for the positions as requested because he did not think he had enough time to fill out the applications and because he didn't think it was really important.

The Workers' Compensation Judge concluded that employer met its burden of proof and entered an order modifying claimant's benefits. The Workers' Compensation Appeal Board reversed that decision, noting that the jobs were not "available" to claimant when he was under house arrest. Because claimant was essentially incarcerated at the time the job offers were made, he was removed from the work force, and employer's only remedy was the suspension of claimant's benefits from February through May of 2002.

On appeal to Commonwealth Court, employer argued that, even though claimant was under house arrest, he was able to leave the house for periods of time for personal business.

The Court noted that whether a claimant whose benefits have been suspended must pursue job referrals while in some form of incarceration depends upon the terms of the house arrest.

Here, claimant was under house arrest for about 21 hours per day. There was no indication that he had permission to go into a work program. As such, he was presented with job referrals that were not actually available to him and claimant was not in violation of the law for failing to pursue them.

Employer next argued that it was still entitled to a modification of claimant's benefits because it had demonstrated that claimant had an "earning power" through the testimony of its expert witness. Again, however, the Court disagreed. Earning power must be based upon jobs that are "available." Here, because claimant could not leave his house to perform the jobs while under house arrest, and because there was no indication that the jobs would be available in May when his incarceration ended, employer failed to meet its burden of proof.

The order of the WCAB was affirmed.

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MPW Industrial Services v. Workers' Compensation Appeal Board (Mebane), No. 1335 C.D. 2004, filed March 29, 2004.

(Jurisdiction - Workers' Compensation Judge lacks jurisdiction to entertain a "reverse claim petition" or a review petition in the absence of an NCP, original or supplemental agreement, or award of compensation.)

Employer held a Christmas party which employees were encouraged, but not required, to attend. Gregory Mebane (decedent) traveled to the party in an employer-owned van

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with another employee. After the party, they stopped at a bar and had some drinks. After leaving the bar, the other employee drove the van into the side of a mountain, killing decedent.

Employer filed two review petitions, seeking to identify the appropriate dependents. One petition identified Danielle Pritts as decedent's dependent and one named Julia Jones. Pritts and Jones each had children by decedent. Both denied that decedent died as a result of a work-related motor vehicle accident.

The Workers' Compensation Judge granted the petitions and ordered employer to pay $50.70 per week to each of decedent's children. Pritts appealed to the Workers' Compensation Appeal Board, which reversed. The WCAB found that the WCJ did not have subject matter jurisdiction, stating: "[W]e find nothing in the statutory text or case law authorizing the WCJ to entertain Review Petitions in the absence of an NCP, original or supplemental agreement or an award of compensation."

Employer then sought review by the Commonwealth Court. The Court noted that, while §413 of the Act provides a WCJ with broad authority to modify existing agreements or NCPs, it does not provide a WCJ with the authority to review and determine if an injury is work-related when there is nothing in the system to review.

Further, under § 410 of the Act, if there is a failure to issue an NCP or to execute an agreement, only the employee or his dependents may file a claim petition. The Act does not authorize a "reverse claim petition" filed by the employer as was done here.

Because the WCJ had no right to grant relief that the employer is not authorized by the Act to obtain, the WCAB did not err in determining that the WCJ lacked subject matter jurisdiction.

The order of the WCAB was, thus, affirmed.

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Linda Murphy v. Workers' Compensation Appeal Board (City of Philadelphia), No. 1751 C.D. 2004, filed March 29, 2005.

(Subrogation/Credits - Employer is entitled to both subrogation and credit for disability pension inasmuch as the two prevent separate double recoveries.)

Claimant, a police officer, suffered a work injury in 1993. As a result, she filed a civil action against a third party tortfeasor whose actions allegedly caused her injury. In 1997, the parties to the civil action reached a settlement and claimant received $280,000.

In addition, claimant had applied for a service-connected disability pension from the City of Philadelphia Board of Pensions and Retirement. The pension was approved, retroactive to the last date of claimant's employment, November 3, 1997. Employer is self-insured. Therefore, when it paid the retroactive pension benefits, it deducted an offset for the workers' compensation benefits it had paid since November 3, 1997. Then, in March of 2000, employer filed a Petition to Modify, Suspend and/or Review Compensation, alleging it was also entitled to a subrogation lien from claimant's third party recovery.

Claimant agreed that employer was entitled to subrogation, but disagreed that it was also entitled to the pension offset. The Workers' Compensation Judge disagreed, holding that employer was entitled to both the subrogation lien and the pension offset. The Workers' Compensation Appeal Board affirmed.

The Commonwealth Court noted that if pension benefits made in lieu of workers' compensation, the employer is entitled to an offset. Here, claimant was paid pension benefits because her injury was work-related. Consequently, a pension offset is appropriated because the pension benefits were paid in lieu of compensation.

Employer also successfully asserted a subrogation lien against the damages claimant received from a third party who was responsible for her injuries. The Court noted that the Act provides the employer with an *absolute* right to subrogation. The rationale for subrogation is 1) it prevents double recovery for the same injury by the claimant; 2) it prevents the employer from having to make compensation payments which resulted from the negligence of a third party; and, 3) it prevents a third party from escaping liability for his or her negligence.

The rationale for a pension offset is: 1) it prevents a self-insured employer from having to pay twice for the same disability; and, 2) it prevents unjust enrichment of the claimant.

Both the right to subrogation and the right to a pension offset serve to prevent a claimant from receiving a double recovery at the expense of the employer. Allowing an employer to take both an offset for pension payments and subrogation prevents two different types of double recovery.

Hence, the Court concluded that employer was entitled to both the subrogation lien and the pension offset. The order of the WCAB was affirmed.

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Norbert Wieczorkski v. Workers' Compensation Appeal Board (LTV Steel), No. 2228 C.D. 2003, filed April 7, 2005.

(Res Judicata - Claimant's current disability status may be challenged only where his condition is irreversible. "Permanent" does not rise to the same level as "irreversible." Hence, benefits may be terminated even after claimant's disability had resolved into a permanent partial disability.)

Claimant suffered a work-related injury to his knee in 1984 for which he received both wage loss and medical benefits. In 1997, as a part of a commutation of bene-

fits, the parties executed a supplemental agreement which provided that claimant's disability had resolved into a "permanent partial disability." In addition, the parties stipulated that employer would remain responsible for all causally related medical expenses.

In 2001, employer filed a termination petition based upon an affidavit of recovery issued by Dr. Abraham, an orthopedic surgeon. The Workers' Compensation Judge found Dr. Abraham to be more credible and convincing than claimant's treating physician, and granted employer's petition.

On appeal to the Workers' Compensation Appeal Board, claimant argued that the parties' supplemental agreement stating that claimant's disability was "permanent" barred employer from seeking to terminate benefits. The WCAB disagreed, and affirmed the decision of the WCJ.

Claimant then sought review by the Commonwealth Court. Claimant again argued that employer was precluded from seeking to terminate his benefits given the supplemental agreement.

The Court concluded that the principle of res judicata, or issue preclusion, only precludes a challenge to a claimant's current disability status where the claimant's condition is clearly irreversible, such as in the case of a progressive occupational disease. Relying upon the Supreme Court's decision in Hebden v. WCAB (Bethenergy Mines, Inc.), 632 A.2d 1302 (Pa. 1993) (TR&C Workers' Compensation Bulletin, Vol. V, No. 3, p. 4), the Court noted that a finding of a "permanent disability" is not the equivalent of a finding that the injury is "irreversible."

The Court explained that this is not merely an issue of semantics. If medical science deems a condition to be irreversible at the time a party seeks to challenge a prior stipulation or adjudication, no review may be had. However, if, when the petition is filed, the claimant's con-

EMPLOYER'S CORNER

INTERNAL SEXUAL HARASSMENT INVESTIGATIONS: COSTLY COMMON MISTAKES

Since the Supreme Court decisions in Faragher and Ellerth, much attention has been given to developing an effective internal sexual harassment complaint process, including developing and distributing equal employment opportunity (EEO) and harassment policies and procedures, and providing supervisor and employee training. However, one critical, but often overlooked, component of an effective internal EEO complaint process is the ***internal sexual harassment investigation***. Failure to conduct an appropriate sexual harassment investigation could be a costly, but easily avoidable, mistake for employers.

In fact, the Equal Employment Opportunity Commission's (EEOC) enforcement guidance on "*Vicarious Employer Liability For Unlawful Harassment By Supervisors*" indicates that an effective harassment complaint procedure includes, among other important factors, conducting a prompt, thorough and impartial investigation. The EEOC's guidelines also advise employers that whomever conducts the investigation should have the necessary skills for interviewing witnesses and evaluating credibility. Recent court decisions also make it clear that careful attention must be given to the internal investigation, including the employer's sexual harassment investigator.

The following is a list of common investigation mistakes made by employers:

- Failure to choose the appropriate person or persons to conduct the investigation. (Sometimes it is advisable to have more than one investigator.)
- Failure to appreciate the fact that not only must the process be fair, but it must also be perceived as being fair.
- Prejudging.
- Failure to investigate/address all issues and complaints.
- Failure to address all allegations in the complaint.
- Failure to interview all relevant witnesses or indicate why relevant witnesses were not interviewed.
- Failure to make reasonable assurances to employee witnesses that they will not be retaliated against for information provided to the investigator.
- Failure to be consistent in the way the witness interviews are conducted.
- Failure to choose a place and time for witness interviews that is conducive to open, honest, and non-threatening communication.
- Failure to address comparative situations.
- Failure to identify, review, and/or analyze relevant documents.
- Including irrelevant information in the investigation report.
- Including opinions in the investigation report.
- Failure to differentiate between firsthand knowledge and hearsay.
- Failure to ask appropriate follow-up questions.
- Failure to be a good listener.
- Failure to include relevant dates and times in the investigation reports.
- Failure to include relevant background information about the incident during the interview and in the investigation report.
- Sharing opinions during the interviews that may give the impression that the investigator is biased.
- Taking too long to conduct and complete the investigation.
- Failure to get statements from witnesses interviewed.
- Failure to go back to the accused and the accuser, provide him/her with the information acquired during the investigation, and give him/her an opportunity to respond before completing the investigation.
- If the investigation is done by the employer's counsel, failure to carefully address the attorney/client privilege issues.
- Failure to take appropriate steps to keep the investigation confidential.
- Failure to do a reasonable search of computer software and hardware for evidence related to the harassment investigation.
- Failure of the investigator to have a standard introduction to each witness interview.
- Failure to take reasonably prompt and appropriate corrective action.

dition is no longer irreversible, benefits may be altered.

Accordingly, the order of the WCAB was affirmed.

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County of Allegheny (Department of Public Works) v. Workers' Compensation Appeal Board (Weis), No. 1478 C.D. 2004, filed April 15, 2005.

(Voluntary Withdrawal from Labor Market - For compensation to continue following retirement, a claimant must show that he is seeking employment after retirement or that he was forced into retirement because of his work-related injury.)

Claimant suffered a work-related knee injury in 1981. As a result, a Notice of Compensation Payable was issued. He never returned to work in any capacity. Eventually, he retired because he could no longer perform his job.

After paying benefits for 20 years, employer filed a suspension petition in 2001 because claimant voluntarily withdrew from the workforce.

The Workers' Compensation Judge found that claimant was incapable of returning to his pre-injury employment and, because employer did not present evidence to establish that work was available to claimant, the WCJ found that claimant did not voluntarily remove himself from the workforce. Employer's petition was thus denied.

The Workers' Compensation Appeal Board affirmed that decision.

On appeal to the Commonwealth Court, employer argued that claimant was not forced to retire inasmuch as 1) he was not forced to leave the entire labor market, and 2) his retirement was based on non-work related conditions.

The Court noted that, generally speaking, in order to obtain a suspension of benefits, the employer must demonstrate that suitable employment was made available to a claimant. However, that general rule is not applicable where the claimant retires. In such situations, an employer is not required to show that the claimant has no intention of returning to work. To the contrary, in order to continue receiving benefits, it is the claimant's burden to establish that he is seeking employment after retirement or that he was forced into retirement because of his work-related injury.

Here, it was undisputed that claimant retired and did not seek employment after retirement. Hence, claimant was required to prove that he was forced into retirement because of his work-related injury. The WCJ found only that claimant was forced into retirement because his work-related injury caused him to be incapable of performing his *pre-injury* job, not that he was incapable of performing any type of gainful employment.

Under these circumstances, it was incumbent upon the claimant to show that he has not voluntarily withdrawn from the entire labor market and is open to employment within his or her physical capabilities. The medical evidence of record established that claimant was capable of sedentary duty work. The record also established, however, that he never sought any type of work.

Because the claimant failed to meet his burden to establish that he was forced to retire from the entire labor market, or that he sought employment, the decision of the WCAB was reversed and the suspension petition was granted.

(Judge Friedman filed a dissenting opinion in which she found fault with the fact that employer did not file its suspension petition until 2001, nineteen years after claimant's 1982 retirement. As such, Judge Friedman would apply the "doctrine of laches" to find that employer failed to exercise due diligence in filing its petition, thereby resulting in prejudice to claimant. Judge Friedman, however, overlooks the fact that an IME was done in 2001 at which time it was found that claimant was capable of sedentary duty work. The petition seeking suspension as of December 5, 2001 was filed on December 10, 2001, such that "laches" could not possibly apply.

Judge Friedman further found fault with the majority's decision inasmuch as "the majority does not make clear whether suspension is effective as of December 5, 2001, or as of the date of claimant's retirement in 1982. If employer is entitled to a suspension as of the retirement date in 1982, the employer will recover more than twenty years of benefits from the supersedeas fund." This is a blatant misstatement of the law, presumably made by mistake rather than as a result of a complete ignorance of the Pennsylvania Workers' Compensation Act and the applicable Regulations. As anyone familiar with the Act and the Regulations knows, reimbursement from the Fund is available only from the date

PLEASE NOTE!

The Bureau has issued a "Revised Forms Update."

The "Statement of Wages" (LIBC 494C) and the "Notification of Suspension or Modification Pursuant to 413(C) & (D)" (LIBC 751) forms have been changed. ***Effective August 1, 2005, earlier versions of these forms will no longer be accepted by the Bureau and will be returned.*** *For more information, please visit the Labor and Industry website at "www.dli.state.pa.us."*

that the suspension petition is filed.)

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Judith P. Ortt v. Workers' Compensation Appeal Board (PPL Services Corp.), No. 2085 C.D. 2004, filed April 27, 2005.

(Premises - The term "premises" as contemplated by §301(c)(1) of the Act means the area where the injury occurred was owned, leased or controlled by the employer to a degree where that property is an "integral part" of the employer's business.)

While working, claimant parked her car at the Colonial Parking Lot, which is not owned by employer. Employer does own four other parking lots for employee parking. Employer and Colonial Parking do, however, have a lease agreement whereby Colonial Parking leases 174 spaces to employer, with the remaining parking spaces open to the general public. Employer also has three other lease arrangements of a similar kind to the one with Colonial Parking. According to the lease agreement, Colonial Parking is responsible for the maintenance of the lot.

After completing her shift on January 3, 2001, claimant left work to retrieve her car from the Colonial Parking Lot. The lot was covered with snow and ice. Claimant fell, sustaining injuries "all over her body." She subsequently filed a Claim Petition.

After hearings, the Workers' Compensation Judge found as fact that the parking program provided by employer was "optional." If an employee chose to park in the Colonial Parking Lot, he or she would receive a discount of the normal parking rate charged by Colonial Parking. The lot was one block away from employer's place of business and, other than the 174 spaces leased to employer, was open to the public at large. Employees were not mandated to park in that lot; but rather, had a number of parking options available to them. Based upon these findings, the WCJ determined that claimant was not in the course and scope of her employment at the time of injury. Consequently, the petition was denied. The Workers' Compensation Appeal Board affirmed, and the claimant then appealed to the Commonwealth Court.

The Court noted that where a claimant is not actually engaged in the furtherance of an employer's business or affairs, the claimant must satisfy the following elements in order to receive benefits for an alleged work injury:

(1) the injury must have occurred on the employer's premises;

(2) the employee's presence thereon was required by the nature of his or her employment; and,

(3) the injury was caused by the condition of the premises or by the operation of the employer's business thereon.

The Court further noted that the term "premises" means that area where the injury occurred was owned, leased, or controlled by the employer to a degree where that property could be considered an integral part of the employer's premises.

Here, Colonial Parking Lot was not an integral part of employer's business because parking in that lot was purely optional, not required or "integral" to claimant's employment. Further, while employer may have reserved spaces from Colonial Parking for the benefit of its employees, the employees were responsible for paying for the parking space.

Because the injury suffered by claimant occurred on a private parking lot, owned and operated by a third party, the order of the WCAB was affirmed.

As Judge Kelley notes in his dissenting opinion, the decision of the Court as authored by Judge Pellegrini is contrary to prior case law which holds that parking lots leased by employers for their employees constitute "premises" of the employer. Claimant was in the parking lot because of her employment. Judge Kelley would find the fact that she did not have to park there to be irrelevant. Claimant's injury was caused by the condition of the parking lot. Accordingly, he would reverse the WCAB's order and remand the case to the WCJ for a determination of the amount of compensation benefits payable.

SUPREME COURT CASE REVIEWS

William Colpetzer v. Workers' Compensation Appeal Board (Standard Steel), No. 63 MAP 2003, Decided March 30, 2005.

(Average Weekly Wage - Where earnings for year before injury are deflated due to prior work injury, the AWW during those periods is used as "earnings" for the weeks of disability.)

In this case, the Court was faced with the issue of how to calculate an injured worker's average weekly wage (AWW) under the following circumstances:

a) worker sustains injury and receives workers' compensation benefits;

b) worker then returns to work, in a regular or modified duty capacity; and,

c) within a year, worker then sustains a new work injury.

Should the claimant be penalized by including in the computation of his AWW for the second injury periods during which he received no wages because of the first injury?

The Workers' Compensation Appeal Board construed the Act as requiring that periods of time when claimants earned no actual wages due to the initial work injury must be included in the calculation of the AWW for the second injury. Conse-

quently, the WCAB would have an AWW assigned which underestimates the claimant's true earning capacity. The Commonwealth Court reversed.

Relying upon its decision in Hannaberry HVAC v. WCAB (Snyder, Jr.), 834 A.2d 524 (Pa. 2003) (TR&C Workers' Compensation Bulletin, Vol. VIII, No. 10, pp. 9-10), the Supreme Court held: "...an accurate computation of the claimant's AWW requires that the artificially depressed wages they received because of a prior compensated work injury cannot be included in the computation of the AWW for the second work injury. Accordingly, we affirm the Commonwealth Court..."

In so concluding, the Court noted that the Act seeks to compensate claimants for the ongoing loss in earning capacity resulting from their injuries; therefore, some reasonable assessment must be made of the claimant's pre-injury ability to generate future earnings.

After a thorough and very lengthy discussion of §309 of the Act, which sets forth the calculations to be followed in computing a claimant's AWW, the Court noted that the factual situation presented in this case is not specifically addressed by the Act. Noting the humanitarian purposes of the Act, the Court stated:

"It is not an accurate measure of economic reality to treat periods where no wages were earned solely because the worker was unfortunate enough to have suffered a previous work injury, as if the worker had no earning capacity for those periods. Such an approach would severely underestimate the reality of the worker's typical earnings, punish the worker for no reason approved in the legislation, and contradict the overriding legislative goal of accuracy in calculation."

Thus, the Court determined that the mechanics for calculating the AWW under these circumstances is to follow §309(d), but that in making the calculation, during periods of disability, the AWW from the first work injury is to be used.

Consequently, the decision of the Commonwealth Court was affirmed. Chief Justice Cappy filed a concurring opinion. Justice Eakin dissented, stating that the Act is clear and is not rendered ambiguous and subject to interpretation simply because the Legislature failed to make an exception for this particular scenario. In his opinion, it is not the function of the Court to ignore the formulas set forth in the Act and to create a new one.

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Jeanes Hospital v. Workers' Compensation Appeal Board (Shawn Hass), No. 231 MAP 2003, Decided April 14, 2005.

(Modification - A Petition to Review an NCP functions as a claim petition for the purpose of adding injuries that arise subsequent to the original injury.)

Claimant was employed for about 10 months as an intensive care nurse when she was injured while attempting to move a patient. Employer issued an Notice of Compensation Payable, which described the work-related injury as "low back."

Over four years later, claimant filed a Petition to Review Compensation Benefits, seeking amendment of the description of her injury as contained in the NCP to include work-related shoulder injuries, fibromyalgia, thoracic outlet syndrome and depression.

After hearing extensive medical testimony from both parties, the Workers' Compensation Judge determined that the NCP contained a material factual misstatement, and ordered a correction of the NCP to add the shoulder injury, fibromyalgia and pain disorder with associated psychological factors.

Employer appealed, arguing that claimant had incorrectly filed a Petition for Review, rather than a Claim Petition. The Workers' Compensation Appeal Board affirmed the WCJ's decision, noting that the form of the petition is not controlling where the facts warrant relief to the claimant.

The Commonwealth Court reversed, however, stating that while a WCJ has authority to amend an NCP when a material mistake occurs, that mistake must exist at the time that the NCP is issued. None of the additional injuries alleged by claimant existed when the NCP was issued, such that there was no material mistake at that time. The Court held that, for injuries that arise subsequent to the work injury and that are not accepted by the employer in its NCP, Section 413 of the Act does not apply and a claimant must file a claim petition subject to the limitations of Section 315. The only exception would be when the additional compensable injuries arise as a natural consequence of the accepted injury. Accordingly, the decision of the WCAB was reversed.

Claimant then sought review by the Supreme Court. The Court agreed that modification of an NCP to reflect further injuries is governed by Section 413 of the Act. That section provides that "[t]he WCJ may amend an NCP if it is materially incorrect or if the disability status of the injured employee has changed. An NCP is materially incorrect if the accepted injury (or injuries) does not reflect all of the injuries sustained in the initial work incident. Conversely, and also covered by Section 413(a), injuries that result or flow from the original injury, represent an increase in disability."

The Court went on to note that the third paragraph of Section 413(a) requires that a petition filed under that section is to be treated "as if such petition were an original claim petition." Therefore, it is unnecessary, as the Commonwealth Court held, for a claimant to file a new claim petition for additional injuries not accepted by the employer, because the WCJ is empowered to and must treat a modification or review petition alleging

those additional injures as if it were a claim petition.

In this case, claimant filed a Review Petition, which is appropriate. It was her burden to establish that there was a material mistake as to the description of the work injury. The WCJ found the evidence she presented to be sufficient to sustain that burden. Consequently, the WCJ properly amended the NCP to add claimant's shoulder injury, fibromyalgia and psychiatric overlay.

The Order of the Commonwealth Court was, therefore, reversed.

Justice Eakin filed a dissenting opinion. He noted that the additional injuries alleged by claimant did not exist at the time of the original work injury, such that the NCP was not materially incorrect. He further noted that the claimant's alleged additional injuries did not arise as a natural consequence of the recognized injury to her low back. Thus, he would require the claimant to file a claim petition to prevent:

> "...the unfair result here - employer had no notice of these claimed injuries until years after the fact, yet must address them as mere 'amendments' claimed only upon cessation of the original injury. Requiring a claimant to give notice to the employer within two years of these additional injuries is explicitly called for by the statute, for reasons of fundamental fairness. This basic requirement is hardly onerous to claimant. Allowing new claims for a different, long-standing injury is not a mere modification. Claimant was not alleging her original low back disability had increased, and the subsequent injuries were not a natural consequence of the low back injury; accordingly, the WCJ had no authority to amend the NCP.
>
> Therefore, I am compelled to dissent."

Most employers must agree with Justice Eakin in his assessment of the situation and the opinions he expressed in this matter.

IRE PUZZLES

(Continued from page 1)

though the IRE was requested prior to the expiration of the 104-week term, the claimant was not prejudiced. The IRE itself did not take place until after the expiration of the 104-week period in compliance with Section 306(a.2) of the Act.

The Court next addressed the issue of "when" an IRE may be requested in its decision in Wal-Mart Stores, Inc. v. WCAB (Rider), 837 A.2d 661 (Pa.Cmwlth. 2003). In that case, the claimant was injured on July 31, 1998. The employer did not voluntarily acknowledge the injury. Consequently, a Claim Petition was ultimately filed in November of 1998. The litigation of that petition, including an appeal to the Board and a remand proceeding (during which time a supersedeas order was in effect), was not concluded until November 21, 2001. Less than one month later, the employer filed a request with the Bureau for an IRE. The IRE was conducted, and it was determined that the claimant's whole body impairment rating was only 26%. Consequently, employer sent an appropriate notice of a change in status to the claimant. Only then did the claimant challenge the IRE, claiming that it was not requested within 60 days of 104 weeks of total disability. The Court disagreed with the claimant's argument, stating that the claimant had not "received" his 104 weeks of total disability benefits until after the WCJ rendered a final decision on the remanded petition on November 21, 2001. Prior to that date, a supersedeas order was in place, and no benefits had been paid. Consequently, the claimant had not "received" 104 weeks of total disability benefits until November 21, 2001 when a check equivalent to 160 weeks of total disability benefits was sent to the claimant. Therefore, the employer's request for an IRE on December 10, 2001 was deemed to be timely.

This holding was most recently re-affirmed by the Court in the case of Ramseur v. WCAB (Wachovia Corporation), 862 A.2d 749 (Pa.Cmwlth. 2004). The day the payment of benefits is made, rather than the date of injury, is the date that a claimant "receives" benefits for purposes of calculating the 104-week period under Section 306(a.2).

After the decision in Rider was issued, Stephen Hilyer was the next to take his challenge of an IRE request to the Commonwealth Court. See Hilyer v. WCAB (Joseph T. Pastrill, Jr. Logging), 847 A.2d 232 (Pa.Cmwlth. 2004). In his case, the employer requested a *second* IRE after the first one yielded an impairment rating of 55%. Looking at the plain language of Section 306(a.2)(6) of the Act, the Court held that an employer or insurer has the right to request and receive an IRE twice in a 12-month period. There is no need to establish a change in the claimant's condition or for any other prefatory showing in order for an employer or insurer to have a second IRE. The Act does, however, limit the employer or insurer to a maximum of two IREs in a twelve-month period.

Must the second IRE be requested within 60 days after the expiration of 104-weeks of total disability benefits? No, as set forth in the case of Lewis v. WCAB (Wal-Mart Stores, Inc. and Claims Management, Inc.), 856 A.2d 313 (Pa.Cmwlth. 2004), the sixty day limitation applies only to an employer's initial IRE request, and not to a subsequent biannual IRE requested by an employer pursuant to Section 306(a.2). The Court in Lewis went on to hold, however, that, unlike an IME, the employer

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does not have the right to select the IRE physician. Section 306(a.2)(1) states, unambiguously, that "[t]he degree of impairment shall be determined based upon an evaluation by a physician…chosen by agreement of the parties, or as designated by the department…"

The Court also recently reaffirmed one of the holdings of Dowhower in the case of Wellington Foods v. WCAB (Rice), 863 A.2d 151 (Pa.Cmwlth. 2004). The Court emphasized that a claimant who attends an IRE does not waive the right to object to the timeliness of an IRE request. A claimant must attend an IRE or face the possibility that his or her benefits will be suspended. Consequently, a claimant may appear for an IRE simply to preserve his or her right to benefits, and then choose to challenge the IRE after learning the results.

A somewhat interesting twist on a similar fact situation occurred in the case of Groller v. WCAB (Alstorm Energy Systems), ___ A.2d ___ (Pa.Cmwlth. 2005). The claimant refused to attend an IRE inasmuch as the employer did not request it within 60 days as required by the Act. The employer filed a petition seeking an order to compel the claimant's attendance and, for reasons that are not clear in the Court's decision, the WCJ granted the employer's petition. No appeal was filed. The IRE then took place, and the claimant was found to have an impairment rating of 28%. Claimant's disability status was thus changed to "partial." Claimant then filed a Review Petition, alleging that his benefits should remain as temporary total disability because the IRE was not performed in a timely fashion. In response, employer argued that because the claimant never appealed the WCJ's order compelling his appearance at the IRE, the doctrine of *res judicata* barred claimant's argument that the original IRE request was untimely. The Court disagreed, noting that the IRE Order was interlocutory and, as such, *res judicata* simply cannot apply. Consequently, the claimant was free to challenge the timeliness of the IRE request even after a WCJ has determined that the request was timely made.

Overall, though sometimes puzzling and still subject to judicial interpretation, the IRE process is a useful and beneficial tool available to employers and insurers to limit their potential liability in these matters. The key to using the tool successfully is "timing." We would recommend that *all* claims be flagged for an IRE request two years after the date of injury. Within 60 days following that two year period, many claimants who are still receiving benefits will have received 104 weeks of TTD. Those instances where 104 weeks of TTD payments may not have been made within that time frame will be rare and will require special attention, but the extra effort may ultimately pay off in a limitation of disability.

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, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219.

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